

Establishment of an Inventory Attorney Rule

Issue

Should the State Bar of Michigan support the Master Lawyers Section's proposal that members who represent any client other than the member's employer identify to the State Bar of Michigan the name of an active member who has agreed to serve as an inventory attorney in the event of the death, disability or disappearance of the member?

RESOLVED, that the State Bar of Michigan support amendment of Rule 2 of the Rules Concerning the State Bar of Michigan as follows (**new language is bolded and underlined**):

Rule 2, Rules Concerning the State Bar of Michigan

(a) 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 information as may be required. If the address provided 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 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.

(b) **A member who represents a client other than the member's employer, hereinafter called the reporting member, must provide the State Bar of Michigan the name of an active member who has agreed to serve as the reporting member's inventory attorney in the event of the reporting member's incapacity to carry out his or her professional responsibilities by reason of death, disability or disappearance. For purposes of this rule, the term "incapacity" includes death, disability or disappearance of the reporting member.**

- (1) If 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 incapacity of the reporting member.
- (2) Upon learning of the reporting member's incapacity, the inventory attorney shall notify active clients of the changed status of the reporting member, return files and papers as appropriate, and retain files as appropriate. The Attorney Grievance Commission may assist the inventory attorney as co-counsel in this process.
- (3) If the inventory attorney is unwilling or unable to act, MCR 9.119(G) shall apply.

Synopsis

This proposed change is intended to prompt lawyers who represent clients other than an employer to engage in advance planning for the winding down or transition of their practice by a lawyer of their choice. The mechanism intended to prompt that planning is a reporting requirement placed in the rule that discusses disclosures that must be made in connection with Bar membership. **The language of the proposal is updated from the version disseminated at the September 20, 2012, Representative Assembly meeting in response to comments received at the meeting and suggestions made by the Representative Assembly's Drafting Committee.** The language exempting a lawyer from compliance has been simplified to reference the lawyer's employer as a client, rather than categorizing types of inhouse employment. The term "reporting member" has been defined and thereafter used consistently throughout the rule. The duties of an inventory attorney as articulated in the rule are limited to notification of *active* clients of the member's changed status, returning files and papers as appropriate, and retaining files as appropriate.

Background

Some seventy-one (71%) percent of Michigan's active lawyers in private practice are either solo practitioners or in a small law firm environment, which is defined as two to ten lawyers. The percentage of Michigan's active lawyer population that is over the age of fifty increases daily. Also on the rise is the percentage of those over age fifty who are working beyond traditional retirement age for a myriad of reasons, many in solo or small firm settings after a career in larger firms. Anecdotally, newly-licensed lawyers are opening solo practices in increasing numbers. Many lawyers in these settings function without support staff of any kind. Lawyers on both ends of the age spectrum may place little priority on contingency planning for death or disability for very different reasons.

Absent such planning, when a solo practitioner dies or becomes incapacitated, nonlawyer employees or family members are left to sort out who should be notified of the lawyer's status, what to do with client files, and how to manage funds on hand in the operating and trust accounts. As a result, client matters may be placed in jeopardy and the potential for malpractice liability significantly increased.

An existing court rule, MCR 9.119(G), authorizes the grievance administrator of the Attorney Grievance Commission to seek court appointment of a receiver in circumstances that include a lawyer's death or disappearance, when "no partner, executor, or other responsible person" capable of conducting the attorney's affairs has been identified. Filings invoking this procedure are on the rise, and the Attorney Grievance Commission reports that finding local lawyers willing to assist in these matters can be challenging, especially when the deceased lawyer's practice is voluminous and the status of pending matters is unknown or not readily apparent, as there is no provision for awarding attorneys fees set forth in the rule. Because that rule makes **no** provision for handling the practice of a lawyer who has been disabled by injury or illness, obtaining court authority to wind down a practice is more arduous in those circumstances as it involves pursuing a proceeding to determine whether the lawyer should be transferred to indefinite inactive status followed by the filing of a receivership pursuant to MCR 9.119(G). In the meantime, a solo practitioner's clients' matters could languish unattended.

Requiring lawyers to identify a lawyer willing to serve as an inventory attorney and to update that information as needed serves as an important first step in addressing the potential risk to clients, the lawyer's surviving family members, and the lawyer's estate posed by a lack of advance planning. Beyond notifying active clients of the reporting lawyer's change of status and either returning or retaining files as appropriate, the role of the inventory attorney and how the inventory attorney will be compensated are strictly a matter of agreement between the two lawyers and wholly outside of the scope of what the rule requires.

Assuming that the rule revisions are recommended by the Representative Assembly and sent to the Court for consideration, sample agreements between the reporting member and the inventory attorney will be developed and made available through the State Bar website covering such topics as: (1) under what circumstances the inventory attorney's obligations are triggered; (2) whether the inventory attorney represents the appointing lawyer's interests or the clients' interests; and (3) whether the inventory attorney is paid and, if so, on what basis. Use of the forms would not be mandated by the Rule.

In response to questions and comments received since this proposal was presented in September, a series of questions and answers is attached as **Exhibit A**.

Opposition

Prior to the September 20, 2012, Master Lawyers Section (MLS) presentation of the proposed changes to Rule 2 of the Rules Concerning the Bar at the Representative Assembly meeting, comments were solicited by the MLS from the State Bar of Michigan's sections and standing committees.

The Arts, Communication, Entertainment & Sports Section opposes the proposal as it was presented in September (**Exhibit B** attached).

The Health Care Law Section has not taken a formal position but poses questions (**Exhibit C** attached).

The Probate and Estate Planning Section has not taken a formal position on the rule, but makes this suggestion:

If the inventory attorney concept is approved by the Representative Assembly, the Council of the Probate and Estate Planning Section requests that all proceedings involving a disabled or deceased attorney under MCR 9.119(G) be heard in the Probate Court and not in the Circuit Court. The Council believes that any guardianship, conservatorship, or probate proceedings involving the disabled or deceased attorney already will be in the Probate Court and that if proceedings under the proposed MCR 9.119(G) are initiated, the Probate Court is the most logical Court for those proceedings.¹

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 27, 2013**

Should the Representative Assembly support the creation of a reporting requirement that identifies an inventory attorney as proposed by the Master Lawyers Section?

(a) Yes

or

(b) No

¹ A copy of the Probate and Estate Planning Section's recent letter is attached as **Exhibit D**.

Exhibit A

Questions and Answers about the Inventory Attorney Rule

I live in a small town with few lawyers. How will I find someone to serve as an inventory attorney who won't have conflicts of interest with my clients?

It may be that lawyers in small towns will have to cast a wider net than within their own town to minimize the possibility of conflicts between their clients and the clients of the would-be inventory attorney. Lawyers may find that what's workable is to establish reciprocal situations where each agrees to be the other's inventory attorney.

In selecting an inventory attorney, must I select someone that matches my years of experience and practices in the same subject matter areas as I do?

Who to select as an inventory attorney depends in large measure on what you will be asking the inventory attorney to do. If you intend to have the inventory attorney do no more than notifying active clients of the changed status of the reporting member, returning files and papers as appropriate, and retaining files as appropriate, it would be necessary that you trust the person's ability to competently, conscientiously, and ethically carry out those tasks, which may not require a sophisticated level of expertise in the subject matter. If, on the other hand, you intend to facilitate having the inventory attorney complete work on the files, you should select someone fully capable of doing that. While that may not require that the inventory attorney matches you in years of practice, it would mean that they have sufficient experience and knowledge in the areas of law in which you practice to competently discharge those duties.

What does "disability" mean in this rule and how is it determined, so that the inventory attorney knows when his or her duty to act is triggered?

This term, like "disappearance," is not defined. The rule prompts the inventory attorney to act based upon knowledge of the reporting member's status. How disability is defined and what means the inventory attorney must rely upon in determining that it exists are a matter of agreement between the two lawyers. To minimize the possible harm to clients, the inventory attorney should be empowered to step in at the earliest point in time that it is apparent the reporting member is unable to fulfill obligations owed clients. One way to approach this is for the reporting member to provide advance authorization for the inventory attorney to receive a statement from the lawyer's treating physician that declares the lawyer is unable to perform his or her duties as a lawyer due to a condition that is of indeterminate duration, should that circumstance take place.

The proposed rule talks about an inventory attorney returning "active files." What does that term mean?

This term is not defined, but can be defined by agreement between the two lawyers. As that term is generally understood, it would include files in which ongoing work is being done.

How can confidentiality be maintained once the inventory attorney examines the files?

Two things must be done. The lawyer who is designating an inventory attorney (the reporting member) must obtain client consent to the inventory attorney's access to client information in the event of circumstances that trigger the inventory attorney's involvement and the inventory attorney must agree to maintain the same confidentiality as the reporting member is bound to maintain. Client consent can be incorporated into the reporting member's fee agreements.

The inventory attorney's obligations should be set out in an agreement between the reporting member and the would-be inventory attorney.

Once someone agrees to be an inventory attorney, can he or she be disciplined for declining to perform the task?

No. The language of the rule contemplates a process for identification of an inventory attorney and for updating that information. It recognizes that the lawyer named as an inventory attorney may become unavailable – without defining the many ways in which a person might become unavailable, leaving room for a designated inventory attorney to simply communicate he or she is no longer willing to be available to serve that function. If implemented, the designation of an inventory attorney will be incorporated in the annual bar dues invoice, affording members an annual opportunity to revisit the designation.

Is the inventory attorney required to complete the client matters left unfinished by the deceased lawyer?

There is no such requirement in the rule. Certainly, the two lawyers could choose to enter into such an arrangement, contingent upon the clients' consenting to the successor attorney; but the rule does not impose that requirement. The rule contemplates only that the inventory attorney will, upon learning of the reporting member's incapacity, notify active clients of the changed status of the reporting member, return files and papers as appropriate, and retain files as appropriate.

Can the inventory attorney be held responsible for malpractice committed by the reporting member before the inventory attorney took possession of the files?

No. Being an inventory attorney does not itself create an attorney-client relationship between that lawyer and the clients of the reporting member, nor does it make the inventory attorney liable for the prior acts or omissions of the reporting member. Of course, if a reporting member designates a law partner as the inventory attorney, then their relationship as law partners may dictate whether the inventory attorney is liable for the acts or omissions of the reporting member.

How are conflicts of interest handled between the clients of the deceased lawyer and the inventory attorney?

The proposed rule is silent on this point. The agreement entered into between a reporting member and an inventory attorney should provide that both lawyers have access to each other's identifying information pertaining to clients, in order to determine whether any conflicts of interest exist. This should also be addressed in fee agreements both lawyers have with their respective clients, so that clients are consenting at the outset of the representation to limited access by a named inventory attorney.

When are the inventory attorney's responsibilities completed?

Assuming that the reporting member and the inventory attorney enter into an agreement that defines what tasks the inventory attorney will perform, that agreement should also articulate what constitutes completion of those tasks. For example, if the inventory attorney is to return all active client files to the clients, then the inventory attorney's job is done when that task is completed.

Exhibit B

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September 19, 2012

Greg Ulrich, Chair, Master Lawyers Section, State Bar of Michigan
306 Townsend Street
Michael Frank Building
Lansing, MI 48933

RE: Comments on Rule 2 Rules Concerning the State Bar of Michigan

Dear Chairperson Ulrich:

This is a response concerning your letter about a proposal developed by the Master Lawyers Section of the State Bar of Michigan inviting our Arts, Communications, Entertainment & Sports (ACES) Section's, support of "Rule 2, Rules Concerning the State Bar of Michigan." Although the reply requested is before ACES's annual meeting, I was able to get comments from ACES Council members as quoted below:

I am opposed to the rule at this time. I do believe there is certainly merit to appointing an attorney in advance who will follow up on files and with clients upon the death or disability of an attorney, adopting this particular rule with its language is not the way. Needs more thought and explanation.

Frederick J. Frank, ACES Council Member

I absolutely do not support this rule.

Mindy Schwartz, Ex Officio ACES Council Member

Seems a bit intrusive, but from a business perspective, it is in the best interest of the client. In business, there is always succession planning and contingent business plans. Worst case, existing retained outside counsel steps in. It doesn't have my whole hearted support, since it is not required in the other states I am licensed in. I would vote against it, and leave the inventory issues or possible failure to appear, up to the probate and trail courts.

Thomas Doty, ACES Chair Elect

As ACES' Chair, I am also opposed to the language for the reasons stated above. Therefore, the Arts, Communications, Entertainment & Sports Section cannot give its support at this time.

Pamela Osborne

Pamela Osborne, Chair

Arts, Communications, Entertainment & Sports Section

Exhibit C



September 7, 2012

Gregory Ulrich
Chair, Master Lawyer Section
Ulrich Law PLC
770 Pear Tree Ln
Grosse Pointe Woods, MI 48236

Dear Chairperson Ulrich:

At your request, I am writing to advise you that the Health Care Law Section Council has reviewed and discussed the revisions to Rule 2 of the Rules Concerning the State Bar proposed by the Master Lawyers Section. We are not taking a *formal* position with respect to the proposed revision at this time however the Council has authorized me to forward this letter outlining our concerns about the proposed revised rule in its *current form*.

While we are certain that the Master Lawyers Section's proposed changes are well-intended, we believe there are currently several unanswered questions that must be addressed before we could formally support revisions of the type now proposed.

Our Council raised the following questions in addition to those noted in your July 23, 2012 letter:

1. When do the Inventory Attorney's obligations end and how?
2. What liability exposure does the Inventory Attorney have with respect to acts and omissions that occur before and after the appointing attorney's death?
3. Given the competency obligations of all attorneys, must the Inventory Attorney be of the same specialty and relative years of experience as the appointing attorney (e.g., must a 25-year health care attorney appoint another health care attorney, as opposed to, e.g., general negligence attorney? Must the Inventory Attorney also have been practicing for 25 years?
4. Does attorney-client privilege require that each of the appointing attorney's clients agree in advance to the Inventory Attorney's appointment, given that the client's secrets might one day be revealed to the Inventory Attorney?

We also noted that several of these questions may be more problematic for very specialized attorneys who may not have many appropriately qualified attorneys from whom to select an Inventory Attorney and whose clients may well be competitors of the similarly qualified attorneys.

Thank you for your efforts on the proposal. We hope that you will consider our questions before seeking formal approval and adoption of the proposed revisions.

Sincerely,

Marta J. Hoffman

Marta J. Hoffman
Chair, Health Care Law Section

Exhibit D



PROBATE & ESTATE PLANNING SECTION

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February 26, 2013

Members of the Representative Assembly
State Bar of Michigan
Michael Franck Building
306 Townsend St.
Lansing, MI 48933-2012

Re: Inventory Attorney

Ladies and Gentlemen:

At its Spring Meeting the Representative Assembly will consider the Inventory Attorney proposal made by the Master Lawyer's Section.

If the inventory attorney concept is approved by the Representative Assembly, the Council of the Probate and Estate Planning Section requests that all proceedings involving a disabled or deceased attorney under MCR 9.119(G) be heard in the Probate Court and not in the Circuit Court. The Council believes that any guardianship, conservatorship, or probate proceedings involving the disabled or deceased attorney already will be in the Probate Court and that if proceedings under the proposed MCR 9.119(G) are initiated, the Probate Court is the most logical Court for those proceedings.

The Probate and Estate Planning Section has taken no position whether the Inventory Attorney proposal should be adopted.

If Members of the Representative Assembly have questions or would like further information, please contact me, or J. David Kerr of Mt. Pleasant, who serves as the Chair of the Ethics Committee of the Probate and Estate Planning Section.

Very truly yours,

Mark K. Harder
Chair