

[Bar Sections](#)[Family Law Section](#)[Labor and Employment Law Section](#)[Probate and Estate Planning Section](#)

Probate and Estate Planning Section

Michigan Probate and Estate Planning Journal

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Table of Contents

[From the Chairperson's Desk](#)

Feature Articles

- [Changes Wrought by the New EPIC: Comments on Fiduciary Accounting Principles, Interested Trust Beneficiaries, and Limitations of Actions](#)
By Dic L. Dorney and Anita Martin
- [An Open Forum: Thumbs Up or Down on Mandatory Continuing Legal Education](#)
- [Opportunity to Reform NIMCRUT Expires on June 8, 1999](#)
By Joseph A. Bonventre
- [Lawyer Advertising: Do's and Don'ts](#)
By Steven A. Mitchell

Departments

- [Tech Talk](#)
By John D. Mabley
- [Ethics, Unauthorized Practice, and Image](#)
By Ramon F. Rolf, Jr.
- [Recent Decisions in Michigan Probate, Trust, and Estate Planning Law](#)
By Hon. Phillip E. Harter
- [Legislative Report](#)
By Harold Schuitmaker
- [Digest of Michigan Probate Opinions](#)
By Julia R. Hathaway

Miscellaneous

- [Section Meetings](#)
- [12th Annual Summer Tax Conference](#)
- Section Publications
- ICLE Products of Interest to Probate Practitioners
- Schedule for the 39th Annual Probate and Estate Planning Seminar

- [Table of Authorities](#)
- [Readers' Questions Form](#)
- [Access to Justice Leadership Campaign](#)

View [recent issues](#) of the Michigan Probate and Estate Planning Law Journal

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Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Winter 1999 issue of [Michigan Probate and Estate Planning Journal](#)

From the Chairperson's Desk

By Brian V. Howe

In Memoriam

It is with sadness that I begin my column by reporting the death of Harold A. Draper, who passed away in Grand Blanc, Michigan, on January 11, 1999. Harold was a former chairperson of our Section and was a well-recognized lecturer and author for the Institute of Continuing Legal Education for many years. He was very interested in the economics of probate and estate planning practice and organized fee surveys of our members, which were used by a number of probate judges in deciding fee issues. Harold was also in the forefront of using paralegals, then known as legal assistants, in his probate practice. He was the recipient of the 1997 Michael W. Irish Memorial Award, which recognized his services to both his profession and his community, along with numerous other awards over the years. I am sure that you will join me in extending our sympathy to Harold's wife, Fulla, and to his family.

Lawyer Civility

I cannot think of Harold and many of his peers without noting an unwelcome and troublesome change slowly working its way into probate and estate planning practice. What is this change? It is the all too frequent lack of civility among those engaged in the practice of estate planning, probating of estates, and trust administration.

If you have practiced in these areas very long, you have probably been involved in a will contest or have had occasion to challenge or defend a personal representative or trustee. Regardless of your position, hopefully you did not take the "in your face" approach that seems to be so in vogue today. Whether on the road, dealing with civil servants or retail employees, or representing a client's position, we are all placed in confrontational positions in which we have several choices for a solution.

After a recent Wayne County Probate Court hearing, a client asked me if I didn't hate the attorney representing the other side. I advised her that he was doing his best to advocate their position as I was trying to do in advocating hers. While our first obligation to our clients is to represent them to the best of our abilities, I hope

that we all will continue to attempt to do so in a civil manner. Harold Draper practiced in an era when civility was the norm, which we should all aspire to maintain.

Organ Donation

Last month I received a letter from Dr. D. W. Chen, who is the director of the Division of Transplantation at the Department of Health and Human Services, requesting assistance in resolving a legal problem relating to organ donation. Since I am a spokesperson for the Transplantation Society of Michigan and have a personal family experience with organ transplantation, I readily offered my assistance.

It may shock you to learn that 11 people die every day in the United States while waiting for an organ transplant. Last year 191 people in Michigan died waiting for organs. Recent statistics show that there are over 2,100 people in Michigan currently on the waiting list for organs.

A problem contributing to the shortage of organs is that even if a decedent has fulfilled the legal requirements with a signed driver's license designation, most doctors, hospitals, and representatives from the Transplantation Society of Michigan impose an additional requirement that the families consent before the organs or tissue are retrieved from the decedent. Unfortunately, when people do not tell their family members about their wishes regarding organ donation, surviving family members often withhold consent. Dr. Chen and members of his division are convinced that most estate planning attorneys are unaware of this fact and do not adequately inform their clients about how to indicate their wishes to become organ donors. Dr. Chen advised me that a recent Gallup poll indicated that when a family knows of one of their member's wishes, 94 percent will honor the request. But in situations in which family members do not know, only 54 percent indicate they will donate the deceased relative's organs. In fact, approximately one-third of all donations are lost due to the family's refusal to consent. Obviously, these lost organs from people who wanted to be organ donors could have saved many lives.

Access to Justice

It should be noted that the American Bar Association has adopted resolutions urging lawyers to inform clients about how to become organ and tissue donors. In your role as estate planners, you can best assist your clients who are interested in organ donation by advising them to sign their driver's licenses and tell their family of their wishes. A good source for additional information on organ donation is the ABA brochure titled *A Legacy for Life*.

Thomas Kavanaugh, who is an associate executive director of the State Bar of Michigan, made a presentation at our December meeting on the Access to Justice Foundation, which is sponsored by the State Bar. He appealed to both the Section and its members for contributions to the Foundation, which will distribute funds to agencies providing free legal services. As I indicated in my fall column, it has been determined that approximately 80 percent of the civil legal needs of Michigan's low-income community go unanswered because of limited legal aid resources. The State Bar hopes that funding through the foundation will help solve this problem. Mr. Kavanaugh is requesting pledges from all of the State Bar Sections to provide seed money for the foundation and to demonstrate support for the program. On completion of the internal fund drive, the State Bar plans to solicit funds for the foundation from corporate America.

After Mr. Kavanaugh's presentation, our Access to Justice Committee recommended an initial 1999 pledge to the Access to Justice Foundation of \$5,000, which the Council approved. Since this action involves the use of Section dues, I shall appreciate any input that you may have regarding the Access to Justice program.

Addition to Section Council

Finally, I am pleased to announce the addition of Judge Phillip E. Harter from the Calhoun County Probate Court as the newest member of the Probate and Estate Planning Council. Judge Harter was unanimously elected at our January meeting to fill the vacancy created by Dirk Hoffius's election as treasurer. He has presented the State of the Law portion of our Annual Probate Seminar for the last several years. In addition, he authors a column in the Journal titled "Recent Decisions in Michigan Probate, Trust, and Estate Planning Law." Judge Harter has also established a probate Web site that many of our members use. His experience, knowledge, and expertise will be invaluable to the Council.

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Probate and Estate Planning Section

CHANGES WROUGHT BY THE NEW EPIC: COMMENTS ON FIDUCIARY ACCOUNTING PRINCIPLES, INTERESTED TRUST BENEFICIARIES, AND LIMITATIONS OF ACTIONS

By Dic L. Dorney and Anita Martin

The Estates and Protected Individuals Code (EPIC), 1998 PA 386, will replace the Revised Probate Code on April 1, 2000. Although EPIC generally adopts the format of the Uniform Probate Code, there are significant differences. There also are significant differences between EPIC and the current Revised Probate Code. One significant departure that EPIC makes from both the Uniform Probate Code and the Revised Probate Code is the statute of limitations on causes of action against a trustee for breach of trust. The reporter for the EPIC project said:

The EPIC revises the rules concerning finality of trust accountings given to beneficiaries. One important development is the statement of standards for the format and content of accountings. An account must meet the standards in order to bind a beneficiary. Additionally, a beneficiary is given 12 months from the receipt of an accounting within which to begin proceedings for breach of trust.

John H. Martin, *A Preview of the Estates and Protected Individuals Code*, 77 Mich BJ 1296, 1298 (1998).

The Estates and Protected Individuals Code provides that the statute of limitations on causes of action against a trustee for breach of trust expires one year after the beneficiaries receive an annual or a final account. Unlike MCL 700.819, MSA 27.5819, which requires a trustee to provide full disclosure, EPIC lists the requirements for an account that will cause the statute of limitations to begin to run. If the trustee can establish that the account satisfied the requirements in EPIC §7307(3), actions for breach of trust brought later than one year after the receipt of the account fail. Paragraphs (a), (b), (c), (d), (e) and (f) of EPIC §7307(3) each restate one of the National Fiduciary Accounting Standards.¹

Beneficiaries Entitled to an Accounting

For the one-year statute of limitations to run under EPIC, a trustee not only must prepare an account that meets the requirements of §7307(3) but also must furnish copies to the beneficiaries identified in EPIC. In identifying the beneficiaries entitled to an account, it is helpful to compare EPIC with the Uniform Probate

Code (which was used as a model for the EPIC).
Uniform Probate Code §7-303 provides:

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

The Uniform Probate Code gives a beneficiary only the right to request an account. However, if requested, an account that satisfies the National Fiduciary Accounting Standards is acceptable. The comments accompanying Uniform Probate Code §7-303 provide:

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. *The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping.* Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request. This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. . . .

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account. See ALI-ABA Monograph, Whitman, Brown and Kramer, Fiduciary Accounting Guide (2nd edition 1990).

(Emphasis added.)

Beneficiaries Entitled to an Account Under EPIC §7303

The Uniform Probate Code influenced EPIC to the extent the drafters made a

conscious effort to reduce the number of beneficiaries entitled to receive or request an accounting. Compare the approach taken in EPIC §7303 to MCL 700.814(2), MSA 27.5814[2] and *In re Childress Trust*, 194 Mich App 319, 486 NW2d 141 (1992). MCL 700.814(2), MSA 27.5814(2) provides that "presently vested beneficiaries" are entitled to an accounting. In *Childress Trust*, the court of appeals held that vested beneficiaries whose interest might be divested are entitled to an accounting. By contrast, EPIC §7303(3) provides:

[F]or all other trusts, within 28 days after acceptance of the trust, the trustee shall inform in writing each beneficiary of the trust's existence, of the court in which the trust is registered, if it is registered, of the trustee's name and address, and of the beneficiary's right to request and receive both a copy of the trust's terms that describe or affect the beneficiary's interest and relevant information about the trust property. In addition, all of the following apply:

(a) Upon reasonable request, the trustee shall provide a beneficiary with a copy of the trust's terms that describe or affect the beneficiary's interest and with relevant information about the trust property.

(b) Unless the settlor directs or requests in the trust instrument that the trustee provide accounts to less than all interested trust beneficiaries, all of the following apply:

(i) At least annually and on termination of the trust or a change of the trustee, the trustee shall provide a statement of account to each current trust beneficiary and shall keep each current trust beneficiary informed of the trust and its administration.

(ii) Upon reasonable request, the trustee shall provide a statement of account to each interested trust beneficiary who is not also a current trust beneficiary and shall keep each of those persons reasonably informed of the trust and its administration.

(iii) The trustee shall provide a statement of account and other information to a beneficiary as the court directs.

(iv) In the trustee's discretion, the trustee may provide a statement of account and other information to any beneficiary.

(c) If the settlor requests or directs the trustee in the trust instrument to provide accounts and information to less than all interested trust beneficiaries, the trustee shall provide statements of account and information as provided in the trust instrument. At the court's direction, the trustee shall provide statements of account and other information to persons excluded by the settlor's request or direction to the extent and in the manner the court directs.

(Emphasis added.)

Definition of Various Classes of Beneficiaries

Section 7303 of EPIC uses the word "beneficiary," and the terms "current trust beneficiary" and "interested trust beneficiaries." EPIC defines all of these. Section 1103(c) of EPIC provides:

"Beneficiary" includes, but is not limited to, the following:

(i) In relation to a trust beneficiary, a person that is an interested trust

beneficiary.

(ii) In relation to a charitable trust, a person that is entitled to enforce the trust.

. . . .

(iv) In relation to a beneficiary designated in a governing instrument, a person that is a grantee of a deed, devisee, trust beneficiary, beneficiary of a beneficiary designation, donee, appointee, taker in default of a power of appointment, or person in whose favor a power of attorney or power held in an individual, fiduciary, or representative capacity is exercised.

Section 1103(j) of EPIC provides:

"Current trust beneficiary" means a beneficiary about which 1 of the following is true:

(i) The beneficiary has a current right to receive all or a portion of the income, if any, of the trust property.

(ii) The beneficiary is currently eligible to receive all or a portion of a mandatory or discretionary distribution of income or principal.

(iii) The beneficiary possesses a testamentary or presently exercisable general or special power of appointment.

Section 1105(d) of EPIC provides:

"Interested trust beneficiary" means a person that has 1 or more of the following interests in a trust:

(i) Life estate.

(ii) Eligible recipient of a mandatory or discretionary distribution by the trustee of income or principal.

(iii) Eligible recipient of a mandatory or discretionary distribution by the trustee of income or principal upon termination of an interest of a person described in subparagraph (i) or (ii).

(iv) Presently exercisable or testamentary general or special power of appointment.

Section 7303 of EPIC authorizes the settlor of a trust to direct which interested trust beneficiaries, if any, are entitled to an account. By doing so, EPIC allows the settlor to avoid the *Childress Trust* rule. In response to EPIC, practitioners now may wish to specify in trust instruments which interested trust beneficiaries are entitled to an account. Absent contrary directions by the settlor, EPIC §7303(3)(b)(i) provides that *current trust beneficiaries* are entitled to annual accounts and a final account. EPIC §7303(3)(b)(ii) provides that an *interested trust beneficiary* who is not also a *current trust beneficiary* can request an account. On receipt of that request, the trustee is bound to furnish the account. EPIC §7303(3)(b)(iii) gives the court the power to direct that a *beneficiary* who is not a *current trust beneficiary* and not an *interested trust beneficiary* should receive an account. Finally, EPIC §7303(3)(b)(iv) provides, "In the trustee's discretion, the trustee may provide a statement of account and other information to any *beneficiary*" (emphasis added).

Statute of Limitations

In the case of testamentary trusts, under the Revised Probate Code, after allowance by the court, an annual account may not be reopened except for fraud. In the case of inter vivos trusts (other than revocable trusts), the Revised Probate

Code provides that the statute of limitations begins to run with the delivery of the final account on the termination of the trust. In the case of inter vivos trusts (other than revocable trusts), under the Revised Probate Code, the statute of limitations expires six months after the beneficiaries receive the final account or three years after informing the beneficiary where to review the books and records. Uniform Probate Code §7-307, which relates to the statute of limitations on causes of action, is almost identical to MCL 700.819, MSA 27.5819, which provides:

Unless previously barred by adjudication, consent or limitation, a claim against a trustee for breach of trust is barred as to any beneficiary who received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within 6 months after receipt of the final account or statement. *Notwithstanding lack of full disclosure, a trustee who issued a final account or statement in good faith which was received by the beneficiary and which informed the beneficiary of the location and availability of records for his examination is not liable after 3 years.* A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if being a minor or legally incapacitated, it is received by his representative or fiduciary.

(Emphasis added.)

The Estates and Protected Individuals Code omits the safety net portion of MCL 700.819, MSA 27.5819 highlighted above. EPIC imposes a one-year statute of limitations from the date of the receipt of each annual and final account for both testamentary and inter vivos trusts. However, the one-year statute of limitations applies only if the account meets the requirements listed in EPIC §7307(3).

EPIC §7307 and Virtual Representation

If all of the beneficiaries so entitled under EPIC §7303 receive an account, EPIC §7307(1) attempts to bind all other beneficiaries through application of the doctrine of virtual representation:

Unless previously barred by adjudication, consent, or limitation, a claim against a trustee for breach of trust is barred unless a proceeding to assert the claim is commenced within 1 year after receipt of an annual or final account as to each beneficiary who receives the annual or final account. Those barred include all of the following:

(a) A beneficiary when an interested trust beneficiary possessing the same interest preceding that of the beneficiary receives an annual or final account.

(b) An object, taker in default, or another who may receive property by virtue of the exercise of or failure to exercise a presently exercisable or testamentary general or special power of appointment if the person possessing the power of appointment receives the annual or final account.

(c) A person described in section 1403(b) as bound by another if that other receives the annual or final account.

Section 1403(b) of EPIC describes the persons bound by a court order and provides:

A person is bound by an order binding others in each of the following cases:

(i) An order that binds the sole holder or all coholders of a power of revocation or a presently exercisable or testamentary general or special power of appointment, including one in the form of a power of amendment, binds another person to the extent the person's interest, as an object, taker in default, or otherwise, is subject to the power.

(ii) To the extent there is no conflict of interest between the persons represented, an order that binds a conservator binds the person whose estate the conservator controls; an order that binds a guardian binds the ward if no conservator of the ward's estate has been appointed; an order that binds a trustee binds beneficiaries of the trust in proceedings to probate a will, to establish or add to a trust, or to review an act or account of a prior fiduciary, or in proceedings that involve a creditor or another third party; and an order that binds a personal representative binds a person interested in the undistributed assets of a decedent's estate in an action or proceeding by or against the estate. If there is no conflict of interest and a conservator or guardian has not been appointed, a parent may represent his or her minor child.

(iii) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent the person's interest is adequately represented by another party that has a substantially identical interest in the proceeding.

EPIC §7307(2)

The Estates and Protected Individuals Code defines *trust* but does not define *revocable trust*. EPIC §1107(m) provides:

"Trust" includes, but is not limited to, an express trust, private or charitable, with additions to the trust, wherever and however created. Trust includes, but is not limited to, a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. Trust does not include a constructive trust or a resulting trust, conservatorship, personal representative, custodial arrangement under the Michigan uniform gifts to minors act, 1959 PA 172, MCL 554.451 to 554.461, business trust providing for a certificate to be issued to a beneficiary, common trust fund, voting trust, security arrangement, liquidation trust, or trust for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or another arrangement under which a person is a nominee or escrowee for another.

For the one-year statute of limitations to apply, EPIC requires that a beneficiary of a trust, other than a revocable trust, receive an account that meets the requirements of EPIC §7307(3). For a revocable trust, EPIC §7303(1) and (2) require only that the trustee keep the settlor (or designated agent in the event of the settlor's incapacity) reasonably informed of the trust and its administration. If an incapacitated settlor has no designated agent, EPIC requires the trustee of a revocable trust to keep each beneficiary who would be a current beneficiary were the settlor deceased reasonably informed of the trust and its administration.

For trusts other than revocable trusts, it is necessary to establish when the one-year statute of limitations begins to run. EPIC §7307(2) provides, "A beneficiary or another person is considered to receive an annual or final account if the account is provided to the person in 1 of the manners specified for a notice by section 1401." EPIC §1401(1)(a) and (b) permit notice by first-class, registered, or certified mail and by personal delivery if the individual's identity and address are known. EPIC §1401(1)(c) permits notice by publication when the

address or identity of the person is unknown. A prudent trustee should retain evidence of proof of service of notice on the beneficiaries to establish a beginning (and ending) date for the one-year statute of limitations.

Definition of an Accounting

Section 7307(3) of EPIC lists the requirements that will cause the statute of limitations to begin to run. EPIC §7307(3)(a), (b), (c), (d), (e), and (f) tacitly adopt the national Fiduciary Accounting Principles. Set out below is a comparison of the national Fiduciary Accounting Principles² with the corresponding provisions of EPIC §7307(3).

I. Accounts should be stated in a manner that is understandable by persons who are not familiar with practices and terminology peculiar to the administration of estates and trusts.

II. A fiduciary account shall begin with a concise summary of its purpose and content.

III. A fiduciary account shall contain sufficient information to put the interested parties on notice as to all significant transactions affecting administration during the accounting period.

IV. A fiduciary account shall include both carrying values—representing the value of assets at acquisition by the fiduciary—and current values at the beginning and end of the accounting period.

V. Gains and losses incurred during the accounting period shall be shown separately in the same schedule.

VI. The account shall show significant transactions that do not affect the amount for which the fiduciary is accountable.

Section 7307. . . .

(3) For purposes of subsections (1) and (2), an accounting shall be considered an annual or final account if the account does all of the following:

(a) Is stated in a manner and with terminology that is reasonably understandable.

(b) Begins with a concise summary of its purpose and content.

(c) Contains sufficient information to put interested persons on notice as to all significant transactions affecting administration during the accounting period.

(d) Includes both the carrying values, representing the value of property at tax cost, and current values at the beginning and end of the accounting period.

(e) Shows gains and losses incurred during the accounting period separately in the same schedule.

(f) Shows significant transactions that do not affect the amount for which the trustee is accountable.

An account that meets the national Fiduciary Accounting Principles will always meet the requirements set forth in EPIC §7307(3). An account that does not meet the national Fiduciary Accounting Principles may or may not meet the requirements set forth in EPIC §7307(3).

Schedules

The comment accompanying Uniform Probate Code §7-303 refers to an account that conforms to the "Uniform Principles and Model Account Formats" and provides:

In any circumstance in which a fiduciary accounting is to be prepared, preparation of an accounting in conformity with the Uniform Principles and Model Account Formats promulgated by the National Fiduciary Accounting Project shall be considered as an appropriate manner of presenting a fiduciary account.

Presumably, the same rule applies to EPIC §7307(3). There are 12 National Fiduciary Accounting Reports (i.e., Model Account Formats). Every trust account does not necessarily require all of these reports. The reports list principal and income transactions separately. The reports titled "Receipt of Principal" and "Principal Balance on Hand" are the beginning and ending inventories. The National Fiduciary Accounting Reports are

- Summary of Account
- Receipts of Principal (i.e., beginning inventory)
- Gains and Losses on Sales or Other Dispositions
- Other Receipts Allocable to Principal
- Disbursements of Principal
- Distributions of Principal to Beneficiaries
- Principal Balance on Hand (i.e., ending inventory)
- Information Schedules
- Receipts of Income
- Disbursements of Income
- Distributions of Income to Beneficiaries
- Proposed Distributions to Beneficiaries

Necessity for a Summary

The national Fiduciary Accounting Principles permit a trustee to tailor an account to fit the trust. However, national Fiduciary Accounting Principle II, adopted in EPIC §7307(3)(b), creates a format within which all trust accounts must exist. National Fiduciary Accounting Principle II provides, "A fiduciary account shall begin with a concise summary of its purpose and content." EPIC §7307(3)(b) provides that an account must begin "with a concise summary of its purpose and content." The explanation accompanying the national Fiduciary Accounting Principle II contains an algorithm (a set of rules for solving a problem in a finite number of steps) and provides:

A summary of the account shall also be presented at the outset. This summary, organized as a table of contents, shall indicate the order of the details presented in the account and shall show separate totals for the aggregate of the assets on hand at the beginning of the accounting period, transactions during the period, and the assets remaining on hand at the end of the period. Each entry in the summary shall be supported by a schedule in the account that provides the details on which the summary is based.

Set out below is a sample summary from Robert Whitman, *Fiduciary Accounting Guide B-2* (2d ed 1998).

Summary of Account

	Page	Current Value	Fiduciary Acquisition Value
Principal Receipts	B-3		\$158,259.02
Net Gain (or Loss) on Sales or Other Disposition	B-4 to B-5		<u>113,539.47</u> \$271,808.49
General Disbursements	B-6	77.36	
Fees	B-6	4,300.00	<u>4,377.36</u>
Balance before Distributions			\$267,431.13
Distributions to Beneficiaries	B-7		<u>\$10,703.79</u>
Principal Balance on Hand	B-8		\$256,727.34
For Information:	B-9 to B-11		
Investments Made	B-9		
Changes in Investment Holdings Income	B-9 to B-11		
Receipts	B-12		\$5,907.25
Less Disbursements	B-13		<u>227.96</u>
Balance before Distributions			\$5,679.29
Distributions to Beneficiaries	B-13		<u>\$1,400.19</u>
Income Balance on Hand	B-13		\$4,279.10
Combined Balance on Hand			<u>\$261,006.44</u>

Conclusion

Several computer programs prepare accounts that meet the national Fiduciary Accounting Principles. The programs range from sophisticated double entry accounting systems to a simpler system devised by the American College of Trust and Estate Counsel entitled Fiduciary Accounting with Quicken. If a trustee furnishes an account after April 1, 2000, for the calendar year 1999, it is presumed that the trustee must observe the national Fiduciary Accounting Principles.

Notes

1. The Committee on National Fiduciary Accounting Standards was formed in 1972 to establish fiduciary accounting standards and make more uniform the principles applied in fiduciary accountings. The committee has representatives from the American Bar Association, the American Institute of Certified Public

Accountants, the National Center for State Courts, the National College of Probate Judges, the Uniform Probate Code Project, the American Bankers Association, and the American College of Probate Counsel.

2. The standards are published by ALI-ABA in Robert Whitman, *Fiduciary Accounting Guide* app D (2d ed 1998).

Dic L. Dorney and Anita Martin are partners in the law firm of Dorney & Martin, in Dexter. Established in 1988, the firm concentrates its practice in the areas of trust and estate taxation and estate planning and administration.

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AN OPEN FORUM: THUMBS UP OR DOWN ON MANDATORY CONTINUING LEGAL EDUCATION

Editor's note: The Michigan Supreme Court is considering a proposal from the State Bar of Michigan that would establish a program of mandatory continuing legal education for all lawyers. The proposed amendment of Rule 17 of the Rules Concerning the State Bar of Michigan and the proposed adoption of the Minimum Continuing Legal Education Implementation Rules were published at pages 1364 through 1368 of the December 1998 Michigan Bar Journal. In publishing the proposed Rule 17 amendment and implementation rules, the Supreme Court stated that

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption in its present form. Timely comments will be substantively considered and your assistance is appreciated by the Court.

Id. at 1368. To be timely, comments should be submitted within 90 days of publication of the proposal in December 1998. When filing a comment, reference should be made to file No. 98-34.

One Michigan practitioner, Stuart Israel, submitted his critique of the proposal and subsequently published it in the Labor Law Section newsletter, *Lawnotes*. With permission, we reprint his comments here. The president of the State Bar, J. Thomas Lenga, strongly supports the minimum continuing legal education requirement, and we reprint below his response to Mr. Israel's comments.

In Support of the Proposed Minimum Continuing Legal Education

*By J. Thomas Lenga
President, State Bar of Michigan*

One of our able colleagues, Stuart Israel, has expressed in cogent fashion his personal criticism of the State Bar's proposal for minimum continuing legal education (MCLE). I appreciate the opportunity to reply as president of the State Bar of Michigan. Let me first highlight the proposal.

What is required? Thirty hours of CLE over three years. This is a modest requirement. By comparison, Wisconsin requires thirty hours in two years, and Ohio requires twenty-four hours in two years.

Who must comply? All active lawyers and judges with the narrow exceptions of federal judges and Michigan lawyers on active duty in the military. There is also a provision for hardship exceptions, to be determined case by case.

Are there prescribed courses or subjects? No! Lawyers and judges may take subjects of their choosing. Lawyers and judges should take courses that make them more proficient in their areas of practice. Hence, lawyers and judges must be free to make their own course selections.

While the current proposal does not include it, I would encourage requiring two or three hours devoted to professional responsibility. That subject transcends us all.

Where will lawyers and judges get these courses? The short answer is wherever they find them. The proposal envisions broad-based provider certification. Thus, certified CLE should be available by telephone or the Internet, just as it currently is for Wisconsin lawyers. Local bar associations, specialized bar associations, ICLE, State Bar sections, and private providers are likewise expected to be sources of CLE.

The proposal was published for comment by the supreme court in the December 1998 *Michigan Bar Journal* at pages 1364–1368. The comment period is 90 days after publication in December 1998. The 60 days noted in the Journal was in error.

My brother Israel's criticism is essentially threefold. I address each issue separately.

First, Mr. Israel asserts that MCLE is an acknowledgment that law schools failed in their task to adequately educate us. Not true at all. Rather, MCLE is an acknowledgment that the law is a dynamic, ever-changing body of principles and rules. Dare we suggest that, since Mr. Israel and I graduated from law school over 30 years ago, all the law as it has been applied has remained the same? Clearly, that has not been the case. While the words of the U.S. Constitution have not changed in 30 years, the last 30 years of what that document is deemed to require in the criminal law area alone fills volumes.

**Honestly now, would you
consult with a doctor for
yourself or a family member if
that doctor had taken no course
to update herself or himself on
the latest diagnostic techniques?**

If continuing education is some kind of admission of the failure of the foundational education in law, is the same true of medicine and accounting? These are two professions that, for more years than lawyers, have required extensive annual continuing education. I was recently talking with a dermatologist who related that for her to maintain her professional credentials, she was obliged to take 50 hours of continuing education. Honestly now, would you consult with a doctor for

yourself or a family member if that doctor had taken no course to update herself or himself on the latest diagnostic techniques? Would you trust your tax return to an accountant who relied solely on his or her college degree courses? The answers are obvious.

The second criticism seems to be that because I'm a lawyer, the public trusts me to maintain my proficiency and competence. I have no doubt that in Mr. Israel's case that is true. And if the almost 33,000 lawyers of Michigan followed Mr. Israel's template, lawyers would not have the public image problem we do have.

While there are no surveys in Michigan, our research suggests that it is likely that between 50 percent and 65 percent of the lawyers in Michigan already routinely take sufficient continuing legal education to satisfy the proposal's requirements. Thus, the behavior of those lawyers would not change if the proposal were adopted. But what of the other 35 percent to 50 percent of our lawyers who take no continuing legal education. Should they? I submit it's hard to legitimately argue they should be permitted to rely on their law school education and never have to update. How well are their clients served?

It's appropriate to say a word or two about this notion of public trust. Surveys the State Bar took in connection with its long-range planning suggest public trust in lawyers needs significant improvement. Does the public believe that we lawyers, like physicians and accountants, must take continuing education? Just ask your nonlawyer friends and acquaintances. My experience is that they are shocked to find we have no such requirement. And asking the public to "trust me" unfortunately doesn't really work very well these days.

**Attending MCLE is simply a
cost of doing business just like
office space, computers, office
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one form or another.**

Finally, does it cost money? Clearly it does. Lawyers will have to pay tuition, an annual administrative fee of \$10 or less, and the cost of lost billable hours in attending the CLE. Are those reasons not to have MCLE? No. Attending MCLE is simply a cost of doing business just like office space, computers, office staff, and, yes, law libraries in one form or another.

Let's try to remember this notion of MCLE began in 1975. Since then 40 states (not 39, as Mr. Israel mentioned) have adopted MCLE. None of the criticisms Mr. Israel raises are new. All have been considered carefully in each of the 40 jurisdictions that have adopted MCLE. They were not sufficient then to block adoption, and with all due respect to Mr. Israel, they are not sufficient now to overcome the merits of MCLE.

On a final note, there are those who hear the notion of MCLE, reflect on the 1989 attempt, and react negatively. Interestingly, Michigan is the only state to have adopted MCLE and later abandon it, and with good reason. If the current proposal bore any resemblance to that earlier experiment, I too would react negatively. The current proposal is not your father's Oldsmobile.

Whether you agree or disagree, like Mr. Israel, I encourage you to submit your thoughtful and constructive comments to the Michigan Supreme Court as soon as

possible.

Continuing Legal Education—Or Else!

By Stuart M. Israel

"The time to go back to school may be drawing near for Michigan's lawyers." So begins a *Detroit Legal News* article reporting on the State Bar of Michigan's mandatory continuing legal education proposal, recently submitted to the Michigan Supreme Court.

The State Bar proposal calls for a rule requiring that each Michigan lawyer complete 30 hours of CLE every three years. The rule would create a 12-person continuing legal education committee ("CLEC"), "at least nine of whom shall be lawyers," to administer the mandatory program, approve courses, receive compliance affidavits from lawyers, send "delinquency" notices, and report annually to the Bar and the Supreme Court. The costs of administering the program would be funded by an unspecified annual fee added to State Bar dues. A lawyer failing to comply would be placed on "involuntary inactive status." The proposal, which would create Rule 17 of the Rules Concerning the State Bar of Michigan, is published at 77 *Michigan Bar Journal* 1027–1028 (Oct. 1998).

State Bar of Michigan President J. Thomas Lenga was quoted by the *Detroit Legal News* as saying it is "absurd that lawyers don't have" mandatory continuing education. Lenga is reported to have said that since he became State Bar president this summer, he has heard only two lawyers express opposition to the proposal. Well, count me as number three.

First, for the record: I favor CLE. CLE is good. CLE is valuable. I participate in CLE, as a consumer and as faculty. I think we in Michigan are lucky to have a high quality CLE provider like ICLE. I serve on an ICLE advisory board. I think the Labor and Employment Law Section does great service to the bar with its CLE Saturday mornings in January and Wednesday afternoons at State Bar meetings and its co-sponsorship of ICLE and MERC seminars, the Gottfried symposium and other CLE programs, not to mention its quarterly publication of *Lawnnotes*. This said, I think *mandatory* CLE is a bad idea.

My opposition comes in part from my observation of the exaltation of form over substance in mandatory CLE programs in other states, with year-end rushes to put in time at whatever course is schedule-convenient, irrespective of the quality or applicability to one's practice. Michigan's failed experience with mandatory CLE for new lawyers—during which many crossword puzzles were completed while videotaped instructors read from outlines—also demonstrates that rigid CLE hours and format requirements are cosmetic, and no guarantors of "education," much less professional competence.

My opposition comes in part from the fact that mandatory CLE reflects unstated resignation to the failure of legal education to create an adequate practical foundation in the law as it is practiced. More clinical programs and simulation courses addressing lawyering skills—not just trial and appellate practice, but also discovery, motion practice and other pre-trial skills, interviewing and counselling, operating a law office, negotiating, legal drafting, persuasive writing, etc.—would better bridge the gulf between the thinking-like-a-lawyer emphasis of many law schools and the being-a-lawyer necessities of practice. There is something wrong when new lawyers, fresh from three years of law school and running the bar examination gauntlet, have to resort to CLE to acquire basic professional skills. Better that the Bar join with the law schools to address the basic curriculum and

its relationship to practice rather than forcing all lawyers back into the classroom.

Some of my opposition comes from my preference for what the proposed rule calls "self-study." I like listening to audiotapes in the car or while running. I read books, articles and advance sheets. Under proposed Rule 17.9, I may be able to get advance CLE approval to engage in "self-study courses involving the use of audio or video tapes, computers, or correspondence courses." However: "Not more than one-third of approved credits for any reporting period may be earned through self-study activities." Although I am a sworn member of the bar, dedicated to the Rules of Professional Conduct, and an officer of the court, it seems I can't be trusted to fulfill my mandatory CLE obligation without serving time in "formal courses conducted in a class or seminar setting." *In loco parentis*.

As I practice with a firm, there's another alternative, under proposed Rule 17.8. "Courses offered by law firms, either individually or with other law firms, corporate legal departments, or similar entities primarily for the education of their members may be approved in advance for credit." As I'm not a solo practitioner, I can sit in our conference room and get CLE credit by listening to my partners wax eloquent, so long as the course description passes muster in advance with CLEC mavens. This convenience, too, is limited: "Not more than one-third of approved credits for any reporting period may be earned through in-office activities."

So, I can meet a third of the requirement with audiotapes and a third in the conference room but still I have to get a third of my "education" in "formal courses conducted in a class or seminar setting."

Why? Is this consistent with the latest in cutting-edge learning theory? I don't think so. People have different learning styles. Many, like me, find the classroom lecture method to be the least effective way to learn, as well as being the most inefficient and inconvenient use of time. Or do I have to sit in class because unless I bear witness with my physical presence at least one-third of the time my affidavit of CLE compliance is not credible? Is there a need for corroborating witnesses in mandatory CLE matters, as in criminal conspiracy cases?

Mandatory CLE is addressed to the lowest common denominator. It is geared to the unconscientious. Isn't this group a small minority of the bar? If not, there is something wrong with the profession that will take measures far more substantial than mandatory CLE to cure. If this group is a small minority, why impose CLE on the vast majority of responsible, conscientious, careful lawyers? We don't address the small minority of lawyers who are dysfunctional because of alcohol or drug abuse by requiring all State Bar members to attend 30 hours of 12-step meetings every three years.

Also, will unconscientious lawyers be so easily transformed? I don't think so. They will be as unmoved by mandatory CLE as they are by professional responsibility, pride in work and the other values that motivate the vast majority of lawyers to be responsible, conscientious and careful.

State Bar President Lenga identifies the objectives of proposed Rule 17 in his October 1998 *Michigan Bar Journal* column: "Why do we need this? To make us better equipped to serve our clients and to improve our public image." Of course quality CLE makes us "better equipped to serve our clients." That truism justifies CLE, not *mandated* CLE regulated by an expensive bureaucracy. This is really about the vogue among organized bar leadership seeking "to improve our public image." There is nothing wrong with efforts to improve the public image of lawyers, but *imposing* CLE is not an effective way to accomplish that objective.

Mandatory CLE is not new. It has been the fashion for many years. Thirty-nine

states have some form of mandatory CLE. As far as I can tell, these programs have done absolutely nothing to improve the public image of lawyers. Indeed, mandatory CLE communicates, to those members of the public who pause to contemplate, that lawyers cannot be trusted to maintain their competence without being *forced* into continuing education and *required* to report compliance in *affidavits*. The negative message: lawyers have to be *compelled* to be conscientious.

Efforts to improve the public image of lawyers would be better concentrated on providing vigorous self-regulation through the grievance process, something lawyers do better than other professions, and on educating consumers of legal services, through initiatives like judicial watch programs, efforts to encourage the simplification and demystification of the legal process, and the distribution of a client "Bill of Rights" to enhance sophistication about selecting and assessing lawyers.

A Bill of Rights might provide prospective clients with meaningful questions to be used in selecting lawyers appropriate to their needs, such as: What percentage of professional time do you spend on my area of legal need? How many cases have you tried involving my area of legal need and what were the results? What CLE courses have you completed in the past three years? What professional publications do you subscribe to? Have you ever been disciplined by grievance authorities or sued for malpractice? Will you give me the name, address and phone number of three client references?

The wide distribution of such a Bill of Rights to consumers (and lawyers) would be exponentially more effective in improving public image, and in heightening lawyer awareness of professional responsibility, than the cosmetic and formalistic mandatory CLE proposal.

A Bill of Rights would be a lot cheaper, too. The April 1998 *Michigan Bar Journal* reports that there are 32,366 Michigan lawyers. If each spent an average of \$300 per year on CLE tuition, the annual cost would be \$9,709,800. This doesn't include incidental costs (food, travel, lodging, parking, etc.) or lost productivity or the annual fee added to State Bar dues. If the annual fee, to be "established by the CLEC and paid by all active lawyers" in the words of proposed Rule 17.10, is \$20, CLEC's yearly budget will be \$647,320.

A ten-lawyer firm would spend about \$3,000 annually on the tuition for two one-day CLE courses per lawyer (10 lawyers x \$300). Lost productivity, however, would add \$28,000 to the cost (10 lawyers x 16 lost billable hours x \$175 average hourly rate). If only half of Michigan lawyers are hourly billers, the lost billable hour revenue from two CLE days a year would total \$45,312,400 (16,183 lawyers x 16 lost billable hours x \$175 average hourly rate).

Change the calculus any way you want. Use ten lost billable hours. Use \$125 as the average hourly rate. Assume there are only 10,000 hourly billers. Factor in the lost productivity time of corporate counsel, government lawyers, judges and others who don't bill by the hour. Assume the CLEC fee added to dues will be only \$10. Subtract what lawyers now spend on voluntary CLE. There is room for debate as to exactly what mandatory CLE will add to the cost of being a lawyer. Whatever the estimate, to paraphrase the late Senator Dirksen, we're talking real money.

While mandatory CLE carries considerable costs, its benefits are not so clear. Have the years of mandatory CLE in other states improved the quality of legal services? Or, phrased negatively, has mandatory CLE reduced lawyer incompetence? In fact, the assumed benefits of mandatory CLE are not

quantifiable. They are taken on faith, resting on little more than this Tarzan-like syllogism: "Ignorance bad. Education good. Forced education must be good." I don't know about you, but whenever I spend \$10 million, I like to do a cost-benefit analysis that's a little more concrete.

Okay, I may be somewhat cranky about this. The path of least resistance would be to just put in my time, pay my added fee, and submit my periodic affidavits. I can fulfill the three-year 30 hour requirement with my business-as-usual CLE activities (assuming CLEC will approve my "self study" after reading this article). But mandatory CLE is such a shallow gesture. It is premised on an undefined "problem." It presumes positive results on faith. It lacks measurable objectives. It will cause thousands of lawyers to spend millions of dollars on image. It is a bad idea that warrants some crankiness—and opposition.

If you agree, submit your measured, constructive, critical analysis of proposed Rule 17 to the Michigan Supreme Court (P.O. Box 30052, Lansing, MI 48909). Do it soon. If enough lawyers speak out, maybe the Supreme Court will listen. If I'm a voice in the wilderness, however, well . . . I'll see you in school.

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Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the *Winter 1999* issue of [Michigan Probate and Estate Planning Journal](#)

OPPORTUNITY TO REFORM NIMCRUT EXPIRES ON JUNE 8, 1999

By Joseph A. Bonventre

Late last year, the Internal Revenue Service issued final regulations that permit the reformation of certain charitable remainder unitrusts (CRUTs). CRUTs that compute the unitrust amount under the net income method or the net income with makeup charitable remainder unitrust (NIMCRUT) method or flip unitrusts that fail to meet the requirements of the final regulations may, under those regulations, be reformed to add provisions allowing a conversion to the fixed percentage method (i.e., converting the trust to a flip unitrust that meets the requirements under the final regulations) on the occurrence of a triggering event. The trustee must initiate legal proceedings to reform the trust on or before June 8, 1999. In the case of a NIMCRUT, any make-up amount under IRC § 664(d)(3)(B) is forfeited at the time of conversion. See Treas Reg §§1.664-1 et seq., 25.2702-1.

By way of background, CRUTs have provided for payment of the unitrust amount under one of the following methods:

- *Fixed percentage method.* The unitrust amount equals a fixed percentage of the net fair market value of the CRUT's assets valued annually.
- *Net income method.* The unitrust amount equals the lesser of the fixed percentage amount or the trust's annual net income.
- *NIMCRUT method.* The unitrust amount equals the amount determined under the net income method plus any amount of income that exceeds the current year's fixed percentage amount to make up for any shortfall in payments from prior years when the trust income was less than the fixed percentage amount.

A flip unitrust is a CRUT under which the payment method changes (flips) on the occurrence of a triggering event. A flip unitrust is commonly funded initially with unmarketable, non-income-producing assets that will at some point be liquidated. Proposed regulations permitted the use of a flip unitrust provided certain requirements were met. See Prop Treas Reg § 1.664-3(a)(1)(i)(c). The final regulations are more liberal than the proposed regulations and expand the availability of the flip unitrust to other situations.

Under the final regulations, a flip unitrust is permissible if the governing instrument meets the following three requirements:

1. The change from the NIMCRUT method to the fixed percentage method occurs on a triggering event (defined below).
2. The change from the NIMCRUT method to the fixed percentage method occurs at the beginning of the taxable year that immediately follows the taxable year during which the triggering event occurs. (Note, in the case of reformation, the triggering event under the reformed CRUT may not occur in a year before the year in which the court issues the order reforming the trust except under special circumstances.)
3. Following conversion to the fixed percentage method, the trust must pay at least annually, to the permissible recipients, the unitrust amount computed under the fixed percentage method and not a unitrust amount computed under the NIMCRUT method. In other words, there can be only one conversion, and after the conversion only the fixed percentage method is available.

For purposes of the flip unitrust rules, a triggering event includes (1) a sale of unmarketable assets held by the trust, (2) a specific date, or (3) a single event whose occurrence is not considered discretionary or within the control of the trustee or any other persons (e.g., a triggering event based on the sale of unmarketable assets or the marriage, divorce, death, or birth of a child of any individual).

A flip unitrust is ideal for someone who wants the unitrust amount computed under the fixed percentage method but has an unmarketable asset that can't be sold quickly. Such individuals have usually settled for a NIMCRUT. Now the person can use a flip unitrust rather than being locked into a NIMCRUT for the term of the trust. Another person who would be interested in a flip unitrust is someone who is concerned about retirement planning. The person might not need income today but want to know that an annual payment can be provided after retirement. As stated above, the person must understand that the makeup amount will be forfeited when the trust flips.

According to the final regulations, adding provisions that comply with the three requirements set forth above will not cause a charitable remainder unitrust to fail to function exclusively as a charitable remainder unitrust under Treas Reg § 1.664-1(a)(4) and will not be an act of self-dealing under IRC § 4941 if the trustee initiates legal proceedings to reform the trust on or before June 8, 1999.

In summary, a CRUT that uses the net income method or the NIMCRUT method or is a flip unitrust that fails to meet the requirements of the final regulations may be reformed if the trustee initiates legal proceedings on or before June 8, 1999. This opportunity will be over in a few months.

Joseph A. Bonventre is a member of the law firm of Clark Hill, PLC. His practice is concentrated in estate planning, charitable planning, tax and estate planning, and trust administration. Mr. Bonventre is vice chairperson of the Taxation Section of the State Bar of Michigan and is an active member of several organizations, including the Section of Real Property, Probate and Trust Law of the American Bar Association, the Financial and Estate Planning Council of Detroit, and the Planned Giving Roundtable of Southeast Michigan. He has written articles and given numerous presentations on estate planning and tax topics.

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Probate and Estate Planning Section

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LAWYER ADVERTISING: DO'S AND DON'TS

By Steven A. Mitchell

In days gone by, members of the legal profession did not advertise their services; it was beneath their professional dignity. In today's market, many lawyers would starve if they were unable to market their services through various forms of advertising.

Indeed, we have come so far in our acceptance of advertising by lawyers that there is a discipline rule that expressly permits it. MRPC 7.2(a) provides, "Subject to the provisions of these rules, a lawyer may advertise." On the other hand, lawyer advertising is not regulation free. For example, MRPC 7.2(b) requires that "A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used." Although this is a little known rule, it should be implemented as part of every lawyer's office procedure for record keeping.

Other regulations on advertising are more commonly known; however, they are not always clearly understood. MRPC 7.3(a) essentially codifies the holding in *Shapero v Kentucky Bar Ass'n*, 486 US 466 (1988). In fact, *Shapero* is cited within the rule. It provides that a lawyer may not "solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." Although this seems to fly in the face of MRPC 7.2, which expressly permits advertising, a reconciliation of the two rules rests on the definition of the term *solicit*.

For the purpose of the rule, *solicit* does not include "letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful." MRPC 7.3(a). The word *solicit* also does not include sending letters to potential clients who are known to face a particular legal problem, as long as the letter is "truthful and non-deceptive." *Id.*

At the center of the rules regarding solicitation with prospective clients is the bar's concern with protecting the public from false, fraudulent, misleading, or deceptive communications made by lawyers. Thus, pursuant to MRPC 7.1, a communication concerning a lawyer's service must not

(a) contain a material misrepresentation of fact or law, or omit a fact necessary to make the statement considered as a whole not materially misleading;

(b) be likely to create an unjustified expectation about results the lawyer can achieve, or state or imply that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compare the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

In general, this rule is designed to prevent advertising that might tend to create an unjustified expectation on the part of potential clients with respect to results the lawyer can obtain. Of course, such an expectation would not be justified without considering the specific facts and legal issues pertinent to each case.

Care therefore must be taken in developing legitimate marketing and advertising vehicles that nevertheless conform with the Michigan Rules of Professional Conduct. Even the use of a particular word can create an impression or expectation that is unjustified.

In Michigan Ethics Opinions, RI-169 (Aug 18, 1993), a lawyer inquired about the propriety of distributing a solicitation letter to new residents in the lawyer's particular geographic area, describing the legal services rendered by the lawyer's firm. In part, the letter suggested that changing one's residence might require modifications to one's will. The lawyer went on to suggest that a new personal representative, one closer to the potential client's new residential area "should be nominated to avoid undue hardship on the current personal representative." *Id.*

In the committee's opinion, the use of the word "should" had the potential to mislead prospective clients. In the opinion of the ethics committee, the advertising letter required redrafting to avoid any misunderstanding in the communication.

While informal ethics opinions do not have the force and effect of law, they are recognized as well-reasoned guidance to actual ethics dilemmas lawyers face in their practices, and as such, the opinions are held in high regard. RI-169 is a good example of how the use of one inappropriate word, or an appropriate word in an inappropriate context, can cause practitioners, eager to advertise their services in a competitive marketplace, to run afoul of the discipline rules.

In RI-244 (Nov 6, 1995), a lawyer inquired whether the use of the word "affordable" in describing his firm's services complied with the requirements of the discipline rules on advertising. The lawyer proposed to send a descriptive circular by direct mail to prospective clients, describing the firm's services in general terms. The firm's mission statement, included in the circular, described the firm's services as "affordable."

While the ethics committee stated that the use of the general term *affordable* was permissible under the facts presented, the opinion was conditioned on the expectation that the lawyer would fully comply with the requirements of MRPC 1.5(b) governing the use of fee agreements. In other words, the committee's opinion was that any ambiguity or misunderstanding created by the law firm's description of its services as affordable could be overcome by clear communication of the elements of the actual fee agreement entered into between the lawyer and the client, preferably in writing.

Technological advances have raised several questions regarding the use of computers to solicit lawyer's services. In RI-276 (July 11, 1996), a lawyer inquired into the propriety of advertising on the World Wide Web, as well the solicitation of clients through e-mail. In general, the ethics committee concluded that "all forms of communications about lawyers' services are governed by ethics rules, regardless of whether they are in person, on paper, billboard, telephone, fax, computer or otherwise."

Advertising legal services on a Web site requires compliance with MRPC 7.1, which pertains to the truthful and nondeceptive content of the information, and with the record keeping requirements of MRPC 7.2. This kind of advertising does not constitute an uninvited solicitation, since the prospective client must initiate the inquiry by accessing the lawyer's Web site. On the other hand, sending an e-mail with advertising content triggers the requirements of MRPC 7.3 because the lawyer initiates the contact.

As the market for legal services becomes more and more competitive, creative methods for accessing those markets will continue to develop. Care must be taken to make certain that the use of new methods for reaching the legal marketplace conform to the requirements of the Michigan Rules of Professional Conduct. Since an ounce of prevention is often worth a pound of cure, it makes sense to have proposed advertising reviewed by an objective third party, whether that is a private consultant or the State Bar of Michigan Standing Committee on Professional and Judicial Ethics. To request a written opinion, send a letter including

- the inquirer's name, address, telephone number, and bar number;
- the facts of the inquiry (set out the circumstances, including all relevant facts that give rise to your request for an ethics opinion);
- the issues (set forth the ethical questions that, in your judgment, arise out of the proposed course of conduct); and
- references (identify the sections of the Michigan Rules of Professional Conduct or the Michigan Code of Judicial Conduct and any ethics opinions that you think apply to your inquiry)

to Chairperson
Standing Committee on Professional and Judicial Ethics
c/o Regulation Counsel
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Probate and Estate Planning Section

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TECH TALK

By John D. Mabley

I am happy to be able to resume this column after a long hiatus. Some of you may recall that this area of the *Journal* is devoted to news and views about technology issues and information. The hope is that you will learn something here that will help your practice and free up some of the time you are spending in the production of documents, managing the office, and trying to maintain an office staff. Your comments and suggestions are always welcome.

It seems appropriate, as I resume this effort, that I remember Harold Draper, who passed away recently. Harold had a tremendous impact on the practice of probate and estate planning law in Michigan. More to the point, Harold was a pioneer in the use of technology in the practice of law. Many of you know that he was one of the first lawyers in Michigan to use a computer in his practice, and he was a constant source of encouragement and guidance to those of us who struggled to make computers work in our offices. Harold will be greatly missed by all of us, and I dedicate this column to his memory as a memorial to a Michigan technology pioneer, and a real gentleman.

What is the hot topic these days? Voice recognition. The ability to talk directly to the computer and have your words appear in word-processing documents, e-mail, and other Windows-based programs. Many of you probably have seen programs demonstrated at past State Bar annual meetings and other technology exhibitions. The early forms of these programs were clunky, lacked accuracy, and tended to cause the user to speak at such a slow rate that the thought process was affected. The problem was the computer itself. Voice recognition programs are memory hogs and require large amounts of hard drive space. Chip speed is also a critical factor. Fortunately, we now live in an age where chip speed and memory capacity have become affordable and fully available. We therefore witness the dawn of a revolution in computerization of the law office.

The two main players at this point are Dragon Naturally Speaking, and IBM ViaVoice 98. The current level of affordable computer performance means that these two programs actually allow you to speak at a natural pace and have the computer translate your spoken words into commands the computer can understand and documents in the word processor. WordPerfect Legal Suite 8.0 actually comes with a copy of Naturally Speaking, Personal Edition, built in. At first glance this seems like a real find, but this version of the program does not

permit you to speak directly into your word processor. You create a voice-produced file that is then imported into the word processor. You will want to consider upgrading to the Professional version, which does provide a direct interface with the word processor. Dragon does have a Naturally Speaking Legal Suite available for lawyers. The sophistication is pretty amazing. The program understands more than 240,000 legal terms and abbreviations. You can also add terms that are specific to the probate and estate planning areas.

IBM has been involved in voice recognition for years, but their track record was not very good. Price is a factor here. The ViaVoice Executive Edition is currently \$149, and it has all the features you need. Because this program has the ability to work with macros, you can invoke standard paragraphs and create forms by using short verbal commands. This is especially handy in creating wills and trust agreements. A legal dictionary can be incorporated into the program for an additional \$149. A recent visit to the IBM Web site revealed that developers are working on practice-specific add-on vocabularies that will be downloadable from the Web site. In addition, several portable dictation machine companies are currently developing products that can be used with ViaVoice. Soon you will be able to dictate in your car, arrive at the office, and plug the tape into a device that can feed it directly into the computer. Of course, you can't do this while you ride around with the top down.

Which brings us to the second critical component in successful voice recognition: the quality of the microphone. The best voice recognition software in the world is not going to perform well if the computer can't hear you clearly. If you are going to bring this tool into your practice, don't skimp on the microphone. Get the best quality you can afford. The difference in accuracy is really quite apparent. When you start using one of these programs, you actually spend the first few hours training the program to recognize the way you speak. As you continue to work with the program, you have the opportunity to continue the training process by bringing up words that were incorrectly transcribed and telling the computer what you were expecting. You actually record the spoken word and then associate it with the correct result. The next time the computer hears that word, it spits out what you have taught it.

Both of the programs mentioned above incorporate "continuous" speech recognition. This means that you can dictate to the computer in the same way you would dictate to a secretary. Of course there are some drawbacks. The computer will print out every *uh*. The secretary is more forgiving and discreet. However, once you get used to the concept, slow down your pace just a bit, and learn to speak clearly, you will find this software almost addicting. But don't expect perfection. *Their* and *there* get confused, as do *a*, *as*, and *and*. You have to be especially sharp in proofreading these documents, not only for typos but also for words that are out of context or do not convey the intended meaning.

The bottom line is that these programs are worth your time and effort, especially if you don't keyboard. If you are interested, you can follow the latest developments in this area by going to <http://www.naturalspeech.com> or <http://www.software.ibm.com/speech>. Developments are occurring daily, and you will want to get the latest word before making your choice.

By the way, be sure you have the machine to run the software before you invest. At a minimum (and I do mean minimum), you will need a machine with a 333 MHz Pentium II-class processor, with MMX technology, 4 gigabytes of hard disk, 32 megabytes of memory, and a good sound card. A fast talker will need a faster machine. If you tend to mumble, you are out of luck, at least for the moment. Go to a speech coach and get yourself free of the keyboard.

Other news of interest: A recent Hot Docs course at ICLE has generated a lot of interest. There is talk of doing a class devoted to estate planning practice. This could be a real boost for your practice.

Will your practice be affected by the influx of lawyer-on-a-disk programs that are coming out these days? I recently tested the Intuit Family Lawyer package (Intuit is the company that makes Quicken and has a pretty loyal following). A pretty amazing little program. The documents left something to be desired, but the program is easy to use, and if you get in trouble, you can call up Arthur Miller of the Harvard Law School for a little context-sensitive video explanation. You pay \$25 for the program, and you can create 100 legal forms and documents. The program even has a feature to guide the user regarding the type of durable power or will that he or she ought to be using. And you thought the accountants, banks, and brokerage houses were the only ones moving in on our turf. There are, of course, a number of other programs out there. Most of the time the clients do more damage than good with these programs. I was recently asked to interpret a joint trust prepared on such a program. As usual, the client couldn't resist running the completed document through the word processor for a few changes. The net result was that the surviving spouse had a general power of appointment over assets that were to be placed in a bypass trust. I have now become sensitive to these programs and have started asking clients about their use if I sense the client is using computers (a client with 20 pages of spreadsheets describing family assets would qualify for this group). At this point there is not much we can do but lecture the clients and try to repair the damage once it is discovered. (Disclaimer—I thought you should be aware that these types of programs exist and that our clients may even be using them. I am not implying or suggesting you buy the program to use in your practice. For you, I recommend Hot Docs).

More in the next issue!

John D. Mabley is president of John D. Mabley, PC, in Farmington Hills, where he practices in the area of estate planning and probate administration. He is vice chair of the Technology Committee of the Real Property, Probate, and Trust Law Section of the American Bar Association; a member of the ABA's Tax and Litigation Sections; a member of the State Bar of Michigan's Taxation Section; and past chair of the State Bar's Probate and Estate Planning Section. Mr. Mabley is also a fellow of the American College of Trust and Estate Counsel and a member of the Oakland County Estate Planning Council. He has taught many ICLE courses.

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Probate and Estate Planning Section

The following article was published in the [Winter 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

ETHICS, UNAUTHORIZED PRACTICE, AND IMAGE

By Ramon F. Rolf, Jr.

Estate Planning Engagement Letters— Has Their Time Come?

A proposed amendment to MRPC 1.5 would require a written fee agreement with a new client before or within a reasonable time period after commencing representation. The supporters of this amendment cite ethical concerns and client protection as the basis for such a requirement. Many practitioners question the ethical necessity of such agreements while others already routinely use fee agreements in their practices. On behalf of the Section Council, attorney John Martin has written to the supreme court and the board of commissioners challenging the amendment and stating that fee agreements are more properly a matter of an individual attorney's business practice and not an appropriate ethical topic for the entire bar.

Michigan currently requires written fee agreements in the narrow class of cases involving contingency fees or probate estates. The current proposal would require fee agreements in every practice area, including estate planning. Other states have begun to implement fee agreement requirements. For example, California (not always a state to be followed) requires a written fee agreement when total expenses to a client, including attorney fees, can reasonably be expected to exceed \$1,000.

To analyze the true impact of a requirement to use fee agreements, it is important to understand how many attorneys are currently using fee agreements. The American College of Trust and Estate Council (ACTEC) recently surveyed members on their use of engagement letters. Seventy percent of those responding indicated that they use estate planning engagement letters. These results indicate a new trend in estate planning, as an earlier survey showed a much smaller percent of ACTEC members using engagement letters.

Absent a requirement to use them, the use of fee agreements and engagement letters can have significant advantages for an estate planner. My own firm, in mid-Michigan, does not have a policy on the use of written fee agreements or engagement letters. In fact, even attorneys within our estate planning group have

divergent philosophies regarding their use. However, my own experience over the last six years using engagement letters has been very positive. When I began to use engagement letters, I also revised my fee arrangements so that I could more precisely explain the probable cost in the letter. The calculation of most fees is based on two factors: a fixed fee for document preparation and an hourly rate for conference time. The use of an hourly rate for conference time lets a client know that your time is valuable. I am always pleased to review in detail draft estate planning documents sent to a client. However, the client knows that he or she will be paying for my time. At the end of an initial meeting and discussion with a client about his or her needs, I can provide the client with a very close estimate of the fee. The engagement letter clearly outlining my fee arrangement is sent to the client within days after the initial meeting. Due mainly to this early disclosure, client questions relating to fees are now virtually nonexistent in my practice.

What specifically should an engagement letter contain? At the end of this article is my standard estate planning engagement letter. I would caution you to use this example only as a guide, as client needs may differ. The standard engagement letter should simply inform and confirm with the client the scope of services. In our engagement letter, we use a check-off system to indicate what legal and tax analysis we will be providing and what documents are to be prepared. The fee agreement should be clearly set forth in an engagement letter, and the client's responsibility for the payment of costs should also be discussed.

My letter includes an additional paragraph when I will be jointly representing a husband and a wife, assuming that no prohibited conflicts have arisen. Obviously, this paragraph is not necessary when you separately represent only one spouse. In addition, notice that the engagement ends when the client has signed the estate planning documents. This can be useful, for example, to avoid a lawsuit brought by a client many years after you prepare documents, alleging a continuing representation and duty to advise of tax law changes.

It would be untrue for me to say that I always use engagement letters in my practice. With long-time clients, engagement letters are sometimes overlooked. In general, however, I have found the use of such letters to be time saving for me and helpful and informative for my clients.

As I mentioned at the beginning of this article, your Council does not believe that engagement letters should be the subject of ethics rules and required in all circumstances. However, the use of engagement letters in estate planning can prove to be a good business practice that clients more and more will come to expect and appreciate.

Fred Rolf is a member of the Midland-Saginaw law firm of Currie Kendall Polasky Meisel, PLC. He is a member of the Probate and Estate Planning Section Council. A graduate of the Detroit College of Law—MSU, he is past president of the Northeastern Michigan Estate Planning Council. Mr. Rolf is a member of the American Bar Association, the State Bar of Michigan, and the Midland County Bar Association.

Sample Engagement Letter

Dr. and Mrs. Joe Chemist
10 Laboratory Drive
Midland, MI 48640

RE: Estate Planning

Dear Joe and Sally:

[If you are preparing a letter to a single person, delete "both of" at end of paragraph.] I am writing this letter to you to confirm our representation in connection with the preparation of an estate plan for both of you.

As a result of our recent meeting, the legal services that we agree to perform and the documents that we agree to prepare for your review and execution are checked in the following list:

- Overall review of your estate planning needs and objectives, including a review of any existing documents and financial information
- Analysis of your estate tax situation, including (a) marital deduction; (b) available unified credit exemption equivalent; and (c) generation-skipping transfer tax issues
- Preparation of "simple" (no trust) will(s)
- Preparation of pour-over will(s)
- Preparation of revocable living trust(s)
- Preparation of general durable power(s) of attorney for financial matters
- Preparation of durable power(s) of attorney for health care decisions
- Preparation of living will(s)
- Preparation of advance medical directive(s)
- Preparation of beneficiary designations for Dow life insurance and retirement benefits
- Preparation of beneficiary designations for non-Dow life insurance and retirement benefits
- Preparation of appropriate transfer documents, consisting of
 - certificate of trust existence and authority
 - assignment of tangible personal property
 - real property deeds
 - stock and bond assignments
 - bill of sale
 - other _____
- Analysis and recommendations relating to a gift-giving program:
 - outright
 - in trust (together with the preparation of a trust) as follows:
 - irrevocable life insurance trust
 - charitable trust
 - 2503(b) trust
 - 2503(c) trust

[Revise the following paragraph as needed.] As we discussed, the fees will be based on a combined hourly rate and fixed fee. All consultation and analytical time exploring your needs will be billed at my standard hourly rate of \$_____. In addition, the documents listed above, which we propose to prepare for you, will be billed at a fixed fee of \$_____. This fixed fee is based on many different factors, including production costs, complexity, and estimated time for document preparation. We will also bill you \$___ for any deed preparation and any additional amounts for all out-of-pocket expenses and certain costs, including long-distance phone calls, facsimile charges, certified mail, photocopy charges,

and the like.

[Delete the following two paragraphs if the representation is of a single person.] I am obligated by the Michigan Rules of Professional Conduct to advise you of the potential risk of a conflict of interest. Whenever an attorney represents more than one individual in a particular matter, there is some risk that the interests of one may be different from the interests of the other. I have evaluated the potential for such a conflict in your particular case and have concluded, given my knowledge of your circumstances, that there is no current conflict that would compromise my professional judgment.

Please sign the enclosed copy of this letter, indicating that you want me to represent you both in your estate planning and return it to me in the enclosed self-addressed envelope.

We will begin the preparation of your estate plan on the receipt of the signed engagement letter. We expect that the completion of the preliminary plan and drafts will take approximately three to four weeks. Following your review of the drafts, we will discuss any questions or revisions you may have and set an appropriate timetable for completion of the plan and the execution of all necessary documents.

The fee will be due following the execution of all documents unless there is a delay in excess of three months from the date of the drafts being sent to you. In that case, an interim bill will be issued for all services rendered to date.

We appreciate the confidence you have shown in our firm by selecting us to assist you with your estate planning needs. This engagement will end with the signing of your new estate planning documents. If you have any questions regarding this engagement letter or the status of your estate plan, please do not hesitate to call me.

Sincerely,
CURRIE KENDALL POLASKY MEISEL PLC

Ramon F. Rolf, Jr.

enclosures

If the foregoing is not consistent with your understanding of our engagement, please call me immediately.

Joe Chemist

Sally Chemist

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Probate and Estate Planning Section

The following is an article excerpt. The complete article was published in the Winter 1999 issue of [Michigan Probate and Estate Planning Journal](#)

RECENT DECISIONS IN MICHIGAN PROBATE, TRUST, AND ESTATE PLANNING LAW

By Hon. Phillip E. Harter

Case summaries of new appellate cases, court rules, and statutes that affect the probate court may be found at the Calhoun County Court's Web site at <http://courts.co.calhoun.mi.us>.

CLAIMS—AUTOMATIC ALLOWANCE—NOTICE OF DISALLOWANCE

Livorine v Gaytan (In re Estate of Gaytan), 232 Mich App 331, ___ NW2d ___ (1998)

The petitioner sought to recover attorney fees of \$50,400 from the estate for services he claimed to have rendered on behalf of the decedent, John A. Gaytan, prior to his death. A claim was properly filed on August 20, 1993. On November 3, 1993, the personal representative served the petitioner with a notice of disallowance of his claim. The petitioner then petitioned the probate court for an order requiring the estate to pay his claim on the ground that his claim was allowed by operation of law pursuant to MCL 700.717(1), MSA 27.5717(1) because the notice of disallowance was not filed within the 63 days required by the statute. The probate court agreed and ordered the estate to pay the claim.

Subsequently, a motion was filed for reconsideration on the ground that good cause existed to excuse the delay. The probate court conducted a hearing and concluded that good cause existed to excuse the untimeliness of the notice of disallowance. The probate court ruled later that the claim need not be paid on several grounds. The petitioner appealed that decision on the sole ground that no good cause existed to excuse the untimely notice of disallowance.

The court of appeals affirmed the probate court, but on a ground other than that which the probate court based its decision. They noted that the notice of disallowance was untimely by two days and that the effect of this under MCL 700.717(1), MSA 27.5717(1) was that the claim was deemed allowed by operation of law. They then pointed out that this section also provides, "If, after allowing or disallowing a claim, the personal representative changes a decision

concerning the claim, the personal representative shall notify the claimant." They concluded that MCL 700.717(1), MSA 27.5717(1) permits a claim that has been deemed allowed as a consequence of the personal representative's failing to disallow it within the statutory period to be disallowed subsequently by the personal representative. Therefore, they held that the untimely notice of disallowance operates as a proper notice of a change of decision by the personal representative.

This decision makes it clear that a personal representative may change a decision concerning the allowance or disallowance of a claim. It is clear that this was the intent of the drafters of this provision, which was taken from §3-806 of the Uniform Probate Code. In a footnote concerning this section in the Uniform Probate Code, it is stated:

Courts and lawyers in UPC states have differed regarding the ability of a personal representative to change an allowed claim to a disallowed claim after 60 days from the original presentation of the claim. The intention of the drafters was to permit a personal representative to change his position regarding an allowed claim, thereby starting the 60-day period within which the claimant may protest the claim classification by commencing a court proceeding on the claim. The drafters considered that the allowance by inaction called for by the last sentence of (a), like an allowance by written notice, could be changed as is clearly stated by the second and third sentences. Otherwise, allowance by inaction can serve as a terrible trap for a personal representative.

Uniform Probate Code, Appendix I, Comment to Amendment 7, at 513 (11th ed 1994).

ESTATES AND PROTECTED INDIVIDUALS CODE

1998 PA 386

1. The act repeals Revised Probate Code and substitutes new provisions, MCL 700.1101–700.8101.
2. It is effective April 1, 2000.
3. Along with other numerous changes, the act
 - a. establishes the "Michigan prudent investor rule" for fiduciaries;
 - b. substantially increases the spousal share in intestate succession and the elective share;
 - c. provides that specific dollar amounts that apply to beneficiaries are subject to cost-of-living adjustments in future years;
 - d. provides for three methods of probating an estate: informal probate, formal probate, and supervised administration;
 - e. allows a personal representative to take periodic fees without prior court approval;
 - f. requires notice to interested parties so they can object to costs of administration (the account must specifically state the amount of attorney and fiduciary fees);
 - g. requires attorneys serving as personal representatives to keep time records;
 - h. permits a personal representative to exclude contaminated real estate from the scope of his or her responsibility;
 - i. requires an affidavit delivered to a bank or a broker as an alternative to a

small estate proceeding for personal property valued at no more than \$15,000;

j. specifies procedures for dealing with property and debts of nonresident decedents;

k. provides for the registration of securities in "beneficiary form," allowing the transfer of a security to a beneficiary on the owner's death;

l. specifies the duties, liabilities, and powers of trustees;

m. requires that when meaningful communication is possible, a guardian should consult with the individual before making a major decision;

n. requires that if a guardian delegates his or her powers through a power of attorney, the guardian must inform the court within seven days and provide the name, address, and telephone number of the attorney in fact;

o. changes the criteria to clear and convincing evidence to appoint a conservator;

p. provides, in general, that the procedural protections in guardianship proceedings apply to conservatorship proceedings, e.g., the right to independent examination, a closed hearing, moving the site of a hearing, and trial by jury;

q. provides for the creation of limited conservatorships under which the court must fashion a conservator's powers to the demonstrated needs of the individual;

r. requires that a conservator must take into account the existing estate plan of the individual in carrying out the conservator's duties; and

s. allows that on the death of an individual, a conservator may petition to be given the powers of a personal representative if no one else petitions. 4. The following acts and parts of acts are repealed:

a. Disclaimer of Property Interests Act, 1996 PA 131, MCL 554.871–554.890, MSA 26.1236(871)–26.1236(890)

b. Uniform Testamentary Additions to Trusts Act, 1962 PA 83, MCL 555.461–555.464, MSA 26.78(1)–26.78(4)

c. Revised Probate Code, 1978 PA 642, MCL 700.1–700.993, MSA 27.5001–27.5993

d. Uniform Simultaneous Death Act, 1941 PA 73, MCL 720.101–720.108, MSA 27.3178(621)–27.3178(628)

e. Registration of Securities in Beneficiary Form Act, 1996 PA 433, MCL 451.471–451.481, MSA 19.858(1)–19.858(11)

CHILD CUSTODY ACT— LIMITED GUARDIAN—JURISDICTION

Walterhouse v Ackley, ___ Mich ___, 586 NW2d 747 (1998)

In September 1986, the defendant voluntarily granted the plaintiff a limited guardianship of her children. In November 1994, the defendant petitioned the probate court to terminate the guardianship. The probate court issued a reintegration order that provided that the guardianship was to terminate September 1, 1995. On May 5, 1995, the plaintiff filed a complaint and motion for temporary and permanent custody in circuit court. The defendant filed a motion for summary disposition, claiming the plaintiff lacked standing to sue for custody. The motion was denied, and after a two-day custody trial, the court awarded custody to the plaintiff. The defendant appealed.

The court of appeals reversed the circuit court. It pointed out that Section 6b of the Child Custody Act, which gives guardians and limited guardians standing to

bring child custody actions, became effective December 20, 1990. It concluded that, based on its interpretation of legislative history, the legislature did not intend to have Section 6b applied retroactively to guardianships established before December 29, 1990. Therefore, the circuit court erred in applying Section 6b retroactively to a guardianship created before December 20, 1990, and improperly asserted its jurisdiction.

The Michigan Supreme Court reversed the decision of the court of appeals. It held that it is clear that the legislature intended these new requirements to apply to guardianships already in place. The only exception to the new rule is when the parents of the child have substantially complied with an approved placement plan. There is no indication the legislature intended for the exception to its newly stated rule of standing to apply to such prior guardianships, which lack a placement plan, that might remain in existence after its enactment.

The Honorable Phillip E. Harter has been a Calhoun County Probate Court judge in Battle Creek since 1984 and chief judge since 1992. He has served as chairperson of the Probate Rules Committee of the Michigan Probate Judges Association and on the advisory committee and as a faculty member of the Michigan Judicial Institute. He has been admitted to the bars of the U.S. Supreme Court and the U.S. Court of Appeals. He is a fellow of the Michigan State Bar Association and a member of the Probate and Estate Planning Section of the State Bar of Michigan and of the Calhoun County Bar Association. He is a frequent lecturer and writer on probate topics.

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The following article was published in the [Winter 1999](#) issue of [Michigan Probate and Estate Planning Journal](#)

LEGISLATIVE REPORT By Harold Schuitmaker

Information on Michigan legislation is available at the Michigan Legislature Web site, located at <http://www.michiganlegislature.org>.

The following bills were passed:

SB 209 (1998 PA 386)

Estate Settlement Act

(retitled Estate and Protected Individuals Code, or EPIC)

(Senator W. Van Regenmorter)

This act repeals the Revised Probate Code. There will be a *Michigan Bar Journal* article detailing the provisions of this act.

SB 754 (1998 PA 277)

Modifications to the Michigan Estate Tax Act

(Senator B. Bullard, Jr.)

This act amends the Michigan Estate Tax Act, MCL 205.240 et seq., MSA 7.591(10) et seq., to provide that references in that act to the "Internal Revenue Code" refer to the U.S. Internal Revenue Code of 1986, in effect on January 1, 1998, thereby incorporating the changes in the state death tax credit brought about by the Taxpayer Relief Act of 1997.

SB 775 (1998 PA 48)

Trusts as Shareholders of Professional Service Corporations

(Senator Bouchard)

This act amends the Professional Service Corporation Act to expand the class of permitted shareholders of a professional service corporation to include a "trust or split interest trust, in which the trustee and the current income beneficiary are both licensed persons in a professional corporation." MCL 450.230, MSA 21.315(10)

The following proposed bills were not passed but may be introduced in the next session:

HB 4649

Delivery of Decedent's Cash and Wearing Apparel

(Representatives Schroer, Bogardus, Cherry, Baird, et al.)

This act would authorize a hospital, convalescent or nursing home, morgue, or law enforcement agency holding cash and wearing apparel of a decedent to deliver such property to a spouse, child, or parent of the decedent. HB 4649 increases the amount of cash that may be delivered under this statute from \$100

to \$500.

HB 5452

Estate Recovery

(Representative D. Olshove)

This act would amend the Social Welfare Act to provide that the amount of medical assistance paid on behalf of a person receiving medical assistance under the act is not a claim against (1) the estate of the recipient following the death of that recipient or (2) the estate of a deceased spouse who survived the recipient. It also provides that the State of Michigan may not "impose a lien against real property of a recipient before or after his or her death to secure amounts properly paid for medical assistance on behalf of that recipient."

SB 80

Michigan Medical Self-Determination Act

(Senator J. Berryman)

This act would allow an individual 18 years of age or older who is of sound mind to execute a declaration to authorize types of medical intervention or the withholding or withdrawal of medical intervention if the declarant is terminally ill or permanently unconscious and unable to participate in medical treatment decisions.

SB 417 and SB 418

Abolishment of Doctrine of Adverse Possession

(Senators J. Conroy, Young, Bullard, and Cherry)

This act would abolish the doctrine of securing title to real property by adverse possession, beginning on the effective date of the acts. SB 417 and SB 418 are tie-barred.

SB 671

Michigan Medical Treatment Decisions Act

(Senator C. Dingell)

This act would authorize the making of medical treatment decisions for a patient when the patient is unable to participate in medical treatment decisions and does not have a patient advocate or guardian.

Harold Schuitmaker practices with the law firm, Schuitmaker, Cooper & Schuitmaker, PC, in Paw Paw. His areas of practice include estate planning, probate and trust administration, municipal law, corporations, and real estate. He is licensed to practice law in both Michigan and Florida. He is a member of the State Bar of Michigan, the Kalamazoo and Van Buren County Bar Associations, the Southwest Michigan Estate Planning Council, and the National Academy of Elder Law Attorneys. Mr. Schuitmaker is a member of the State Bar's Probate and Estate Planning Section Council and is chairperson of its Legislative Committee. He also serves on the Region F Character and Fitness Committee of the State Bar of Michigan.

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Probate and Estate Planning Section

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DIGEST OF MICHIGAN PROBATE OPINIONS

By Julia R. Hathaway

96-17

Best interests; guardianships, limited; legislative intent; *In the Matter of Two Minor Children*; Judge Kenneth L. Tacoma, Wexford County. The father could not unilaterally terminate the grandparent's limited guardianship because he had neither the mother's consent nor the right to custody of the children. The statutory provision regarding mandatory termination did not apply because the father had not substantially complied with the limited guardianship placement plan. The court also found that permissive termination would not be in the children's best interests. MCLA: 700.424a, .424b, .424c, 722.21; MSA: 25.312(1), 27.5424(1), .5424(2), .5424(3); 433 Mich 592.

96-18

Conservators; fiduciaries; guardianships; legally incapacitated persons; *In the Matter of Lucille Moffit, Legally Incapacitated Person*; Judge Kenneth L. Tacoma, Wexford County. In this motion for a new trial or judgment notwithstanding the verdict, the court held that it was improper to name as guardian/conservator a person with no legal kinship to the incapacitated person when another person with statutory priority was "minimally acceptable" for the position. MCLA: 700.5, .454, .455, .470, .501, .531, MSA: 27.5005, .5454, .5455, .5470, .5501, .5531; MCR: 2.610, .611(A)(1)(e); 160 Mich 704; 133 Mich App 1.

96-19

Fiduciaries; trustees; wills, construction; *In re Estate of Delia M. Hoffmeyer, Deceased*; Judge Kenneth L. Tacoma, Manistee County. Successor co-trustees of a 90-year-old trust for the benefit of a church obtained control of the testator's specific bequest to the church. The court determined that the testator had intended her bequest as a trust to benefit the church, although she had not named a trustee. The court held that the "trustees" had assumed a fiduciary duty and thus were liable for its breach. MCLA: 700.133, .561; MSA: 27.5133, .5561; 212 Mich App 357.

96-20

Escheat; judges, disqualification; jurisdiction; relief from judgment; venue; *In the Matter of the Estate of Margaret J. Venners, et al., Owners of Abandoned Property*; Judge Kenneth L. Tacoma, Roscommon County. When the decedent's heirs failed to exercise dominion or control over shares of stock they inherited, the

state commenced escheat proceedings, which resulted in the corporation, as holder of the property, making a cash payment to the state that was apparently below market value. The heirs argued that the escheat proceedings should be void because jurisdiction was improper and the probate judge in the escheat proceeding had been the attorney for the decedent's estate and that relief from judgment should be granted because of the misconduct of the state and the corporation. The court denied these claims. MCLA: 567.11, .13, .15, .16, .33, .63, .245, .259; MSA: 26.1053(1), (3), (5), (6), (23), (53), .1055(25), (39); MCR: 2.003(B)(4), .612; 362 Mich 303.

97-23

Attorney fees; fiduciaries; personal representatives; supervised probate administration; *In the Matter of the Estate of Dennis James Sylvain, Deceased*; Judge Kenneth L. Tacoma, Wexford County. The personal representative of the estate breached her fiduciary obligation when she (1) purchased for herself real property that the estate already had an interest in; (2) failed to list on the final account items of personal property the decedent had bequeathed to his son that had been listed on the inventory; and (3) failed to keep adequate books regarding certain bank account transactions. The court imposed a surcharge for the amount of actual attorney fees incurred during this hearing. MCLA: 700.5, .281–.291, .307(2), .544, .561; MSA: 27.5005, .5281–.5291, .5307(2), .5544, .5561; MCR: 8.303; 299 Mich 499; 347 Mich 272; 19 Mich App 155; 96 Mich App 7; 176 Mich App 95.

98-8

Disappeared persons; distribution; insurance; *In the Matter of the Estate of Kimberly Ann Banks, Deceased*; Judge Milton L. Mack, Jr., Wayne County. A petition to distribute the proceeds of the decedent's estate was denied even though the decedent met the statutory definition of a disappeared person. The statute allows the distribution of proceeds for the support of minor children before the three-year waiting period is over. However, in this case the only asset was a life insurance policy, and it was not clear whether the proceeds would be paid to the estate or to the decedent's mother. MCLA: 700.4(4), .492(1), (2), (4), (5), (6), .493(3); MSA: 27.5004(4), .5492(1), (2), (3), (4), (5), (6); MCR: 5.106(A); 143 Mich 186; 228 Mich 400; 258 Mich 26; 290 Mich 219; 306 Mich 392; 323 Mich 516; 136 Mich App 150; 178 Mich App 345.

98-9

Intestate succession; parents, natural; paternity; res judicata; *In the Matter of the Estate of James Eddie Williams, Deceased*; Judge Milton L. Mack, Jr., Wayne County. The petitioner attempted to rebut the presumption that she was the natural child of her mother's husband, even though she was born during their marriage, for the purpose of intestate succession. However, her claim was denied because only the natural parents have standing to rebut the presumption of paternity, not the children. Furthermore, under the doctrine of res judicata, even a spouse may not deny the other's paternity when a divorce judgment lists children born of the marriage. MCLA: 700.111(1)–(3); MSA: 27.5111(1)–(3); MCR: 2.602; 20 Mich App 68; 224 Mich App 682.

98-10

Ineffective assistance of counsel; juvenile crime; new trials, motions; sex offender registration law; *In the Matter of a Minor*; Judge Michael J. Anderegg, Marquette County. A convicted juvenile sex offender moved for a new trial, claiming ineffective assistance of counsel. However, the court determined that counsel's decisions were a matter of trial strategy and thus could not be a basis for overturning the conviction. The court further held that the verdict was not against the great weight of the evidence and that the sex offender registration law was not cruel and unusual punishment. MCLA: 28.725, .728(2), 712A.18d; MSA:

4.475(5), (8)(2), 27.3178(598)(18d); MCR: 2.611(A)(1), 5.925(E)(2)(b), 6.431(B); 387 Mich 167; 390 Mich 346; 440 Mich 15; 446 Mich 298; 454 Mich 145; 456 Mich 625; 155 Mich App 785.

98-11

Competency; evidence, character; ineffective assistance of counsel; juvenile crime; new trials, motions; witnesses, impeachment; *In the Matter of a Minor*, Judge Michael J. Anderegg, Marquette County. A convicted juvenile sex offender moved for a new trial, claiming ineffective assistance of counsel under a variety of theories, including failure to investigate the defendant's competency, a conflict of interest between counsel and a codefendant's attorney, failure to communicate with the client, failure to request a separate trial, and failure to impeach a witness. The court denied the defendant's motion. MRE: 404, 405, 609(e); 390 Mich 436; 446 Mich 298; 454 Mich 145.

98-12

Guardianships; *In the Matter of Eileen M. Hansen, Legally Incapacitated Person*; Judge Michael J. Anderegg, Marquette County. Both before and after being appointed his grandmother's legal guardian, the grandson distributed virtually all of her assets to himself and other family members. The court fined the guardian, appointed a conservator, and deprived the guardian of his authority to give or receive his grandmother's assets. MCLA: 700.544(1); MSA: 27.5544(1).

Julia R. Hathaway is an attorney, a student in the Wayne State University Library and Information Science Program, and a graduate research assistant in the WSU Law Library.

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