

INTERIM ADMINISTRATOR PROGRAM

Issue

To protect clients in the event their attorneys become unexpectedly unable to practice law, should the State Bar of Michigan (SBM) recommend rule changes to the Michigan Supreme Court to allow SBM to implement an Interim Administrator Program (IAP) to help lawyers prepare for end of practice events and to require attorneys in private practice to choose to either: 1) designate an Interim Administrator (IA) or 2) participate in the IAP?

RESOLVED, SBM should recommend rule changes to allow SBM to implement an IAP and to require attorneys in private practice to designate an IA or participate in the IAP.

Synopsis

Lawyers' ethical obligations to their clients are ongoing, but many attorneys in private practice do not have a succession plan to protect their clients in the event the attorney becomes unable to practice law due to death, disability, or discipline. The SBM Receivership Workgroup recommends that the Michigan Supreme Court require attorneys in private practice to either designate IAs who have agreed to be responsible for managing or winding down attorneys' practices should they become unable to practice law or, alternatively, participate in an IAP, under which, for an annual fee, SBM would assume the responsibilities associated with managing or winding down the practice. This comprehensive proposal would protect clients and the public by effectively addressing Michigan's growing succession planning needs.

Problem: Attorneys Have Inadequate Succession Plans Posing Substantial Risks to Clients Should the Attorneys Become Unexpectedly Unable to Practice Law.

Clients rely on their attorneys to be there for them, and, as a profession, we tout our collective commitment to follow through for our clients, no matter what. But life (death, disability, and discipline) sometimes happens. Many attorneys do not have a plan in place to protect their clients if they are unable to carry out their duties due to death or disability or discipline. When this happens, not only do clients suffer, so does the image of the legal profession.

We do not know exactly how many clients are affected by this problem each year, but we do know that it is growing. Every year, a significant number of attorneys become unexpectedly unable to practice law without a plan in place to manage or wind down their practices. In this situation, a number of things should happen to protect clients, the law practice, and the public, including:

- Clients must be notified;
- Pending litigation must be stayed;
- Pending cases must be transferred to new attorneys;
- Client files must be transferred to new attorneys, returned to clients, or destroyed;
- The law practice may need to be wound down by a competent attorney;
- Funds held in trust for clients must be returned;
- Employees, rent, and other bills must be paid; and

- The attorney's outstanding fees must be billed and collected.

Currently, Michigan (as most other states) has limited resources available for clients, the attorney's family members, and others who are left to handle the aftermath. Under MCR 9.119(G), which has not been revised to accommodate growing needs since its adoption in 1987, the Attorney Grievance Commission (AGC) administers attorney receiverships. It sensibly provides that if the incapacitated attorney is a member of a law firm, the law firm may continue to represent the attorney's clients with the clients' consent. For solo practitioners, the AGC administers attorney receiverships by requesting a judge to appoint a receiver with powers including inventorying the attorney's files, protecting the interests of the attorney and clients, and securing the attorney's trust account.

MCR 9.119(G), however, was promulgated under the assumption that almost all attorneys would have functional plans in place in case of catastrophe and that emergency intervention would be rare. The rules did not anticipate the growth of solo practices, including for "end of career" attorneys who have previously practiced in a firm. Increasingly, the AGC has difficulty locating an attorney willing to wind down the law practice due to the lack of funds available and the significant amount of work required. Moreover, MCR 9.119(G) does not provide for funding or clear guidelines regarding the receiver's ability to manage the firm or access to the operating account.¹ Often, the receiver's role is limited to returning files to clients. This leaves non-attorney family or staff members with the responsibility of winding down the law practice and raises a number of concerns, for example:

- **Attorney-Client Privilege.** A non-attorney may not understand the ethical obligations owed to client information when handling and returning client files. Further, a non-attorney is not bound by the Rules of Professional Conduct, so there is no recourse if there is a violation of attorney-client privilege.
- **Pending cases.** Non-attorneys may not take any legal action on pending files, including steps that require immediate attention, such as notifying courts and ensuring that the statute of limitations on pending matters does not run.
- **Funds held in trust.** Non-attorneys may not know that the funds held in an attorney trust account belong to clients and not to the estate or how to differentiate between funds belonging to the practice and funds to be returned to clients.
- **Funds held in operating accounts.** Sometimes the funds are the clients' funds and should be used to compensate clients or they are used to pay the law practice's bills.

Without a competent attorney managing, winding down, or transitioning a law practice, clients can suffer severe consequences, such as missing filing deadlines or court hearings in pending cases, being unable to locate vital documents and pleadings for their case, having the statute of limitations run on a cause of action, losing the right to appeal, or being unable to recover funds or property entrusted to the incapacitated attorney.

¹Receiverships established under this rule do not have the same provisions or protections provided by MCR 2.622(F).

Proposed Solution: Require Attorneys in Private Practice to Demonstrate that They are Prepared.

Both the American Bar Association (ABA)² and the SBM 21st Century Practice Task Force³ have recommended that bar associations more effectively assist attorneys in planning for the unexpected. The need for better succession planning is great and growing, as more attorneys practice alone, and at an age where death and disability are a greater risk. Over 50% of Michigan attorneys are over 50 and the median age of attorneys in Michigan is 53.⁴

In response to the growing need and the ABA's and 21st Century Practice Task Force's recommendations, SBM formed the Receivership Workgroup in May 2018. The workgroup included members of the Master Lawyers Section, judiciary, and practitioners who have acted as receivers in various types of cases.⁵ The Receivership Workgroup reviewed receivership programs and succession planning requirements from around the country. The most promising was the Iowa Supreme Court Designated Representative Plan that requires all attorneys in private practice to designate a representative who would be responsible for managing or winding down their practices should they become unable to practice law. The Iowa State Bar Association is a plan administrator. The workgroup determined that the requirements of the Iowa plan was the most comprehensive of all jurisdictions. However, the workgroup had the benefit of learning of improvements that Iowa would have made to its plan with the benefit of hindsight. The SBM IAP makes improvements on the Iowa plan and is tailored to address Michigan attorneys' succession planning needs.

How the SBM IAP Works.

As is now the case, on the annual dues statement, all attorneys would indicate whether they are in private practice. Those in private practice for that bar year would have to either nominate an IA or participate in the IAP for a fee.

An attorney could nominate another attorney or law firm to act as their IA. SBM would send a confirmation email to the nominee outlining the IA's responsibilities and confirming that the attorney or law firm accepted the nomination. If the attorney or law firm did not accept the nomination, the attorney would be given an additional chance to designate a different IA; if that designation also failed, the attorney would be required to pay the IAP fee.

Instead of nominating an IA, attorneys could simply choose to pay an annual fee and participate in the IAP, in which case SBM would be responsible to finding an interim administrator should the attorney become unexpectedly unable to practice law (SBM-appointed IA).

² In 2007, the ABA recommended that states adopt a mandatory succession planning rule to protect the public in the event that an affected attorney, with no backup, becomes unable to practice law. [Home](#) > [ABA Groups](#) > [Center for Professional Responsibility](#) > [Resources](#) > [Attorneys in Transition – Resources related to end-of-career issues](#)

³ The SBM 21st Century Practice Task Force Report recommended that SBM form a workgroup to review the current AGC receivership program, provide options to expand the services offered, and facilitate transition of the handling of such matters from AGC to SBM.

⁴ State Bar of Michigan 2018-2019 Statewide and County Demographics.

⁵ Workgroup members: Alan M. Gershel P29652, Rhonda Pozehl P38854, Erin Bednarski (AGC paralegal), Yuily Osipov P59486, David M. Findling P43256, Michael H. Dettmer P12709, and Judge Tomas Byerley P28937.

When an attorney in private practice became incapacitated, SBM staff would file in the probate court where the attorney's practice is located an *ex parte* petition requesting that the court appoint the IA designated by that attorney or, if participating in the IAP, an IA identified by SBM. SBM would attempt to appoint an IA in the same geographic and practice area as the affected attorney, but the SBM IAP staff attorney could also serve as an IA if necessary.

Once appointed, the IA would be responsible for determining the steps required to effectively continue or wind down the practice. The IA would have the authority to continue, sell, or wind down the affected attorney's practice. Often, the IA would wind down the practice, but if the affected attorney were only temporarily unable to practice law, the IA would take steps to protect the clients while continuing the firm if practicable. The IA would be responsible for protecting clients' information, files, and property. The IA would also have the duty to maintain attorney-client privilege with the affected attorneys' clients and address any conflicts of interest. IAs would have civil immunity from suits deriving from conduct undertaken in good faith. Where appropriate, the IA would run the office, including paying overhead and maintaining staff, while completing an orderly shutdown or sale of the practice or until the affected attorney was able to resume the practice of law.

IAs would be eligible for compensation, first through the attorney's law practice or estate. SBM-appointed IAs, as a secondary source of compensation, could be reimbursed through the SBM IAP Fund. Other IAs would only be eligible for compensation from the SBM IAP Fund for extraordinary services, such as an unusually excessive number of cases or files that require an exhaustive amount of time to review.

To assist attorneys, attorneys' families, and IAs, SBM IAP staff will create tools, such as succession planning guides, IA training documents, and steps for clients and an attorney's family to take in the event of an attorney's unexpected inability to practice law. Staff would also amend currently available resources, such as the [Planning Ahead](#), [Record Retention](#) and [Closing a Firm](#) guides.

Rule Changes Required to Create this Program.

The following rules will need to be changed to implement the program;

- SBR 2 would be amended to require selection of an IA;
- SBR 4 would be amended to authorize the funding structure;
- MCR 9.119(G) would be amended and the definition of receiver would be removed; and
- New MCR would outline the IA's responsibilities.

Opposition

The workgroup is unaware of any opposition to the current proposal.

Prior Action by Representative Assembly (RA)

The workgroup developed the IAP in response to previous feedback provided by RA members. In 2012, the Master Lawyers' Section proposed an amendment to SBR 2 to require that all attorneys identify an inventory attorney. Although many RA members supported the rule amendment, others raised important questions, including; (1) what the inventory attorney's responsibilities, including

ethical obligations, would be; (2) how the rule would apply to law firms; (3) how a nominated inventory attorney would receive notice of the nomination; (4) what would happen if an appropriate inventory attorney could not be found; and (5) how the inventory attorney would be compensated.

The workgroup incorporated the RA's feedback into the SBM IAP now under consideration.

1. The responsibilities of all involved are outlined in the proposed rules, including the IA's ethical obligations, such as attorney-client privilege and conflicts of interest. The IAP will also develop educational resources to provide IAs with guidance on how to address ethical issues, such as how to proceed regarding files for which there is an actual or potential conflict of interest.
2. The IAP is clear that law firms can act as IAs.
3. Because the nomination is placed on the annual dues statement, IAs will confirm annually that they agree to serve as an IA for a particular attorney.
4. Attorneys could locate their own IA or participate in the IAP, in which SBM would be responsible for locating an IA. If SBM were unable to locate an appropriate IA, then the SBM IAP staff attorney could act as the IA.
5. The IAP also addresses IA compensation to provide reasonable, not excessive, compensation for the IA's services. The SBM IAP will provide additional outreach and educational components to assist attorneys in establishing their own, more personalized succession plans.

Fiscal and Staffing Impact on the State Bar of Michigan

The Workgroup estimates that the IAP will cost SBM between \$250,000 and \$350,000 annually to administer. This cost includes hiring additional SBM staff to administer the program and administrative costs such as transportation, shredding, storage, postage, outside counsel costs, and ancillary expenses. The SBM IAP staff would be responsible for filing all petitions for court appointment of IAs, acting as IAs in some circumstances, fielding all calls related to the program, providing education regarding succession planning, and guiding IAs through the process, as needed.

Currently, the AGC Receivership Program handles approximately 12 receiverships each year, each of which can take between 20 and 200 hours to resolve. In addition, the AGC receives on average 10 calls per week, some of which require extensive research or seeking appointment of a receiver. The IAP is a more expansive program than the AGC Receivership Program, and this will likely translate not only into a greater volume of telephone calls and receivership appointments, but SBM staff will also be developing educational resources and conducting outreach and training to attorneys and their IAs.

If the IAP administration costs are funded solely by the IAP participant fee – and not subsidized by general membership dues – the IAP fee could range between \$60 and \$175 depending on the program costs and the number of participants. It is important to note, however, that the IAP not only benefits IAP participants, but it also benefits all attorneys in private practice and those serving as IAs by providing educational resources and tools and by SBM IAP staff initiating the appointment of all IAs. Even more broadly, the fact that attorneys have succession plans in place to help ensure the safe transition of clients' cases improves the reputation of the legal profession as a whole. Therefore, the Court may determine that SBM should use a portion of membership dues to subsidize the program. Given the difficulty of anticipating how many attorneys will participate in the IAP instead

of designating their own IA, the IAP fee will need to be reassessed regularly based on IAP participation with the aim of keeping the fee as low as possible while covering a majority of the costs associated with the program.

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 13, 2019

To protect clients in the event their attorneys become unexpectedly unable to practice law, should the State Bar of Michigan (SBM) recommend rule changes to the Michigan Supreme Court to allow SBM to implement an Interim Administrator Program (IAP) to help lawyers prepare for end of practice events and to require attorneys in private practice to choose to either: 1) designate an Interim Administrator (IA) or 2) participate in the IAP?

(a) Yes

or

(b) No