

Developing an Inventory Attorney Rule for Michigan

The most recent State Bar membership data indicates that seventy-one (71%) percent of Michigan's active lawyers in private practice are either solo practitioners or in a small law firm environment, which is defined as two to ten lawyers. Anecdotally, it appears that newly-licensed lawyers unable to secure employment as a lawyer in the public or private sector are opening solo practices in increasing numbers. Additionally, the percentage of Michigan's active lawyer population that is over the age of fifty increases daily, as the Baby Boomers approach traditional retirement age. Many lawyers are working beyond traditional retirement age for a myriad of reasons. Of those, a significant number of lawyers is turning to solo or small firm settings after a career in medium or large firm settings, practicing for the first time without the safety net of other lawyers that a medium or large firm setting affords.

Small Firm and Solo Lawyers

It is important for Michigan lawyers to plan for how their practice will be wound down – particularly when that task may need to be done by someone else because the lawyer has died or become incapacitated. This is especially important for solo practitioners. Absent such planning, the task often falls to nonlawyer office personnel or a family member to sort out who should be notified of the lawyer's status, what to do with client files, and how to manage funds on hand in the operating and trust accounts.

Planning as a Priority

For a young lawyer, contingency planning for death or disability may have little or no priority. Similarly, more seasoned lawyers, having spent careers in a law firm structure that obviated the need for individual planning and who are practicing solo for the first time, might not necessarily place succession planning high on their list of priorities.

Limits of Existing MCR 9.119(G)

An existing court rule, MCR 9.119(G), authorizes the grievance administrator of the Attorney Grievance Commission to seek court appointment of a receiver in circumstances that include a lawyer's death or disappearance, when "no partner, executor, or other responsible person" capable of conducting the attorney's affairs has been identified. However, operation of the rule is dependent upon awareness of its existence. Surviving nonlawyer family members or friends could learn of the procedure by contacting the State Bar or the Attorney Grievance Commission. Unfortunately, not all lawyers have a family member, friend, or colleague who has an emotional, professional or ethical interest in seeing that the lawyer's clients are protected after the lawyer dies or otherwise unable to competently continue practicing. Moreover, even when survivors are knowledgeable of the existence of MCR 9.119(G), it can be difficult to identify a lawyer willing to serve as receiver, especially if the deceased lawyer's practice is voluminous and the status of pending matters is unknown or not readily apparent, as there is no provision for awarding attorneys fees set forth in the rule. Additionally, the rule makes no provision for handling the practice of a lawyer who has been disabled by injury or illness, whether as a result of a sudden event such as a car accident or stroke or a condition that has had a debilitating effect over time.

Proposed Improvements

The Master Lawyers Section of the State Bar (“Section”) has worked for two years to formulate a proposal that, if implemented, would serve as an important first step in addressing this potential risk to clients, the lawyer’s surviving family members, and the lawyer’s estate. After surveying approaches taken in a number of other states, the Section-recommended approach is to require every lawyer who represents clients (other than a governmental entity, public body, or political subdivision) to identify an active member of the Bar who has agreed to act as an “inventory attorney.” The inventory attorney will, in the event of death, disability or disappearance, take such action as is appropriate to protect the interests of the clients, including notifying the clients of the lawyer’s changed status, returning files and papers and, where appropriate, retaining files. The obvious advantage to planning for contingencies is that it places squarely in the hands of the lawyers the ability to define for themselves the circumstances that trigger the inventory attorney’s obligations – including a circumstance of sudden disability or incapacity unaddressed by MCR 9.119(G); to clarify what the inventory attorney is both empowered and obligated to do; to provide a method of payment; and, most importantly, to hand pick the person who will undertake the inventory attorney role.

The requirement of designating an inventory attorney would be embodied in language to be added to Rule 2 of the Rules Concerning the State Bar of Michigan (“SBR 2” or “Rule”). In anticipation of the amended Rule’s adoption, sample agreements will be developed and made available through the State Bar website that would describe such topics as: (1) under what circumstances the inventory attorney’s obligations are triggered; (2) whether the inventory attorney represents the appointing lawyer’s interests or the clients’ interests; and (3) whether the inventory attorney is paid and, if so, on what basis. Use of the forms would not be mandated by the Rule.

Comments and Suggestions Requested

Information about the proposed change has been sent to interested sections and a number of bar associations for review and comment. One comment already received suggests adding an exemption for inhouse counsel, on the theory that the single client of such a lawyer would be immediately aware of the need to secure alternative counsel, rendering the lawyer’s own identification of a would-be inventory attorney unnecessary. Another comment expresses concern about the ability of all solos to locate someone else who is willing to serve. For many lawyers, it may make sense to enter into mutual agreements with another lawyer who is geographically convenient or has a compatible practice. The proposed rule imposes no duty on lawyers to agree when asked to serve as an inventory attorney; nor does it create either an independent cause of action or basis for discipline should the designated attorney decline to actually serve when the designating attorney dies, disappears, or becomes disabled.

Comments upon the proposal will continue to be collected and reviewed, with the intent of bringing before the Representative Assembly at its April 27, 2013, meeting the question of whether to approve in concept the proposed amendment to SBR 2. The amended Rule would require lawyers who represent clients (other than a governmental entity, public body, or political subdivision) to identify annually, as a part of the reporting requirements associated with dues payment, an active member of the Bar who has agreed to act as an “inventory attorney;” who will, in the event of death, disability or disappearance of the designating lawyer, take such action as is appropriate to protect the interests of the clients, including notifying the clients of the lawyer’s changed status, returning files and papers and, where appropriate, retaining files. Refinements to the proposal, such as adding an exception for inhouse counsel, may be incorporated before the proposal is presented for consideration in April 2013.

A copy of the proposed rule revision is attached, with new language underlined.

Rule 2, Rules Concerning the State Bar of Michigan

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