

March/April 2010

BARBEAT

Genesee County Bar Association



Springtime in Bloom
by P. Anthony Mainprize

Taxes, Budget Deficits, and
Justice

Practicing Civility

Qualified Interns Bring Fresh,
New Talent to Local
Companies

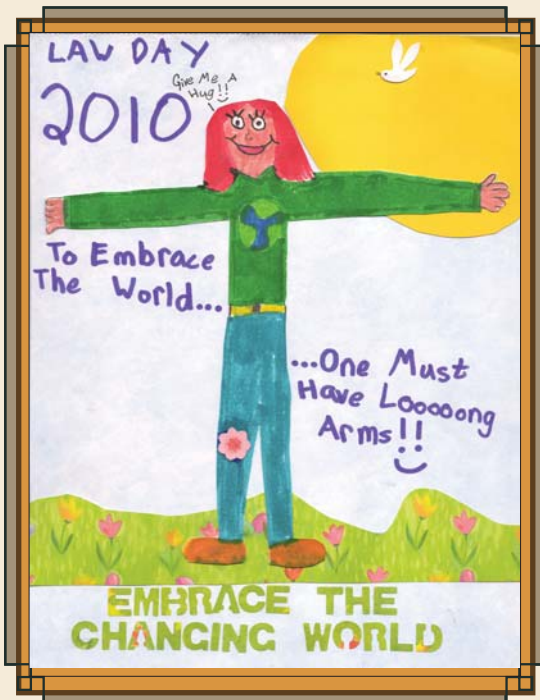
From Public Communications
to Practicing Attorney:
Henry J. Clark, Jr.

Your State Bar Dues at Work

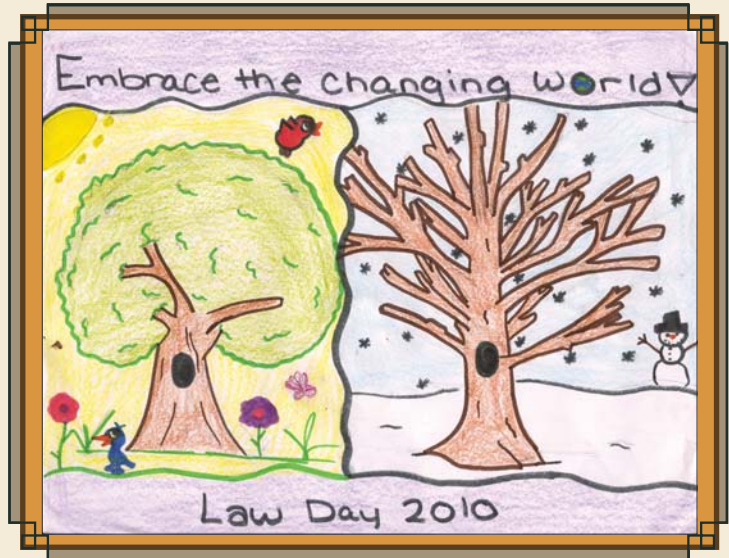
Top 10 Things to Know
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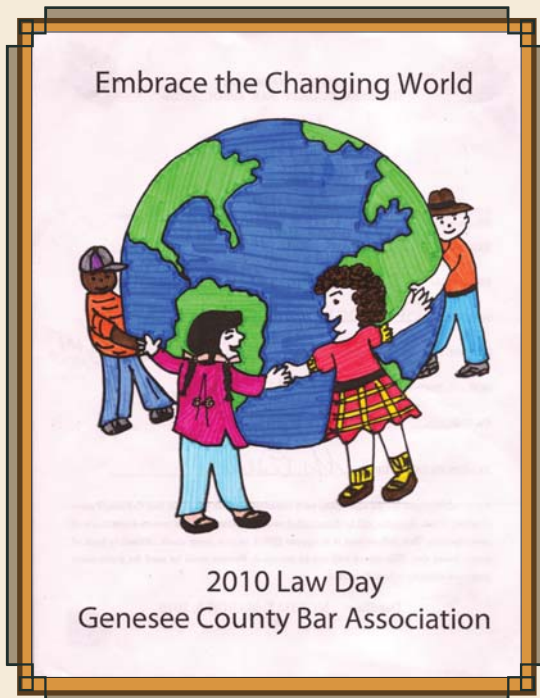
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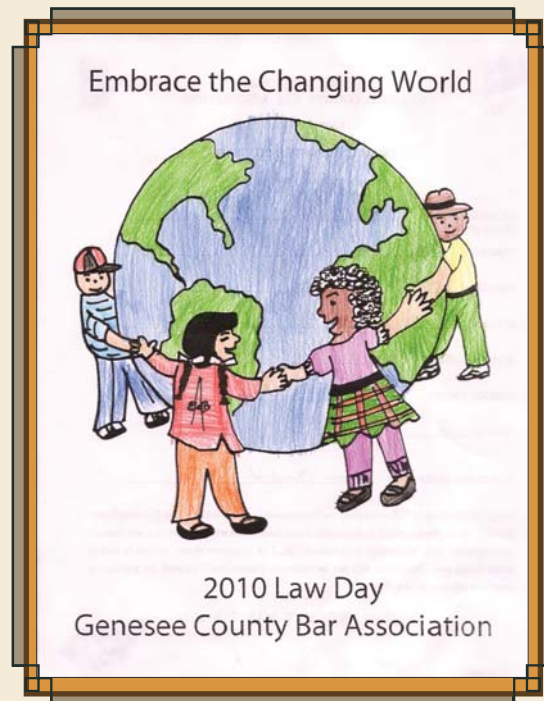
5th grade winner, City School



4th grade winner, City School



3rd grade winner, St. Robert School



2nd grade winner, Anderson Elementary

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- ❖ **Publications** – “Private Mediation,” *Bar Beat*, July 1995; “Facilitative Mediation,” April 1996 and “Michigan Mediation Update,” June 2004, *Michigan Lawyers Weekly*
- ❖ **Methods** – Facilitative. Evaluative, only with consent of all parties. Minimal use of joint session.

Taxes, Budget Deficits, and Justice

By Timothy H. Knecht, President

Governments depend on tax revenues for their operation. When government expenditures exceed tax revenues, budget deficits occur. What happens to justice when we have budget deficits?

Taxes are, and always will be, unpopular. State and local governments must balance their budgets. They cannot operate at a deficit as can the Federal Government. State and local budget cuts mean the legal system is going to be affected. We, as lawyers, must act individually and collectively to make sure justice is not thrown under the bus in the face of diminishing resources.

Having fewer policemen puts a strain on the criminal justice system. Continued low pay for public defenders stresses lawyers and may put indigents at risk. Reduced funding for the court system brings pleas for a streamlined set of court procedures. The proposed sales tax on professional services rendered by lawyers to individual, but not business, clients may reduce access

to justice for individuals.

As lawyers, we are at the heart of the looming mess as taxes, budget deficits and justice collide. We lawyers also have the best chance to make a difference. Making a difference, however, requires action, not apathy.

Lawyers were asleep at the switch when the 1993 tort reforms were passed by the Michigan legislature. Certain business interests lobbied the legislature and got the tort reform they wanted. Collectively, we lawyers did not believe that tort reform legislation would have the drastic effect it has had on civil claims in our state court system.

Let us learn from that mistake. If we lawyers want a say in how justice is going to be affected by taxes and budget deficits, we have to speak out. We have to voice our opinion effectively and to the right people.

Whether you are a Republican, a Democrat or fiercely independent, take a stand. Lawyers have a vested interest in the justice system. Lawyers make the

system work. It may work slowly, tediously, and at great expense, but it works.

If lawyers do not speak out and take a position to protect the justice system both at a conceptual and practical level, who else will? Who else knows how the system works? Who else knows the implications of any number of changes which may be proposed to the entire justice system because of our current budget deficit?

Stand up and be counted.



Timothy H. Knecht

BAR ASSOCIATION PROPOSED SLATE OF OFFICERS

The Genesee County Bar Association Nominating Committee proposes the following slate of officers and directors:

- President B.D. "Chris" Christenson 2010-2011
- Vice President Karen L. Folks 2010-2011
- Treasurer Erwin F. Meiers, III 2010-2011
- Secretary Orene Bryant 2010-2011
- Director James N. Bauer 2010-2013
- Director Shayla D. Blankenship 2010-2013
- Director Roger G. Isaac 2010-2013
- Director Jeremy R.M. Piper 2010-2013

Terms begin on July 1, 2010 and expire on June 30th of the year noted.

The election will be held at the Association's Annual Meeting scheduled for Monday, May 17, 2010, noon, at the Masonic Temple, downtown Flint. The Genesee County Bar Foundation Annual Meeting will immediately follow.

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Practicing Civility

By Karen L. Folks, Professional Practice and Ethics Committee Chairperson



Karen L. Folks

What do we know about the current state of civility in the practice of law? Each year we recognize the importance of civility in our profession through the Herbert A. Milliken Civility Award, presented to a colleague who is widely recognized as a professional role model. The recipient demonstrates the highest standards of professional courtesy and civility while exhibiting a zealous and thorough advocacy.

The criteria for this award underscore that civility is not only a valuable core tradition of the legal profession grounded in the Rules Of Professional Conduct, the Michigan Code Of Judicial Conduct, and the Lawyer's Oath. It is the contextual lens which colors our perception of all decisions, actions and conduct of an attorney.

To gain a greater understanding concerning the current state of civility in our courts we asked Genesee County Judges and former recipients of the Milliken Civility Award to share their observations and insights in this first installment of a two part exploration into the issue of civility.

Does incivility exist in the practice of law? Most Genesee County Judges agree that they are seeing incivility in their courts.

Judge Neithercut: It is "... not so bad in the civil/criminal realm."

Judge Hayman: "... is most prevalent in the domestic arena where it is more personality driven than indicative of the Bar as a whole."

Judge Behm: "Such personalities would present issues of incivility regardless of the profession chosen."

Judge Barkey: "I am spoiled here in probate court because I do not see the problems revolving around this issue (incivility) that other courts have. I attribute that to the fact that the more seasoned lawyers practice here. You know, the ones that have been around before the deterioration of courtroom demeanor started."

What conduct, behavior and language demonstrate a lack of civility? Most Judges and the Civility Award recipient attorneys agree that the lack of civility has worsened over the years.

Judge Perry: "There have been issues of disrespect both on and off the record. Some lawyers are late and do not call either the Court or the other lawyer."

Judge Behm: "Attorneys interrupting or talking over his or her opponent."

Judge Fullerton: "... (A)nd sometimes even shouting at the other attorney."

Judge Hayman: "Overly aggressive and harsh, disrespectful language towards the judiciary, lawyers and the public; intentional harassment of opposing counsels' clients in and out of the courtroom; physical assaults of attorneys upon other attorneys and ... (upon) opposing counsel's clients."

Pam Wistrand: "Refusal to answer phone calls and (refusal) to sign or discuss orders."

Linda Pylypiw: Attorneys "taking on the client's cause in a very personal way which results in name calling and/or personal attacks for the (legal) positions taken by the attor-

ney and a lack of candor with both the Judges and other counsel."

Pam Wistrand offered this further comment: "I believe the judges are much more respectful now than some were in the early years of my practice, but the conduct of attorneys has worsened."

What factors contribute to creating and perpetuating an environment of incivility? Some attorneys identify the failure of the bench to hold uncivil attorneys accountable.

Judge Hayman: "I believe that the Judiciary has to accept some responsibility for the incivility that exists. I think Judges have condoned and encouraged this behavior by rewarding attorneys who act unprofessional in the courtroom. It would appear that the adage 'the squeaky wheel gets the grease,' has been taken to a new level by the judges. Besides the judges' actions I believe that we have a select group of lawyers who have come to believe that in order to attract and keep clients they must behave in a manner that is unprofessional."

Judge Perry and Linda Pylypiw cite economic pressures.

Judge Goggins: "The general public gets the impression from various court TV shows that you need to be demeaning or aggressive to get your point across."

Pam Wistrand: "Clients expect us to be pit bulls."

Ed Jakeway: "Clients, at times, are expecting their attorneys to be

Continued on next page

hostile to the opposing party or are not realistic as to what the attorney can accomplish.”

Judge Neithercut: “Increasing informality of customs and dress.”

Judge Fullerton: “Many new attorneys who do not know each other through the Bar Association or Inns of Court or in their community have no hesitation in pushing against the other side, even to the point of rudeness.”

Other than creating an unpleasant and uncomfortable atmosphere in which to practice law, does incivility significantly affect or compromise the integrity, credibility and the administration of justice in our judicial system?

Judge Fullerton: “Lack of civility demeans the profession which we revere as being a civilized, professional, non-pugnacious manner of dispute resolution.”

Richmond Riggs: “The law is a symbol of all that is right and noble in our society; instead of brute force we settle our differences in a court of law through the strength of our arguments.”

Judge Behm: “(Incivility) gives the impression to litigants that ‘anything goes’ in the courtroom.”

Pam Wistrand: “It generates unnecessary litigation and expense - sometimes outrageous expense. Often times the attorney ends up suffering the loss when the client goes bankrupt or refuses to pay because they believe their attorney should have been able to ‘control’ opposing counsel or should have been able to get the court to ‘control’ them.”

Linda Pylypiw: “In my area of practice, incivility greatly affects

the ultimate ability of the family to heal from a court proceeding. I have seen cases in which the actions of an attorney have ramped up the level of animosity between the parties to such an extent that the parties/children have been unable to interact civilly for years after the case has ended.”

Are attorneys who practice with passionate advocacy unfairly being accused of incivility? The Milliken Civility Award recipients agree that the line between passionate advocacy and incivility is pretty clear.

Where is the line between passionate advocacy and incivility?

Ed Jakeway: “Attorneys should never be criticized for representing their clients with conviction.”

Bill Smith: Incivility occurs “when it becomes abusive behavior.”

Pam Wistrand: Passionate advocacy does not manifest it-

self in “rudeness, intentional uncooperativeness and intentionally being extremely late for court appearances.”

Richmond Riggs: “Attorneys can disagree without being disagreeable.”

As we conclude this first segment focusing on the existence and scope of incivility in the practice of law, the Milliken Civility Award recipients share some final thoughts. Incivility is not as prevalent in federal court. The family law arena appears to suffer the most. While incivility appears to be personality driven and not age or gender specific, some younger attorneys exhibit incivility because they are under the impression that incivility constitutes effective litigation. Finally, the good news is that the civility in Genesee County courts fares quite well when compared to other southeastern Michigan counties.

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Qualified Interns Bring Fresh, New Talent to Local Companies

By Francine Cullari and Doritta McDaniel

One of the recurring themes in any entry level job search is the lack of experience factor. "Where do I get experience if no one is willing to hire me?" The answer is simple: in an internship!

Not too long ago, Stephen Pyles completed a 150-hour internship with McLaren. "My internship at the McLaren Health Plan was a great opportunity to work in a real-world business setting and to experience working for a top healthcare provider. I was able to learn and apply sales and marketing techniques that cannot be taught by simply reading a marketing textbook. My boss became an invaluable mentor by sharing his vast wealth of insight and knowledge of the healthcare industry, as well as genuinely caring about my success throughout and after the marketing internship." Stephen's internship put him on the path to success.

While internships are an excellent opportunity for students, the UM-Flint School of Management's business internship program can provide countless benefits to your law practice. What do employers say about School of Management interns from the University of Michigan-Flint? Bill Geroux, Tropi-Tan controller, said, "The quality of the candidate pool I had to choose from was tremendous. The student I chose was well prepared, professional, and fit right into our corporate environment. The business internship program provided our company the opportunity to educate a future businesswoman as well as reap the benefits of a well-educated and competent individual. She helped with the workload of three individuals in our accounting department."

Interns are an excellent solution to many problems facing businesses in today's economy, and the internship

program can provide you with the most qualified candidates. Why hire an intern from the University of Michigan-Flint?

1. Some students are specifically interested in law school and law office internships.
2. Interns are low-cost yet highly productive workers.
3. Interns can free the time of salaried professionals for more important tasks.
4. Interns can finish projects that regular employees never have time to complete.
5. Interns offer a fresh perspective and a new outlook for your practice.

6. UM-Flint offers the most qualified candidates in the area.

Internships developed through the business internship program may begin and end at any time during the calendar year, but must provide the intern with a minimum of 150 work hours. Salaries for School of Management interns range from \$8 to \$25/hour. For more information about the program or to start looking for a professional intern today, contact Doritta McDaniel, student services coordinator, at (810) 237-6680 or doritta@umflint.edu.

Interns are an excellent solution to many problems facing businesses in today's economy, and the School of Management can provide you with the most qualified candidates.

Editor's Note: The GCBA has entered into a formal arrangement to assist UM-Flint business students with intern placement. Look for more information in the April edition of Notes N' News.

Ira Bare Memorial Pavilion

Clio Rotary Club dedicated the Ira Bare Memorial Pavilion, in Clio Park, in memory of long time Clio attorney Ira Bare who passed away June 13, 2007. Friend and partner Otis

Stout wrote a fitting tribute to Ira in the September/October 2007 issue of *Bar Beat* which can be found on our website at www.gcbalaw.org.



From Public Communications to Practicing Attorney: Henry J. Clark, Jr.

By Roberta J.F.Wray



Henry J. Clark, Jr.

We get to where we are by diverse routes and for different reasons. And yet, “How and/or why did you decide to become an attorney?” brings surprisingly similar answers: “I like to argue; I wanted to help people; I revere the law and the Constitution; I thought I could make a difference.” When and how we actually make the decision to go to law school and (bigger step) take the bar exam is where the real diversity comes in.

Take Henry J. Clark, Jr., aka, Jamie, for example: Born in Flint, graduated from Mt. Morris High School, father in law enforcement (plant protection), first inclination out of school was to go into advertising, though he always liked the idea of being a lawyer.

His bachelor’s degree from Central Michigan University (thus the maroon and gold colors in his golf bag and running togs) is in Interpersonal and Public Communications with a minor in Advertising. He said he found out that “advertising” involved too much “sales”. His idea was to do the creative part of advertising, but he discovered the road to a living in advertising includes a lot of door knocking and cold calls. Jamie says

he was attracted to the law because of his sense of freedom and flexibility, and while there’s still an element of sales in the law, at least the customers come to you. Another reason he went to law school, he added, “is because I could not stand the sight of blood so I could not be a doctor.”

While trying to figure out how to get to the law from advertising, Jamie happened to mention to a college counselor that there was no pre-law program at CMU. That’s when he found out that law schools accept degrees from many disciplines as the foundation for a law degree.

With BA in hand, Jamie headed to California with his sister, intending to attend some law school in the sun. Tuition rates for non-residents are prohibitive, however, so he returned to Michigan and gained admission to the Wayne State University Law School. He completed his law degree in 1994 and passed the bar, then went directly into solo private practice. He immediately joined the Genesee County Bar Association and has served on the board of the Bar Foundation.

When asked who inspired him

to go into law he said.

“No one in particular.”

The late Supreme Court Justice Thurgood Marshall was an early role model because of everything he did for African-Americans and because he was the first African-American to serve on the high court. He also expressed admiration for the late Johnnie Cochran and Gerry Spence.

When and how we actually make the decision to go to law school and (bigger step) take the bar exam is where the real diversity comes in.

Jamie’s practice is 85 percent criminal defense. He’s been involved in several high profile cases, including the 1997 Bonner Park murder/assault case. When people ask how he can defend criminals, his response is, “Everyone is entitled to be considered innocent and to have a defense attorney who will see to it his rights are protected. That’s what I do because no one is immune from accusations, and sometimes the accusers are wrong. Not enough people really understand that, including court personnel.”

Jamie’s Facebook page usually has something “Spartans” on it. He explained that he had visited the MSU campus with an older cousin in 1979 and was introduced to Earvin “Magic” Johnson. He has been an assistant basketball coach at Carman Ainsworth for the last five years. His other interests are golf, running, working out and riding his motorcycle.

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Your State Bar Dues at Work

Donald G. Rockwell, State Bar of Michigan Commissioner, District B
Former member of Representative Assembly



Donald G. Rockwell

Like all of you, I have paid my annual State Bar dues over the years and, like many of you, I often wondered what became of my dues. Now that I have had the privilege to serve for some time in different capacities at the State Bar level, I believe I have a much better understanding of what our State Bar does with our money.

To say that our association has many functions, services, and benefits is not just an accurate statement but one that can even be something of an understatement. Our dues support all of the following, many of which are not only important but are critical to several of our colleagues:

- Character and fitness processing for bar applicants
- Investigating and preventing unauthorized practice of law
- Providing informal ethics advice and rendering written opinions
- Evaluating proposed laws and court rules for their impact on our justice system and profession
- Publishing our *Michigan Bar Journal* and annual Directory
- Publishing an e-Journal that updates us on changes in the law
- Operating a Public Policy Resource Center to increase awareness of public policy issues of interest to lawyers
- Operating a Lawyers and Judges Assistance Program that provides referral, assessment, monitoring, and counseling services to lawyers, judges, and law students challenged by substance abuse and mental health issues
- Providing member affinity programs that offer discounted services including credit cards, insurance, rental cars, and other business and personal services
- Providing opportunity and administrative support to participate, network, and share information in member interest groups, sections, and State Bar committees
- Annual Meeting and conference, an annual leadership conference, and periodic seminars
- Administering a Client Protection Fund for victims of attorney misconduct in the general public
- Operating a subscriber-based lawyer referral service
- Administering the State Bar's justice initiative program that promotes the effective delivery of high-quality legal services to lower-income groups
- Operating the Practice Management Resource Center to provide basic and up-to-date practice information with a website containing articles, features and forms; an onsite education center and lending library; and law practice seminars
- Providing an online legal research tool for Michigan case and statutory law

Many of the above programs and services provided by the State Bar are worthy of discussion well beyond this brief article. It is concerning the last of these services and benefits, though, that I wish to make further comment—the providing of online legal research of Michigan case and statutory law.

For the last five years, the State Bar had contracted with the Institute of Continuing Education (ICLE) to provide online legal research for Michigan case law as a free-of-cost member benefit. That contract expired at the end of last year. In its place, the State Bar has now continued to provide free-of-cost online legal research through CASEMAKER 2.1™. It is our newest

member benefit. Along with 28 other state bar associations, our association has partnered with CASEMAKER 2.1™ to presently bring you “premium” searchable state and federal materials, including case law, constitutions, and statutes for all 50 states, including the District of Columbia. This research tool also provides the ability to search for secondary and/or third party treatises and publications as well as other capabilities. Our present contract to provide the “premium” federal and 50-state service with CASEMAKER 2.1™ will extend through to October of this year, at which time it is anticipated that this online research tool will continue to be available, although there is the possibility that it may be restricted to Michigan law.

Over the last several years when I have mentioned this online legal research capability as a membership benefit, I am surprised to learn that many of us have been unaware of its availability. It is hoped that this article will apprise many of you of this benefit and that it is cost-free. I invite all of you to visit the State Bar of Michigan website at www.michbar.org and go to the “member area” at the top of the page. You can then log in with your provided username and password to enter the “Member Home” page where CASEMAKER 2.1™ is listed on the left.

Our association is continuing to work hard for the benefit of ourselves, our profession, and our fellow citizens of Michigan. Please take advantage of the services and benefits it offers as it is your dues that make them possible.

Top 10 Things to Know about the Michigan Trust Code (MTC) for Drafting Documents and Representing Fiduciaries

By Teresa Schafer Sullivan, JPMorgan Chase Bank N.A. and Carol A. Sewell, United Bank & Trust

On April 1, 2010, the MTC becomes effective. The following is a highlight of some of the more significant provisions of which practitioners should be aware. Please note this is not an exhaustive list and will not replace a full review of the MTC (found in Part 7 of EPIC).

- 1. SETTLOR CAPACITY.** The capacity to make a trust is now, by statute, the same as to make a will. MTC Sec. 760I. The will standard in EPIC Sec. 260I has been modified to mirror the current Standard Jury Instructions.
- 2. TRUST PROTECTORS.** While trust protectors have been used under various names by attorneys for the past several years, the MTC will statutorily recognize them. A trust protector can be a person or committee that has power to direct certain actions with respect to the trust, but cannot be the settlor or the holder of a power of appointment
- 3. MANDATORY RULES.** The MTC was designed to provide default rules that the settlor of a trust can draft around except for certain mandatory provisions that cannot be waived in a document. These mandatory rules are set forth in MTC Sec. 7105 (2).
- 4. ESTATE SETTLEMENT ISSUES.** The statute of limitations for contesting the validity of a trust is the earlier of two years after the settlor's death or six months if an appropriate notice is sent. MTC Sec. 7604.
- 5. CREDITORS CLAIMS.** The court rules for creditors' claims against an estate or trust have been combined in MCR 5.208. Otherwise, the new MTC sections on Creditors Claims 7605-761I incorporate the current EPIC provisions.
- 6. EXCULPATORY TERMS a/k/a IN TERROREM CLAUSES.** The MTC provides statutory recognition of no contest clauses in trusts. However, Section 7113 also provides that such clauses shall not be given effect if probable cause exists for instituting either a proceeding to contest a trust or another proceeding relating to the trust.
- 7. REVOCABILITY.** Another change in current law, the MTC provides that unless a trust expressly provides that it is irrevocable, it is presumed to be revocable. MTC Sec. 7602(1). Note, however, this only applies to trusts created after April 1, 2010.
- 8. EARLY TERMINATIONS.** A trustee that determines the value of trust property is insufficient to justify the costs of administration may terminate a trust with trust property of less than \$50,000 (adjusted for inflation) after providing 63 days' notice to qualified trust beneficiaries [defined in MTC Sec. 7103(g)], and for charitable trusts, to the attorney general.
- 9. NON-JUDICIAL SETTLEMENTS.** The MTC recognizes non-judicial settlement agreements. So long as they do not violate a material purpose of the trust and include terms and conditions that could be approved by a court, these agreements may be used in a variety of areas and matters related to trust administration. These agreements, however, may not be used to terminate or modify trusts. MTC Sec. 711I.
- 10. EXCULPATORY CLAUSES.** The MTC acknowledges provisions in trusts that purport to exculpate trustees. However, it provides that provisions relieving a trustee of liability for breach of trust are unenforceable to the extent that either (a) the terms relieve the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries or (b) the provisions were inserted as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor. MTC Sec. 7908.

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