

HOLLAND, MICHAEL, RAIBER & SITTIG PLC

Attorneys at Law

123 North Linn Street, Suite 300

Iowa City, Iowa 52245

319-354-0331

www.icialawyers.com

C. Joseph Holland
jholland@icialaw.com

Robert Michael
rmichael@icialaw.com

Crystal Raiber
craiber@icialaw.com

Erek Sittig
esittig@icialaw.com

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Rule 39.18 Study Committee Member

Dear Colleagues:

I have reviewed the report which Joe Feller prepared and the Current Rule with Deb's revisions. As you are aware I have had reservations about this Committee's recommendation to expand the scope of the Rule to cover every lawyer in private practice in Iowa. I continue to have those reservations, and although I may be a minority of one I am not able to join in this recommendation.

The Committee has gone far beyond the charge which was given to the Committee by then ISBA president Bruce Walker. That charge was to provide guidance to members of ISBA for compliance with the new provisions in Rule 39.18. Nothing of the sort has come from this Committee.

I have no issue with the Committee identifying practical problems with the Rule. I think it was very productive to discuss how the Rule would work and to identify the issues which are not necessarily well addressed in the current Rule. I certainly would have been in favor of a report to the Court regarding those issues, and suggesting ways in which the Rule might be revised to make implementation more practical.

Instead of that the Committee has chosen to rewrite the Rule to cover every private practitioner licensed in Iowa. Some members felt the need to head in that direction based upon anecdotal experience with problems with law firms suddenly dissolving and leaving clients in the lurch. That is not a problem identified by the Court or OPR. In fact, Paul Wieck advised the Committee that in all the time he has headed OPR he has never had an issue with a law firm dissolution.

The Court and OPR had identified a very real issue, the death or disability of a sole practitioner resulting in potential or real risk to clients, with no one to attend to pending matters and to wrap up the practice of the deceased or disabled lawyer. Although few of those occur annually, it is a real problem. I suspect there are other instances death or disability never reaches the attention of the Court because other lawyers and family members have successfully handled the events. Also, sole practitioners may have had in place formal or informal mechanisms to deal with death or disability.

What the Court and the OPR attempted to do was to formalize the process of having a succession plan. I fully support addressing a problem which has been identified. I do not support seeking out a problem and addressing a perceived problem which does not appear to have any statistical validity.

This is no longer a Court Rule. This is an ISBA proposed Rule which would require every lawyer in Iowa to make a certification on an annual basis, irrespective of the size of the firm. Proposing this Rule may have negative consequences for ISBA at a time when Bar Associations around the Country and in Iowa have serious concerns about stagnant and declining membership and participation.

The questions added to the client survey questionnaire I find somewhat onerous however well intended. I don't know how some people will answer the question about the "custody" of a single named person having custody of electronic files and records. The same holds true with paper files and passwords and "other security protocols" - whatever those might be. I do not find a definition of custody or custodian in the ISBA Rule. Perhaps I missed that.

With respect to any confidential or privileged materials, and passwords or access codes to the same, the custodian cannot be someone outside the firm. How is that addressed by a sole practitioner who has no staff?

Who is going to be named as the "custodian"? Does the custodian have to consent? In writing? Is that a non-lawyer staff member? Is that a lawyer associated with the firm? What happens if that person leaves the firm or dies, or themselves becomes medically disabled? If the form is filed once a year is there a provision for reporting changes?

I see other technical issues to be addressed. One which concerns me is in Rule 34.17(6)(a) which says that "the chief judge in the judicial district in which the attorney practiced may appoint an attorney or attorneys to serve as trustee to inventory the attorney's files, sequester client funds, and take any other appropriate action to protect the interests of the attorney's clients and other affected persons."

Many Attorneys practice in multiple Judicial Districts.

How does this work in the instance of an out of State licensee? Remember "An "attorney in private practice" includes an active Iowa attorney who resides outside Iowa but engages in the private practice of law in Iowa." 39.18(7). This implies extra-territorial jurisdiction. Which Chief judge gets this assignment?

I could go on with other technical issues, but I do not support the report or the proposed Rule changes so I will not further fly speck the text. I ask that my position be made known to the Board of Governors. I apologize for the 11th hour communication, but I did not want to write this letter, but came to feel that I must.

Respectfully,

C. Joseph Holland