

MICHIGAN
LAW
REVISION
COMMISSION

May 13

2015



Meeting
Documents

MICHIGAN LAW REVISION COMMISSION

AGENDA

Wednesday, May 13, 2015
11:30 a.m.
Legislative Council Conference Room
3rd Floor ■ Boji Tower Building
Lansing, Michigan

- I. Call to Order
- II. Roll Call
- III. Approval of November 5, 2014 Meeting Minutes (Page 1)
- IV. Approval of 2014 Annual Report (Page 3)
 1. Approval of Tribute Resolutions (Pages 10, 11, and 12)
 2. CSG Report (Previously Approved-See Separate Document)
 3. Approval of Report on Recent Court Decisions Identifying Statutes for Legislative Actions and Recommendations to the Legislature (Page 14)
- V. New Business
 1. Immigration Report (Page 33)
 2. New Cyber Business Court Report (Page 44)
- VI. Other Business
 1. CRC Report re: Use of Immediate Effect in Michigan (Page 53)
- VII. Comments from Commissioners
- VIII. Public Comment
- IX. Adjournment

proposed minutes

Michigan Law Revision Commission Meeting

Wednesday, November 5, 2014 ▪ 11:30 a.m.

Room 426

4th Floor ▪ State Capitol Building

100 N. Capitol Avenue ▪ Lansing, Michigan

Members Present:

Richard McLellan, Chair
Tony Derezinski, Vice Chair
Senator Tonya Schuitmaker
John Strand
George Ward

Members Absent and Excused:

Senator Vincent Gregory
Representative Andrew Kandrevas
Representative Tom Leonard
Judge William Whitbeck

I. Convening of Meeting

Vice Chair Derezinski called the meeting to order at 11.36 a.m. and noted that Chair McLellan is on his way and should be present shortly.

II. Roll Call

After the arrival of the Chair, the roll was taken and absent members were excused. A quorum was present.

III. Criminal Sentencing and Procedures Project

The Vice-Chair called on Mr. Carl Reynolds, Senior Legal and Policy Advisor of the Council of State Governments Justice Center, to present the policy ideas found in the CSG report to the MLRC. Mr. Reynolds proceeded with an overview of the project and highlighted the proposed policy changes and justice reinvestment process. (See the attached presentation for more details.) He ended with a description of the four bill drafts that have been proposed (introduced House Bills 6301, 6303, 6305, and 6307.)

The following resolution was offered.

The Michigan Law Revision Commission approves the publication of a Special Report that includes the May 2014 Report by the Council of State Governments Justice Center and other related documents received in conjunction with this project.

The Commission recommends the substance of the Report as a guide for the Legislature, but does not recommend any specific version of draft legislation because of the ongoing discussions by the many interested individuals and stakeholders.

Vice Chair Derezinski moved, supported by Commissioner Strand, that the Michigan Law Revision Commission adopt the proposed resolution and include the Special Report in the 2014 Michigan Law Revision Commission Annual Report. There was no further discussion. The motion was unanimously approved.

IV. Approval of May 13, 2014 Meeting Minutes

The Chair asked for a motion to approve the minutes of the May 13, 2014. No corrections or additions were offered.

Commissioner Ward moved, supported by Commissioner Strand, to adopt the minutes of the May 13, 2014 Michigan Law Revision Commission meeting. There was no further discussion. The minutes were unanimously approved.

V. 2012-2013 Annual Report

The Chair called on Ms. Wilensky to present the items to be included in a combined 2012-2013 Michigan Law Revision Commission Annual Report. She proceeded with an overview of three reports: 1) Recent Court Decisions, 2) Licensure of International Corporate Lawyers, and 3) the Open Meetings Act (attached to these minutes.) **Vice Chair Derezinski moved, supported by Commissioner Ward, that the proposed reports on Recent Court Decisions, Licensure of International Corporate Lawyers, and the Open Meetings Act be included in the 2012-2013 Michigan Law Revision Commission Annual Report. There was no further discussion. The motion was unanimously approved.**

VI. Comments from Commissioners

The Chair offered comments regarding state law implications of comprehensive immigration reform at the federal level. He then asked if there were any comments from the Commissioners. Vice Chair Derezinski offered additional comments regarding the Criminal Sentencing and Procedures Project and expressed his thanks to those who took part in the project.

VII. Public Comment

The Chair asked if there were any public comments. Mr. Tim Haak commented that he is concerned that some of the data issues and recommendations from the report are not being acted upon. There were no other public comments.

VIII. Adjournment

Having no further business, the meeting was adjourned at 1:03 p.m.

*46th Annual Report
2014*

*Michigan
Law
Revision
Commission*

Term Members:

RICHARD D. McLELLAN,
Chairperson

ANTHONY DEREZINSKI,
Vice Chairperson

GEORGE E. WARD

WILLIAM C. WHITBECK

Legislative Members:

SENATOR VINCENT GREGORY

SENATOR TONYA SCHUITMAKER

REPRESENTATIVE ANDREW KANDREVAS

REPRESENTATIVE TOM LEONARD

Ex Officio Member:

JOHN G. STRAND

Legislative Council Administrator

Boji Tower

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124 West Allegan

P.O. Box 30036

Lansing, Michigan 48909-7536

JANE O. WILENSKY, *Executive Secretary*



Michigan Law Revision Commission

FORTY-SIXTH ANNUAL REPORT
2014

MICHIGAN LAW REVISION COMMISSION

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RICHARD D. McLELLAN, *Chairperson*
ANTHONY DEREZINSKI, *Vice Chairperson*
GEORGE E. WARD
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**This report may be downloaded from the Commission’s Internet website,
<http://council.legislature.mi.gov/mlrc.html>**

MICHIGAN LAW REVISION COMMISSION
FORTY-SIXTH ANNUAL REPORT TO THE LEGISLATURE
FOR CALENDAR YEARS 2014

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its forty-sixth annual report pursuant to section 403 of Act No. 268 of the Public Acts of 1986, MCL § 4.1403.

The Commission, created by section 401 of Act No. 268 of the Public Acts of 1986, MCL § 4.1401, consists of two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex officio member; and four members appointed by the Legislative Council. The terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chair of the Commission. The Vice Chair is elected by the Commission.

Membership

The legislative members of the Commission during 2014 were Senator Vincent Gregory of Southfield; Senator Tonya Schuitmaker of Lawton; Representative Andrew Kandrevas of Southgate; and Representative Tom Leonard of DeWitt. Legislative Council Administrator John G. Strand was the ex officio member of the Commission. The appointed members of the Commission were Richard D. McLellan, Anthony Derezinski, George E. Ward, and William C. Whitbeck. Mr. McLellan served as Chairperson and Mr. Derezinski served as Vice Chairperson. Jane O. Wilensky served as Executive Secretary. Brief biographies of the Commission members and staff are located at the end of this report.

The Commission's Work in 2014

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.
2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.
3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers, and the public generally as to defects and anachronisms in the law.
4. To recommend such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the civil and criminal law of this state into harmony with modern conditions.
5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.
6. To cooperate with the law revision commissions of other states and Canadian provinces.
7. To issue an annual report.

The problems to which the Commission directs its studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and commissions from other jurisdictions, and legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the year have been devoted primarily to three areas. First, Commission members provided information to legislative committees related to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and outside the United States. Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission sometimes found that the subjects treated had been considered by the Michigan Legislature in recent legislation and, therefore, did not recommend further action. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

Proposals for Legislative Consideration in 2014

In addition to its new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 2014:

- (1) Enhance Licensure of International Corporate Lawyers in Michigan, 2012-13 Annual Report, p. 6.
- (2) Updating the Open Meetings Act, 2012-13 Annual Report, p. 18.
- (3) Use of Technology to Conduct Government Meetings, 2003 Annual Report, page 9.
- (4) Governor's Power to Remove Public Officials from Office, 2003 Annual Report, page 21.
- (5) Immunity for Court-Appointed Psychologists, 2000 Annual Report, page 84.
- (6) Pre-Dispute, Contractual Venue Selection Clauses, 1998 Annual Report, page 203.
- (7) Uniform Unincorporated Nonprofit Associations Act, 1997 Annual Report, page 144.
- (8) Prison Mailbox Rule, 1997 Annual Report, page 137.
- (9) Uniform Conflict of Laws—Limitations Act, 1997 Annual Report, page 151.
- (10) E-Mail and the Freedom of Information Act, 1997 Annual Report, page 133.
- (11) Uniform Putative and Unknown Fathers Act, 1994 Annual Report, page 117.
- (12) Motorcycles and the No-Fault Insurance Act, 1993 Annual Report, page 131.
- (13) Tortfeasor Contribution under MCL 600.2925a(5), 1992 Annual Report, page 21.

- (14) International Commercial Arbitration, 1991 Annual Report, page 31.
- (15) Uniform Contribution Among Joint Tortfeasors Act, 1991 Annual Report, page 19.
- (16) Uniform Statutory Rule Against Perpetuities, 1990 Annual Report, page 41.
- (17) Standardization of Condemnation Powers Provisions, 1989 Annual Report, page 15.
- (18) Consolidated Receivership Statute, 1988 Annual Report, page 72.

Current Study Agenda

Topics on the current study agenda of the Commission are:

- (1) Review of emergency preparedness laws.
- (2) Impact of Immigration Policies on Michigan Laws.
- (3) New Cyber Business Court.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary. The current Executive Secretary of the Commission is Jane O. Wilensky, who was responsible for the publication of this report. By using faculty members at several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate on a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 120 Michigan statutes passed since 1967 upon the recommendation of the Commission.

The Office of the Legislative Council Administrator handles the fiscal operations of the Commission under procedures established by the Legislative Council.

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairperson
Anthony Derezinski, Vice Chairperson
George E. Ward
William C. Whitbeck
Senator Vincent Gregory
Senator Tonya Schuitmaker
Representative Andrew Kandrevas
Representative Tom Leonard
John G. Strand

A RESOLUTION HONORING STATE SENATOR VINCENT GREGORY

A resolution to commend and thank the Honorable Vincent Gregory for his service to the Michigan Law Revision Commission.

Whereas, We are proud to salute Senator Gregory and express our gratitude for his commitment to the work of the Michigan Law Revision Commission. Since joining the Commission in January 2011, his talents and energies in the field of law have been notable in his duties as a member of the Michigan Law Revision Commission; and

Whereas, First elected to the Michigan House of Representatives in 2008 and currently serving his second term as the State Senator for the 11th District, Senator Gregory has rendered exemplary service through his experience and insight. His strong leadership, including his previous service as Democratic Whip in the Senate Democratic Caucus and current work as Minority Vice Chair of the Senate Appropriations and Assistant Minority Caucus Chair, makes Senator Gregory a key participant in debates on many aspects of the law; and

Whereas, His background with the Wayne County Sheriff Department, where he attained the rank of Corporal and then Detective and served as Vice President and then President of the Wayne County Sheriff's Local 502 SEIU, AFL-CIO, gave him valuable perspective on the role laws play in all aspects of our society; and

Whereas, In 1998 he was elected in a special election for Oakland County Commissioner of the 21st District and maintained the position for the next ten years. His tenure on numerous committees including General Government, Public Service, Planning and Building, Parks and Recreation, Vice Chair of the Airport Committee and the Democratic Commission Caucus, and Minority Vice Chair of the Finance and Personnel Committees, have enhanced his service to our Commission and has earned him our respect; now, therefore, be it

Resolved by the membership of the Michigan Law Revision Commission, That we extend this expression of gratitude to the Honorable Vincent Gregory for his exemplary work with this body. We are confident that his sense of commitment and justice will long serve our state well.

A RESOLUTION HONORING STATE REPRESENTATIVE ANDREW KANDREVAS

A resolution to thank and commend State Representative Andrew Kandrevas for his service to the Michigan Law Revision Commission.

Whereas, It is a pleasure to extend this expression of thanks to Representative Andrew Kandrevas for his dedication and contributions to the Michigan Law Revision Commission. Appointed to the Commission in January 2013, his enthusiasm and motivation have been an invaluable asset to the Commission and the people of this State; and

Whereas, Representative Kandrevas earned a bachelor's degree in Political Science from the University of Michigan in 1997 and a law degree from Wayne State University Law School in 2001. During his legal career, Representative Kandrevas worked as a member of the Wayne County Prosecutor's Office, Assistant City Attorney and Prosecutor for the City of Lincoln Park, and staff attorney for Detroit City Councilwoman Sheila Cockrel. With this wealth of legal knowledge, he has been particularly helpful in developing meaningful recommendations; and

Whereas, Before Representative Kandrevas was first elected to the Michigan House in 2008, he served on the Southgate Planning Commission and then served as the City of Southgate's Council President in addition to running his own law office. In his work as a legislator, practicing attorney, and community leader, he has demonstrated his dedication and commitment to public service and has set an example of hard work that is esteemed by his colleagues; and

Whereas, Representative Kandrevas' experience and insights provided valuable contributions to the Commission's work on the Sentencing Guidelines and Justice Reinvestment Study; now, therefore, be it

Resolved, That we extend this expression of our gratitude to the Honorable Andrew Kandrevas for his dedicated service to the Michigan Law Revision Commission.

A RESOLUTION HONORING STATE REPRESENTATIVE TOM LEONARD

A resolution to thank and commend the Honorable Tom Leonard for his service to the Michigan Law Revision Commission.

Whereas, It is with great respect for his commitment to the highest standards in public service and the law that we honor and thank Representative Tom Leonard for his service as a member of the Michigan Law Revision Commission. Having served on the Commission since his appointment in January 2013, Representative Leonard has demonstrated a distinguished record of tackling complex issues that are important to Michigan; and

Whereas, Representative Leonard graduated with a bachelor's degree in History and Spanish from the University of Michigan and then earned his law degree from Michigan State University. He then served as an Assistant Attorney General for the State of Michigan and was a prosecutor for Genesee County, where he was assigned to the Special Crimes Division. His education and background has served him well during his tenure with the Commission; and

Whereas, Representative Leonard was first elected to serve the 93rd District in the Michigan House of Representatives in November 2012. His experience as the former chair of the DeWitt Township Public Safety Committee and an associate member of the Clinton County Farm Bureau as well as being an active member of the DeWitt Lion's Club and the St. John's Kiwanis Club has enhanced his ability to serve on the Commission; and

Whereas, Representative Leonard has made thoughtful and valuable contributions to the Commission's work and is an admirable lawmaker who has contributed greatly to this State; now, therefore be it

Resolved, That we offer this expression of our thanks and respect to the Honorable Tom Leonard as he completes his service to the Michigan Law Revision Commission. We offer our best wishes and trust that his work with the law will continue to strengthen Michigan in the years to come.

SEE MLRC SPECIAL REPORT

PROVIDED AS A SEPARATE DOCUMENT

FOR MLRC MEETING ONLY.

FINAL REPORT WILL HAVE SPECIAL REPORT INCLUDED.

REPORT ON RECENT COURT DECISIONS IDENTIFYING STATUTES FOR LEGISLATIVE ACTION AND RECOMMENDATIONS TO THE LEGISLATURE

As part of its statutory charge to examine recent judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reforms, the Michigan Law Revision Commission undertook a review of Michigan Supreme Court and Court of Appeals decisions issued from January 1, 2014 through December 31, 2014, urging legislative action. That review identified four decisions for which the Commission makes no recommendation. The decisions reviewed by the Commission are:

1. **People v Taylor**, 495 Mich 923; 844 NW2d 707 (2014)
2. **Ghanam v Does**, 303 Mich App 522; 845 NW2d 128 (2014)
3. **Younkin v Zimmer**, 304 Mich App 719; 848 NW2d 488 (2014)
4. **People v Hughes**, 306 Mich App 116; 855 NW2d 209 (2014)

1. Level of Intent Required to Impose Criminal Liability in Administratively Defined Malum Prohibitum Cases

A. Background

Section 30304 of the wetlands protection act, MCL 324.30301 et seq., Part 303 of the Natural Resources and Environmental Protection Act, MCL 324.30301 et seq., imposed criminal liability on a person who damages wetlands in certain specified ways. In *People v. Taylor*, 495 Mich 923 (2014), Taylor, a business owner, was convicted under this provision for filling a wetland without a permit.

Taylor expanded an employee parking lot to accommodate the growth of his company. Though the Department of Environmental Quality (DEQ) first visited the site when the parking lot was under construction, it wasn't until a year and a half later that the DEQ determined that the expanded parking lot was intruding on a wetland portion of Taylor's industrial park property. Since the DEQ had not issued a permit for the intrusion on the wetland, Taylor was ordered to undo the parking lot expansion and restore the wetland. The Supreme Court denied Taylor's application for leave to appeal his conviction.

Justice Markman concurred with regret, believing that confusing lower court proceedings had resulted in Taylor waiving compelling legal arguments. He wrote separately to comment on what he believes is the significant harm at issue in this case: the criminalization of regulatory conduct, and bring the Legislature's attention to this and similar "legal issues that are likely to arise increasingly in the prosecution of administratively defined malum prohibitum criminal offenses within this state." *Id.* at 925. Justice Markman expressly urged the Legislature "to exercise care in avoiding defects in due process of the type that have come increasingly to characterize criminal offenses within our federal justice system." *Id.*

Justice Markman felt that the facts of this case illustrate why strict liability offenses are generally disfavored. The offense, which required the identification of a wetland, "require[d] ordinary citizens to possess a heightened degree of technical skill." *Id.* at 929. Even the DEQ investigator acknowledged that it was not readily apparent that a wetland was present on the property. Regardless, this public welfare offense imposed criminal liability despite any wrongful intent.

“As a result,” Justice Markman concluded, “our Legislature might wish in the future to review this and similar criminal statutes and communicate with clarity and precision its specific intentions concerning which public-welfare offenses...should be treated by the judiciary of this state as strict-liability offenses.” *Id.* at 928. Justice Markman expressed concern that where the Legislature has not spoken with precision, it vests an insufficiently described power in administrative agencies and prosecutors to define the law and impose criminal liability.

B. Question Presented

Should the Legislature amend MCL 324.30304 of the wetlands protection act to include a mens rea, or mental state, requirement?

C. Recommendation

The Commission notes that 2013 PA 98 made significant changes to the wetlands protection act, including the repeal of section 30304. However, because Justice Markman’s comments apply beyond the facts of this case, the Commission recommends legislative review and consideration of the arguments presented, but makes no recommendation of specific legislative action.

2. First Amendment Rights of Anonymous Internet Critics

A. Background

In *Ghanam v Does*, 303 Mich App 522 (2014), the Michigan Court of Appeals struggled to define the line between defamation and protected First Amendment activity in the context of anonymous Internet postings.

Ghanam, a city official, sued Munem, a former city employee, and several anonymous defendants who, using fictitious names, posted allegedly defamatory statements about him on an online message board. Ghanam wanted to depose Munem to discover the identities of the anonymous critics. The circuit court denied Munem’s motion for a protective order solely on the basis of Michigan’s open and liberal discovery rules. The circuit court did not consider the First Amendment rights of the anonymous Internet critics.

The Court of Appeals reversed the trial court’s denial of defendant’s request for a protective order, and further held that defendants were entitled to judgment as a matter of law under MCR 2.116 (C)(8) because the statements on the online message board were not defamatory.

The Court stated that First Amendment concerns are implicated when public official plaintiffs in defamation actions use the discovery process to identify anonymous critics since this may discourage the public from exercising their rights to free speech. The Court reviewed the various standards used by courts in other states in cases involving public figures trying to identify an anonymous defendant who has posted allegedly defamatory statements about the public figure. In those cases, the courts required plaintiffs to plead facts and show evidence sufficient to withstand a summary judgment motion.

The Court, however, felt bound to follow a prior Michigan Court of Appeals’ decision, *Thomas M. Cooley Law School v Doe 1*, 300 Mich. App. 245; 833 N.W. 2d 331 (2013), which held that Michigan’s rules of civil procedure, including MCR 2.116(C)(8), (failure to state a claim, in which the motion is decided on the pleadings alone), sufficiently protect a participating defendant’s First Amendment rights.

The Court distinguished the facts in the *Cooley* case, in which the anonymous defendants knew about the litigation, from this case, in which they did not. Because of this difference the Court believed that

application of the Cooley protection scheme was inadequate to protect the First Amendment rights of an anonymous defendant who does not know about a pending lawsuit. The Court, therefore, invited the Legislature to review this important question and consider adopting a higher standard that requires a plaintiff to produce enough evidence to withstand a summary judgment motion under MCR 2.116(C)(10), (no genuine issue of material fact, in which a party must submit documentary evidence to support the motion).

B. Question Presented

Should the Legislature amend MCL 600.2911 to specify the preliminary showing required for a plaintiff public official who, in a defamation action, seeks to identify an anonymous defendant who has made allegedly defamatory statements about that public official?

C. Recommendation

The Commission recommends legislative review of the issue, but makes no recommendation of specific legislative action.

3. Location of Workers' Compensation Hearings

A. Background

Under MCL 418.851, hearings on workers' compensation claims "shall be held at the locality where the injury occurred." In an effort to reorganize the hearing process, state officials closed some hearing offices, and transferred the hearings on those claims to different offices.

In *Younkin v Zimmer*, 304 Mich App 719 (2014), Younkin, who was injured in Flint, brought a claim for mandamus against the Executive Director of the Michigan Administrative Hearing System and the Director of the Michigan Department of Licensing and Regulatory Affairs, to prevent the closing of the workers' compensation office in Flint, and transfer of his claim to the office in Dimondale.

The Court of Appeals granted Younkin's claim for mandamus, on the grounds that the Court was compelled to enforce the statute as written. The Court, however, called on the Legislature to consider defendants' arguments about the need to streamline the hearing process and conserve State resources.

B. Question Presented

Should the Legislature revise the definition of "locality" in MCL 418.851 to permit workers' compensation claims to be heard in places beyond the locality where the injury occurred?

C. Recommendation

The Commission recommends legislative review of this issue, but makes no recommendation of specific legislative action.

4. Admissibility of Law Enforcement Officers' False Statements as Evidence in a Subsequent Criminal Proceeding

A. Background

MCL 15.393 provides that a law enforcement officer's involuntary statement shall not be used against the law enforcement officer in a criminal proceeding. The question in *People v Hughes*, 306 Mich App 116

(2014), was whether this statute prohibited introduction of an officer's false denials of assault in a subsequent prosecution for obstruction of justice.

The Court of Appeals held that the phrase "involuntary statement" includes only true statements; false statement and lies, therefore, fall outside the statute's protection. Consequently, an officer's false statements made during a criminal investigation may be used as evidence in a subsequent criminal prosecution.

Judge Wilder dissented on this portion of the Court's ruling. After analyzing the broad language of the statute, Judge Wilder concluded that an officer's statements are protected. Judge Wilder recognized that permitting law enforcement officers to make false statements with impunity is a seemingly untenable result, and called on the Legislature to address this anomaly.

B. Question Presented

Should the Legislature amend MCL 15.393 to clarify the terms of the statute?

C. Recommendation

The Commission makes no recommendation of specific legislative action.

PRIOR ENACTMENTS PURSUANT TO
MICHIGAN LAW REVISION COMMISSION RECOMMENDATIONS

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

1967 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Original Jurisdiction of Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meetings	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

1968 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Stockholder Approval of Mortgage of Corporate Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardians Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

1969 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Access to Adjoining Property	1968, p. 19	55
Recognition of Acknowledgments	1968, p. 64	57
Dead Man's Statute Amendment	1966, p. 29	63
Notice of Change in Tax Assessments	1968, p. 30	115
Antenuptial and Marital Agreements	1968, p. 27	139
Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue for Civil Actions	1968, p. 17	333

1970 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships	1969, p. 41	90
Minor Students' Capacity to Borrow Act	1969, p. 46	107
Warranties in Sales of Art	1969, p. 43	121
Appeals from Probate Court	1968, p. 32	143
Circuit Court Commissioner Powers of Magistrates	1969, p. 57	238

1971 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors in Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Summary Proceeding for Possession of Premises	1970, p. 16	120
Interest on Judgments	1969, p. 59	135
Business Corporations	1970, Supp.	284
Constitutional Amendment re Juries of 12	1969, p. 60	HJR "M"

1973 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

1974 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Choice of Forum	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the Michigan General Corporations Act	1973, p. 37	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to Dead Man's Statute	1972, p. 70	305
Attachment and Collection Fees	1968, p. 22	306
Contribution Among Joint Tortfeasors	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Due Process in Seizure of a Debtor's Property (Elimination of Pre-Judgment Garnishment)	1972, p. 7	371

1975 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Hit-Run Offenses	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 12	288
Disposition of Community Property Rights at Death	1973, p. 50	289
Insurance Policy in Lieu of Bond	1969, p. 54	290
Child Custody Jurisdiction	1969, p. 23	297

1976 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Due Process in Seizure of a Debtor's Property (Replevin Actions)	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

1978 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Juvenile Obscenity	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Company Act	1973, p. 48	63
Elimination of References to Abolished Courts:		
a. Township Bylaws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
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i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Plats	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

1980 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Condemnation Procedures	1968, p. 8	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of Reference to the Justice of the Peace: Sheriff's Service of Process	1976, p. 74	148
Court of Appeals Jurisdiction	1980, p. 34	206

1982 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Limited Partnerships	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407

Interest on Probate Code Judgments	1980, p. 37	412
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1983 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
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1984 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
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1986 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
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1988 Legislative Session

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<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
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1992 Legislative Session

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BIOGRAPHIES OF COMMISSION MEMBERS AND STAFF

RICHARD D. McLELLAN

Richard D. McLellan is Chair of the Michigan Law Revision Commission, a position he has filled since 1986 following his appointment as a public member of the Commission in 1985.

McLellan is a practicing attorney and business consultant in Lansing, Michigan. In 2007, Mr. McLellan retired as a lawyer with the law firm of Dykema Gossett PLLC where he served as the Member-in-Charge of the firm's Lansing Office and as the leader of the firm's Government Policy Department.

He is a member of the Board of Directors of ITC Holdings (NYSE: ITC) and is an Independent Trustee of the JNL Series Trust, a \$50 billion variable annuity fund managed by the Jackson National Life Insurance Company. He also serves as Chairman of Africa Continental Holdings, LLC.

By appointment of the Supreme Court, Mr. McLellan served two terms as a Member of the Board of Commissioners of the State Bar of Michigan.

Mr. McLellan started his career as an administrative assistant to Governor William G. Milliken and as Acting Director of the Michigan Office of Drug Abuse.

Following the 1990 Michigan elections, Mr. McLellan was named Transition Director to then Governor-elect John Engler. In that capacity, he assisted in the formation of Governor Engler's Administration and conducted a review of state programs. He was also appointed by the Governor as Chairman of the Corrections Commission, a member of the Michigan Export Development Authority, a member of the Michigan International Trade Authority, a member of the Library of Michigan Board of Trustees, a member of the Michigan Jobs Commission, a member of the McPherson Commission on Charter Schools and Chairperson of the Michigan Film Advisory Commission.

During the administration of President Gerald Ford, he served as an advisor to the Commissioner of the Food and Drug Administration as a member of the National Advisory Food and Drug Committee of the U.S. Department of Health, Education and Welfare.

In 1990, Mr. McLellan was appointed by President George Bush as a Presidential Observer to the elections in the People's Republic of Bulgaria. The elections were the first free elections in the country following 45 years of Communist rule. In 1996, he again acted as an observer for the Bulgarian national elections. And again in February 1999, he acted as an observer for the Nigerian national elections with the International Republican Institute.

Mr. McLellan is a member of the Board of Governors of the Cranbrook Institute of Science, one of Michigan's leading science museums. He helped establish and served for ten years as president of the Library of Michigan Foundation. He helped establish and served as both President and Chairman of the Michigan Japan Foundation, the private foundation providing funding for the Japan Center for Michigan Universities.

Mr. McLellan has served as a member of the Board of Trustees of Michigan State University Detroit College of Law and is a member of the Advisory Board for MSU's James H. and Mary B. Quello Center

for Telecommunication Management and Law. He also serves as an adjunct professor in MSU's College of Communications Arts.

Mr. McLellan is a former Chairman of the Board of Directors of the Michigan Chamber of Commerce and is a member of the Board of Directors of the Mackinac Center for Public Policy, the Oxford Foundation, and the Cornerstone Foundation.

Mr. McLellan served as a member of the Board of Directors of the Mercantile & General Life Reassurance Company of America and the Crown America Life Insurance Company. He also served as Chairman of the Michigan Competitive Telecommunications Providers Association and as Chairman of the Information Technology Association of Michigan.

Mr. McLellan has been active in matters concerning persons with disabilities. He is a former President of the Arthritis Foundation, Michigan Chapter, a former member of the National Advocacy Committee of the Arthritis Foundation, and a former member of the National Research Committee, Arthritis Foundation.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School. He has served as an adjunct professor of international studies at Michigan State University.

ANTHONY DEREZINSKI

Mr. Derezinski is Vice Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski recently served for four years as a Councilmember of the Ann Arbor City Council to which he was elected in November of 2008. He was also an Instructor at The University of Michigan School of Education where he taught courses in various aspects of Education Law. He is the former Director of Government Relations for the Michigan Association of School Boards from which he retired in 2008. He also previously served as an adjunct professor of law at the University of Michigan Law School and at the Department of Education Administration of Michigan State University, and previously was a visiting professor of law at the Thomas M. Cooley Law School.

He is a graduate of Muskegon Catholic Central High School, Marquette University, the University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and resides in Ann Arbor, Michigan.

Mr. Derezinski is a Democrat and served as a State Senator from 1975 to 1978. He was a member of the Board of Regents of Eastern Michigan University for 14 years, served on the Committee of Visitors of the University of Michigan Law School, and was a member of the Council of the Center for the Education of Women in Ann Arbor. He also served on the Foundation Board of Hospice of Ann Arbor, and as a Judge and Chief Judge of the Michigan Military Appeals Tribunal.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezinski Post 7729, the American Legion Department of Michigan, and the Vietnam Veterans of America. He is also a Life Member of the Harley Owners' Group.

GEORGE E. WARD

Mr. Ward is a public member of the Michigan Law Revision Commission and has served since his appointment in August 1994.

Mr. Ward was the Chief Assistant Prosecuting Attorney in Wayne County in the administration of the Honorable John D. O’Hair. Earlier in his career, he clerked for Justice Theodore Souris of the Michigan Supreme Court and for 20 years was in private civil practice in the City of Detroit. In 2001, Mr. Ward returned to private practice in Wayne County.

He is a graduate of the University of Detroit, and the University of Michigan Law School. He and his wife Margaret, parents of five adult children and grandparents of eight, live in Canton.

Mr. Ward is an Adjunct Professor at Michigan State College of Law and Wayne State University Law School, and a Wayne County Public Administrator. He is Board Chair of Community Social Services of Wayne County; past President of the Incorporated Society of Irish American Lawyers; a former President of the Board of Control of Saginaw Valley State University; a former commissioner of the State Bar of Michigan; the former President of the Wayne County Home Rule Charter Commission; the former Executive Secretary of the 1971-1972 City of Detroit Charter Revision Commission; and a former member of the Board of Directors of Wayne Center.

WILLIAM C. WHITBECK

Judge William C. Whitbeck is a public member of the Michigan Law Revision Commission and has served since his appointment in January 2000.

Judge Whitbeck was born on January 17, 1941, in Holland, Michigan, and was raised in Kalamazoo, Michigan. His undergraduate education was at Northwestern University, where he received a McCormack Scholarship in Journalism. He received his J.D. from the University of Michigan Law School in 1966, and was admitted to the Michigan Bar in 1969.

Judge Whitbeck has held a variety of positions with the state and federal governments, including serving as Administrative Assistant to Governor George Romney from 1966 to 1969, Special Assistant to Secretary George Romney at the U.S. Department of Housing and Urban Development from 1969 to 1970, Area Director of the Detroit Area Office of the U.S. Department of Housing and Urban Development from 1970 to 1973, Director of Policy of the Michigan Public Service Commission from 1973 to 1975 and Counsel to Governor John Engler for Executive Organization/Director of the Office of the State Employer from 1991 to 1993. He served on the Presidential Transition Team of President-Elect Ronald Reagan in 1980, and as Counsel to the Transition Team of Governor-Elect John Engler in 1990.

In private practice, Judge Whitbeck was a partner in the law firm of McLellan, Schlaybaugh & Whitbeck from 1975 to 1982, a partner in the law firm of Dykema, Gossett, Spencer, Goodnow and Trigg from 1982 to 1987, and a partner in the law firm of Honigman Miller Schwartz and Cohn from 1993 to 1997.

Judge Whitbeck is a member of the State Bar of Michigan, the American Bar Association, the Ingham County Bar Association, and the Castle Park Association, and has served as Chair of the Michigan

Historical Commission. He is a Fellow of both the Michigan State Bar Foundation and the American Bar Foundation.

Governor John Engler appointed Judge Whitbeck to the Court of Appeals effective October 22, 1997, to a term ending January 1, 1999. Judge Whitbeck was reelected to six-year terms in 1998, 2004, and 2010. Judge Whitbeck retired from the Court on November 21, 2014. Chief Judge Richard Bandstra designated Judge Whitbeck as Chief Judge Pro Tem of the Court of Appeals effective January 1, 1999. The Supreme Court appointed Judge Whitbeck Chief Judge of the Michigan Court of Appeals three times and he served in that position from January 1, 2002 to December 31, 2007.

Judge Whitbeck and his wife Stephanie reside in downtown Lansing in a 125-year-old historic home that they have completely renovated. They are members of St. Mary Cathedral.

Judge Whitbeck is the author of a work of fiction, *To Account for Murder*, a courtroom drama set in Michigan in 1945-1946.

VINCENT GREGORY

State Senator Vincent Gregory is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 2011. In 2008, he was elected to State Representative for the 35th House District and currently is serving his first term as the State Senator for the 14th District. Senator Gregory is a member of the Senate Appropriations Committee and serves on the Appropriations Subcommittees of the Departments of Community Health, Human Services and State Police and Military Affairs. Senator Gregory also serves as the Minority Vice-Chair on the Senate Families, Seniors and Human Services Committee and as the Minority Vice-Chair on the Veterans, Military Affairs and Homeland Security Committee. Senator Gregory holds the positions of the Democratic Whip in the Senate Democratic Caucus and the 2nd Vice Chair of the Michigan Legislative Black Caucus.

In 1973, Senator Gregory joined the Wayne County Sheriff Department, where he attained the rank of Corporal and then Detective. After ten years with the Department, he ran for and was elected as Vice President of the Wayne County Sheriff's Local 502 SEIU, AFL-CIO. In 1993, he ran for President of the local and won that election, where he served as their President for the next seven years. In January 2003, Senator Gregory retired from Wayne County service.

In 1998, Senator Gregory ran successfully in a special election for Oakland County Commissioner of the 21st District. For the next ten years, he maintained that position. He served on numerous committees during his tenure with the Commission, which included General Government, Public Service, Planning and Building, Parks and Recreation, Vice Chair of the Airport Committee and the Democratic Commission Caucus, and Minority Vice Chair of the Finance and Personnel Committees.

Senator Gregory is married to his wife Yvonne and has six grown children (Lawrence, Troi, Vanessa, Vincent Jr. (deceased), Cortney and Kristen). They also have seven grandchildren (Lawrence "Jay", Kelsey, Elijah, Caiden, Caleb, and Kaylin).

ANDREW KANDREVAS

State Representative Kandrevas is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 2013. He was first elected to the Michigan House in 2008.

Before becoming a State Representative, Representative Kandrevas served as Council President for the City of Southgate in addition to running his own law office. He also served on Southgate's Planning Commission prior to being elected to the City Council.

During his legal career, Representative Kandrevas worked as a member of the Wayne County Prosecutor's Office; assistant city attorney and prosecutor for the City of Lincoln Park; and staff attorney to Detroit City Councilwoman Sheila Cockrel. In 2006, he opened his own law office in the same Southgate building where his father, 28th District Court Judge James Kandrevas, had practiced law throughout Representative Kandrevas' childhood.

He graduated from Southgate Aquinas High School in 1993 and went on to receive his bachelor's degree in political science from the University of Michigan in 1997. He earned a degree from Wayne State University Law School in 2001.

Representative Kandrevas is a resident of Southgate, where he was raised and has lived much of his life. He is past-president of the Southgate Democratic Club and the Michigan Hellenic Bar Association and a member of the Southgate Kiwanis.

TOM LEONARD

State Representative Tom Leonard is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 2013. He was first elected to serve the 93rd District in the Michigan House of Representatives in November 2012. The 93rd District encompasses Clinton County and portions of Gratiot County including the city of Ithaca and the townships of Sumner, Arcada, New Haven, North Shade, Newark, Fulton, Washington, North Star, Elba, Hamilton, Lafayette and Wheeler.

Representative Leonard graduated with a bachelor's degree in History and Spanish from the University of Michigan and then went on to earn his law degree at Michigan State University.

Prior to being a state representative, he served as an Assistant Attorney General for the State of Michigan and was a prosecutor for Genesee County, where he was assigned to the Special Crimes Division.

Representative Leonard is the former chair of the DeWitt Township Public Safety Committee and is an associate member of the Clinton County Farm Bureau. He is also an active member of the DeWitt Lion's Club and the St. John's Kiwanis Club.

Tom and his wife Jenell live in DeWitt Township.

TONYA SCHUITMAKER

State Senator Tonya Schuitmaker is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 2009. She was elected to the Michigan House in November 2004 and was elected to the Michigan Senate in November 2010, following three terms in the House of Representatives.

Ms. Schuitmaker is a 1986 graduate of Mattawan Consolidated Schools. She holds a B.A. in business from Michigan State University and graduated Cum Laude from the Detroit College of Law in 1993. Before being elected to the Michigan House, Ms. Schuitmaker was a partner in the law firm of Schuitmaker, Cooper and Schuitmaker. She began practicing law in 1993 and concentrated in family, estate, business and governmental law.

Senator Tonya Schuitmaker has made issues such as child protection, job growth and retention, the justice system, agriculture and tourism some of her top legislative priorities. In addition to her role as President Pro Tempore of the Michigan Senate, Senator Schuitmaker serves on the Appropriations Committee and is Chair of the Higher Education Subcommittee, Vice Chair of the Community Colleges, Capital Outlay and Judiciary Subcommittees. She also serves as Vice Chair of the Judiciary Committee and is a member of the Committee on Energy and Technology, and Committee on Health Policy.

Senator Schuitmaker has been actively involved in her community. She has served on the State of Michigan Board of Medicine and Intercare Community Health Network and on the Van Buren Community Mental Health Board. In addition to her involvement in health-care causes, Senator Schuitmaker serves as a member of the Van Buren County Community Corrections Advisory Board. Furthermore, she is involved in several organizations devoted to the arts and nature conservancy including the Kalamazoo Institute of the Arts, the Southwest Michigan Land Conservancy, and the Kalamazoo Nature Center. She is also a member of the Paw Paw Rotary, the Paw Paw Optimist Club, Daughters of the American Revolution, the Kalamazoo Bar Association and the Farm Bureau in addition to other local, state and national groups.

Senator Schuitmaker and her husband Steve live in Lawton with their two children, Jordan and Savina.

JOHN G. STRAND

Since January 2001, Mr. Strand, as the Legislative Council Administrator, has served as the ex-officio member of the Michigan Law Revision Commission. The following agencies fall under his supervision: Legislative Service Bureau, Legislative Council Facilities Agency, Legislative Corrections Ombudsman, Joint Committee on Administrative Rules (staff), Michigan Law Revision Commission, State Drug Treatment Court Advisory Committee, and the Michigan Commission on Uniform State Laws.

Prior to being appointed to the Legislative Council, Mr. Strand served as Chairman of the Michigan Public Service Commission since October 1993 and had been a Tribunal Judge for the Michigan Tax Tribunal from January to October 1993. He had previously served six terms as a state legislator beginning in 1981, serving in a leadership position and as Vice Chair of the Insurance and the House Oversight Committees and as a member of the Taxation and Judiciary Committees.

Mr. Strand is a member of the State Bar of Michigan. He holds a B.A. from the University of Pittsburgh in Economics and Political Science (1973) and a J.D. from Case Western Reserve University (1976). Mr. Strand and his wife Cathy live in East Lansing, Michigan, and have two sons, Michael and Matthew.

JANE O. WILENSKY

Jane O. Wilensky was an Assistant Attorney General from 1984 until 2008, serving in the Finance and Development and Education and Social Services Divisions. From 1997 until 2008, she was the First Assistant in the Education and Social Services Division. Prior to her appointment as an Assistant Attorney General, she worked in the Office of Strategy and Forecasting in the Department of Commerce and the Office of Regulatory and Consumer Affairs in the Michigan Public Service Commission. She was a law clerk for the Hon. John W. Fitzgerald of the Michigan Supreme Court. In 2011, she was appointed Executive Secretary of the Commission.

Ms. Wilensky is a graduate of Boston University's School of Public Communications and received her J.D. *cum laude* from the Thomas M. Cooley Law School.

To: Jane Wilensky, Executive Secretary, MLRC
From: David Koelsch, Associate Professor, UDM Law School
Date: November 26, 2013

Re: Michigan Law Revision Commission -- Proposed Revisions to Michigan Laws
to Clarify References to Aliens

1. Background

There is a fair degree of imprecision in the manner in which Michigan laws refer to persons who are not citizens of the U.S. For example, Michigan laws refer to "nonresident aliens", "undocumented aliens", "alien residents", "aliens lawfully admitted", and "aliens". The issue is more than semantic because, in certain instances, benefits and rights attach by operation of law to persons depending on their immigration status. In addition, consistency between Michigan and federal nomenclature under the Immigration & Nationality Act (INA), the federal law regulating immigration, is desirable because certain matters affecting non-U.S. citizens are generally considered to lie within the province of the federal government. To be clear, revisions are not needed in an attempt to be politically or socially correct by avoiding the use of terms, such as "illegal alien", which does not appear in Michigan laws, that are viewed as pejorative.

According to the INA, "alien" is the correct legal term for persons who are not citizens or nationals of the U.S. INA 101(3), 8 U.S.C. 1101(a). "Alien" encompasses a wide swath of persons, including Lawful Permanent Residents, persons holding visitor, work or student visas, as well as persons who either entered the U.S. without permission or who overstayed a non-immigrant visa. On that basis, Michigan laws which refer to "alien" are correct, although "alien" under Michigan law is often modified with "nonresident" or "resident" or "lawfully admitted", which then distort the meaning of "alien" or, at least, raise questions regarding the intent of the Legislature.

Based on a review of all Michigan laws, references to "alien" in Michigan laws are completely accurate. For example, MCLA 700.2111, regulating who may or may not be an heir in Michigan, refers to an "alien" to clarify that whether or not a person is an alien has no bearing on their qualification to be an heir. Likewise, the Michigan constitution correctly refers to "aliens" when it clarifies that "[a]liens who are residents of this state shall enjoy the same rights and privileges in property as citizens of this state". MCLA Const. Art. 10, sec. 6.

2. Suggested Modifications

A. Pistol Ownership and Possession

MCL 28.422(c) allows an "alien lawfully admitted into the United States", who is also a "legal resident" of Michigan to purchase, carry, possess or transport a pistol. "Lawfully admitted" is not a separately defined term under Michigan law or the INA. In fact, the INA holds that, "[t]he term "lawfully admitted for permanent residence" means the status of having been "lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws". INA 101(20), 8 U.S.C. 1101(21). In contrast, millions of aliens are "lawfully admitted" to the U.S. each year for reasons other than permanent residence, including as tourists, international students, employees, and clergy.

As written, MCL 28.422(c) allows large categories of aliens to have legal access to pistols, which is not likely the intent of the Legislature. In addition, the second condition, that an alien must also be a "legal resident" of Michigan is not limiting, because "legal resident" is similarly undefined under Michigan law and the INA. The solution is simple: MCL 28.422(c) should be amended to add "for permanent residence" after "lawfully admitted" to ensure that only U.S. citizens and Lawful Permanent Residents may purchase, carry, possess or transport a pistol.

B. Driver License Eligibility and Document Requirements

Under MCL 257.303(1)(h), the Secretary of State is prohibited from issuing a license to a "nonresident, including, but not limited to, a foreign exchange student." Neither MCL 257.303(1)(h) nor any Michigan law defines "nonresident". Separately, in MCL 257.307(1), an applicant for a license who is not a U.S. citizen (i.e. "nonresidents") must present documents to verify "legal presence" in the U.S. As written, the bar in MCL 257.303(1)(h) of issuance of a driver license to a "nonresident" clearly differs from the requirement under MCL 257.307(1) that an applicant demonstrate "legal presence" in the U.S.

Slight modifications to the language of MCL 257.303(1)(h) would bring greater clarity. MCL 257.303(1)(h) should be revised to strike the current text and provide that the Secretary of State is prohibited from issuing a license to "any person who is not legally present in the U.S.". The revision has the added benefit of removing the imprecise term of "foreign exchange student", which is meaningless under both the INA and Michigan law.

C. Death Benefit Eligibility

MCLA 418.341 states that "[n]o person [for purposes of serving as a death benefit beneficiary] shall be excluded as a dependent who is a nonresident alien." The "nonresident" modifier is completely unnecessary; if the statute dropped "nonresident", it would have exactly the same meaning. The intent of the Legislature is clear: aliens can be dependents for purposes of death benefits and "nonresident" is meaningless because it does not modify "alien" under Michigan law or the INA.

D. Nomenclature Updates

MCL 764.15(2) provides that, "[a]n officer in the United States customs service or the immigration and naturalization service, without a warrant, may arrest a person" in certain circumstances. The amendment should simply specify "an officer of the U.S. Department of Homeland Security". That moniker covers any employee of DHS, including Border Patrol, Customs and Border Protection, U.S. Citizenship & Immigration Services and Immigration and Customs Enforcement.

Driver's Licenses, State ID, and Michigan Immigrants

DRAFT

Introduction

Since 2008, Michigan has required applicants for driver's licenses and state identification to provide proof of U.S. citizenship or immigration status. This change was part of a series of post-9/11 changes, and has had significant consequences for all Michiganders who use the roads. Ten states, plus the District of Columbia, have already changed their laws to permit some form of legal driving without proof of immigration status.¹ States have chosen to restore access to driver's licenses irrespective of immigration status to address significant economic and public safety-related challenges posed by greatly-increased numbers of unlicensed drivers, including reductions the agricultural workforce, exclusion from the insurance market,

This report highlights the economic and safety benefits to all Michigan residents of expanding access to driver's licenses for all otherwise-eligible Michigan drivers. Section One describes the legal background, the federal REAL ID Act and states' relationship to it; Section Two explores potential benefits to the State of Michigan by allowing more individuals to be eligible for state driver's licenses and identification cards; and Section Three states specific recommended changes to Michigan law.

Section 1: Background

A. Background of Michigan Driver's Licenses & REAL ID Act Compliance

Prior to 2008, Michigan law contained no requirement that an applicant for a driver's license or state ID card needed a specific immigration or citizenship status in order to be eligible. Applicants did have to submit documents that were sufficient to prove identity and establish state residency. A 1995 Michigan Attorney General opinion concluded that there was no law precluding an "illegal alien" from establishing residence in Michigan.² The relevant statute defined a resident as: "[one who] resides in a settled or permanent home or domicile with the intention of remaining in this state," and it contained no reference to citizenship or immigration status.³ In December 2007, Attorney General Mike Cox issued a superseding opinion.⁴ The 2007 Attorney General opinion stated that an unauthorized immigrant cannot be considered a Michigan resident and, in fact, only a Lawful Permanent Resident, commonly called a "green card" holder, could be considered a Michigan resident under the law.⁵

The Secretary of State implemented the late-2007 AG opinion in early 2008 and excluded from eligibility tens of thousands of lawfully present noncitizens as well as all unlawfully present immigrants.⁶ To address the concerns raised by the sudden change in circumstances for so many individuals who relied on the ability to drive to live, work, and study in the state, often for many years at a time, the Michigan Legislature changed the statute in February of 2008 to specify that driver's license and state ID applicants

1 National Conference of State Legislatures, *States Offering Driver's Licenses to Immigrants* (2014). Available at: <http://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx>

2 Attorney General Frank J. Kelly, Ability of an Illegal Alien to Obtain a Michigan Driver's License, Opinion No. 6883, (December 14, 1995). Available at: <http://www.ag.state.mi.us/opinion/datafiles/1990s/op06883.htm>

3 *Id.*

4 Attorney General Mike Cox, Permanent Residency Requirement for Driver's Licenses, Opinion No. 7210, (December 27, 2007). Available at: <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10286.htm>

5 *Id.*

6 See, e.g. McFarland, Jodi, *Foreigners Pinched by Driver's License Law*, Saginaw News, (February 4, 2008) available at: http://blog.mlive.com/saginawnews/2008/02/legal_immigrants_pinched_by_dr.html.

who are not U.S. citizens must be “legally present” in the U.S., including both temporary and permanent forms of legal immigration status.⁷ The definition of “legally present” has been slightly changed by lawmakers since 2008, but at this point, it refers to federal law to determine who is “legally present.” Michigan law does not currently reflect the requirements of the federal “REAL ID Act.”⁸

In June 2012, the Obama Administration announced a program called Deferred Action for Childhood Arrivals (DACA), which grants temporary relief from deportation and employment authorization documents for young people who entered the U.S. as children and meet certain education and background requirements⁹ (These young people are often referred to as “DREAMers” because they would benefit from the federal DREAM Act if it were to become law.) Initially, Michigan Secretary of State Ruth Johnson indicated that the Department of State did not consider DACA beneficiaries to be “legally present” and would not issue driver’s licenses or state identification cards to them.¹⁰ However, after she was sued by a group of DACA beneficiaries and the federal government provided clarification about their legal presence, the Secretary of State reversed her decision and began issuing driver’s licenses and state IDs to DACA beneficiaries in February of 2013.¹¹

Michigan law does not currently provide driver’s licenses to individuals with no legal status, and many people who are U.S. citizens or in lawful immigration status have struggled to prove it or obtain verification. Significant delay may occur while the Secretary of State verifies certain categories of immigration documents with United States Citizenship and Immigration Services through their Systematic Alien Verification for Entitlements (SAVE) program and noncitizens who hold those status are unable to hold driver’s licenses during verification or reverification periods.

B. Background of REAL ID Act

Signed into law on May 11, 2005, the federal REAL ID Act provides that driver’s licenses and state IDs that do not meet the Act’s requirements will not be accepted for specifically defined federal purposes. Since the enactment of REAL ID, the Department of Homeland Security (DHS) has repeatedly extended the deadline by which state driver’s licenses must meet its criteria to be accepted for federal purposes.¹² Most recently, in December 2014, DHS extended the full compliance deadline to October 1, 2020.¹³ Until compliance is required, Michigan licenses and state ID may be used as identification for the specified federal purposes. Some of these federal purposes include accessing federal facilities, boarding federally-regulated commercial aircraft, and entering nuclear power plants.¹⁴

7 Michigan Legislature, Public Act 7 Of 2008 (Effective: 2/15/2008). Available at: [https://www.legislature.mi.gov/\(S\(23egotfxeffsolt0obhi3\)\)/mileg.aspx?page=GetObject&objectName=2007-HB-4505](https://www.legislature.mi.gov/(S(23egotfxeffsolt0obhi3))/mileg.aspx?page=GetObject&objectName=2007-HB-4505)

8 See Department of Homeland Security website, <http://www.dhs.gov/real-id-enforcement-brief>

9 U.S. Citizenship and Immigration Services, Consideration of Deferred Action for Childhood Arrivals (DACA). <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>

10 Charlise Dewey, State will not grant driver’s licenses to DACA immigrants (2012). <http://www.grbj.com/articles/74634-state-will-not-grant-drivers-licenses-to-daca-immigrants>

11 <http://www.michigandaily.com/opinion/02daily-immigration-reform07>

12 National Conference of State Legislatures, The History of Federal Requirements for State Issued Driver’s Licenses and Identification Cards (2013). <http://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx>. See also <http://www.dhs.gov/real-id-faqs-states>

13 Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 79 Fed. Reg. 248 (December 29, 2014).

14 Roy Maurer, DHS Extends REAL ID Compliance Dates to 2020 (2015). <http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/dhs-extends-real-id.aspx>

C. *Two-tiered States' Driver's Licenses*

One of the REAL ID's requirements is that the applicant for a license must prove, and state agencies must verify, his or her U.S. citizenship or immigration status. However, states are not required to issue licenses that meet the Act's criteria nor must states exclusively issue licenses that meet the Act's criteria. If states decline to issue any form of REAL ID Act-compliant licenses, however, their residents must produce another identity document, such as a passport, or be subjected to additional screening for any of the specified federal purposes.¹⁵ In order to provide as many residents as possible with legally regulated access to the roads and access to government-issued identity documentation, many states have created two categories of driver's licenses and state identification: residents may either prove U.S. citizenship or immigration status and apply for an Act-compliant document which allows use for "federal" purposes, *or* residents may apply for a non-Act-compliant document for state and local purposes only. Residents unable to prove or verify citizenship or immigration status could choose the non-Act compliant license. In 2013, eight states and the District of Columbia followed other states in passing laws that enable residents to obtain driver's licenses and state identification cards regardless of their citizenship or immigration status.¹⁶

Section Two: Potential Benefits to the State of Michigan

A. *Citizens may lack proof of citizenship*

Immigrants are not the only individuals in Michigan who are currently harmed by our existing driver's license and identification restrictions. In addition to assisting noncitizens residing in Michigan, providing a non-Act-compliant form of driver's license would benefit U.S. citizens who cannot prove their citizenship. According to a 2006 study by the Brennan Center for Justice at New York University School of Law, as many as 7% of U.S. citizens nationwide did not have ready access to citizenship documents for a variety of reasons including older African Americans whose births were never registered due to discriminatory practices, U.S. citizens born abroad to American parents (common in military families), and foreign adoptees.¹⁷ Under current Michigan law, inability to prove citizenship results in inability to drive legally.

Advocates for successful prisoner reentry often cite lack of access to driver's licenses and state ID as an obstacle to successful prisoner reentry. While a 2008 Memorandum of Understanding between the Michigan Department of State and Michigan Department of Corrections allows a former prisoner's Department of Corrections ID to be used as an identity document, a prisoner must still have access to documents establishing proof of U.S. citizenship or immigration status to obtain a license under current law.¹⁸ Increasing access to driver's licenses could increase workforce participation by ex-offenders, and workforce participation is a key factor in reducing recidivism.¹⁹

15 National Immigration Law Center, *The REAL ID Act: Questions and Answers* (2015)

17 Brennan Center for Justice, *Citizens Without Proof*, (November 28, 2006). Available at: <http://www.brennancenter.org/analysis/citizens-without-proof>

18 *Memorandum of Understanding between the Michigan Department of State and the Michigan Department of Corrections Regarding Use of Prisoner Identification Cards for the Purpose of Applying for Driver's Licenses and Personal Identification Cards* (January 8, 2008), available at:

http://reentry.mplp.org/reentry/images/7/70/MOU_State_%26_MDOC-1.pdf

19 Christy A. Visher and Jeremy Travis, "Transitions from Prison to Community: Understanding Individual Pathways," *Annual Review of Sociology*, Vol. 29 (2003), pp. 89-113.

B. Insurance Savings to Consumers and Private Sector Profits

Michigan requires all individuals who want to register a car and get license plates to provide proof of insurance. Despite this, Detroit has one of the highest car insurance rates of all American cities, and Michiganders in general also pay relatively high rates.²⁰ An insurance pool widened by re-licensed undocumented immigrants would hold down premium costs for all Michigan residents. Costs accruing to all Michigan residents in the insurance market could be further mitigated by fewer claims originating with unlicensed uninsured drivers, which otherwise, would be paid for by insured drivers. Michigan insurance companies will also receive increased per capita revenues from the addition of new drivers required to purchase auto insurance.

C. Enhanced Public Safety

Michigan residents will be safer if drivers are licensed and insured irrespective of immigration status because some part of the population that is unlicensed due to inability to prove citizenship or immigration status still drives. Unlicensed drivers in general are five times more likely to be in a fatal crash as licensed drivers.²¹ Although drivers who have lost driver's licenses or cannot obtain them because they lack proof of citizenship or immigration status are not entirely representative of the overall unlicensed population, excluding them from driver's training, screening and testing means missing opportunities to address problems. Ensuring that all Michigan drivers are knowledgeable of traffic laws will decrease accidents, decrease the number of uninsured drivers who flee the scene of an accident, and consequently better the health and well-being of all Michigan residents. For example, since New Mexico began issuing non-status dependent driver's licenses in 2003, alcohol-related crashes decreased 32%, and traffic fatalities fell 23%.²² Licensing eligible individuals who cannot prove immigration status will also make communities safer in general. Studies show that by creating a more inclusive community and improving relations between immigrant communities and law enforcement, members of these communities will be more comfortable contacting the police to report and cooperate in the investigation of accidents and crimes.²³ Allowing regulated access to official identity documents to the broadest group of people also has the tendency to reduce the risk of corruption among government staff and discourage the production of fraudulent documents.

Driver's licenses assist law enforcement officers to more quickly identify the drivers they stop and evaluate if there is a threat to the officer's safety, as well as check the driver's traffic and criminal record. Police can use their resources more efficiently when residents have identity documents with accurate data, as it can take significant resources to identify an individual who doesn't possess any government-issued identification.²⁴ In addition, the driver's license database is the largest law

20 Diane Bukowski, Michigan, Detroit Car Insurance Rates Highest in Nation (2014).

<http://voiceofdetroit.net/2014/02/10/michigan-detroit-car-insurance-rates-highest-in-nation/>

21 American Automobile Association Foundation, Unlicensed to Kill Research Update (2008), available at: <https://www.aaafoundation.org/sites/default/files/UnlicensedToKillResearchUpdate.pdf>

22 See "Driver's Licenses for All: Economic and Safety Benefits," Illinois Highway Safety Coalition (Nov. 17, 2012).

23 See, e.g., Police Foundation, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, (April 2009), available at <http://www.policefoundation.org/content/local-police-immigration-enforcement>

24 *Voices from Across the Country: Local Law Enforcement Officials Discuss the Challenges of Immigration Enforcement* (Police Executive Research Forum, 2012), www.policeforum.org/library/immigration/VoicesfromAcrossTheCountryonImmigrationEnforcement.pdf, p.

enforcement database in the country, providing vast personal information, including photographs, that is updated regularly as drivers renew their licenses. State driver's license databases are more complete than the IRS database, the Social Security database, or state birth certificate databases – it is thus an invaluable tool for police investigation. A more complete database benefits law enforcement.²⁵

D. Stronger Workforce Participation

Studies have found that individuals who lack the ability to obtain driver's licenses have more difficulty maintaining steady employment, as they do not always have access to public transportation or other transit opportunities. This makes it less attractive for job creators to want to hire these individuals, as well as more likely that employers will fire people who often show up late or miss work shifts. Having a driver's license enables job seekers to be able to drive at any time--whether planned in advance or spur of the moment. This affords people much more flexibility, allowing for advanced planning for work shifts and overall a greater ability to work more frequently. The approximately 150,000 unauthorized residents in Michigan play a large role in the farming, auto, and manufacturing industries.²⁶ By allowing this workforce to lawfully drive to and from work, they will be better workers by arriving to work consistently and on time.

F. Other Contributions to the Economy

In addition, having greater access to automobile transportation increases purchasing power and consumer activity.²⁷ Michigan residents who obtain driver's licenses will contribute to Michigan's economy by being able to accomplish everyday tasks that require transportation outside the home. These include going to the grocery store, visiting the doctor, dentist, and orthodontist, shopping at the mall, and even attending local community and religious establishments, such as church and holiday affairs. Having a valid driver's license allows people to engage in these activities without worrying about potential consequences or sacrificing other economic activities in their place. In addition, driver's licenses are often used as a standard form of identification for essential daily activities, such as cashing checks, renting an apartment, and purchasing various forms of insurance. Without a valid license, individuals and communities at large are prevented from participating in these economic activities that are both essential to a stable home as well as beneficial to the Michigan economy. The ability to obtain driver's licenses will also promote the purchase of automobiles, a historical and essential industry to the Michigan economy.

15.; National Immigration Law Center, "Why it Makes Law Enforcement Sense for All California Drivers to Be Eligible for Driver's Licenses," available at: <http://www.nilc.org/document.html?id=1036>.

25 Bruce Schneier, "Giving Drivers Licenses to Illegal Immigrants," *Schneier on Security*, Feb. 13, 2008, www.schneier.com/blog/archives/2008/02/giving_drivers.html; National Immigration Law Center, *Why it Makes Law Enforcement Sense for All California Drivers to Be Eligible for Driver's Licenses*, available at: <http://www.nilc.org/document.html?id=1036>.

26 See *With 150,000 undocumented residents, Michigan has stake in U.S. debate*, Detroit Free Press, May 28, 2013, available at www.archive.freep.com/article/20130528/NEWS06/305280014/undocumented-immigrants-michigan-economy.

27 See Mary C. King, et al., *Assessment of the Socioeconomic Impacts of SB 1080 on Immigrant Groups* (Oregon Department of Transportation Research Section, June 2011), available at: www.oregon.gov/ODOT/TD/TP_RES/docs/reports/2011/sb1080.pdf (finding that as a result of not having a valid driver's license, unauthorized workers have trouble scheduling hours and accomplishing daily tasks, and reduced their large consumer purchases.)

Perhaps most significantly, Michigan's agriculture industry depends on a mostly-immigrant workforce for steady, constant production and processing. This industry is particularly profitable in Western Michigan, which produces one-third of the state's total agricultural sales--about \$1.5 billion of the regional economy. Since the 2008 changes in Michigan's driver's license law, Michigan agriculture industry groups have consistently complained of a shortage of agricultural workers in the state.²⁸ Michigan's Migrant and Seasonal Farmworkers Workgroup (MSFW), a collaboration of state agencies and stakeholders created by the Michigan Civil Rights Commission, issued a report in March 2013 highlighting the work done over the past three years to improve the living and working conditions of migrant and season farmworkers in Michigan. One of the recommendations moving forward focuses on driver's licenses. Specifically, the workgroup recommends improving the system in which migrant and seasonal farmworkers go about applying for licenses, as there still remains confusion over what individuals do or do not need to prove. The report makes it clear that access to driver's licenses is extremely important for regular seasonal and migrant farmworkers' ability to participate in the workforce.²⁹

G. Increased State Revenue

Michigan could generate significant license fee revenue from newly eligible driver's license applicants. State revenues vehicle registrations and taxes on insurance premiums and car purchases would also likely see an increase. New Mexico, which expanded access to driver's licenses in 2003, has thus far generated an estimated \$500 million in new revenue.³⁰

Section Three: Recommended Changes to Existing Michigan Law

Current Michigan law conditions driver's license eligibility on proof of citizenship or proof of legal status in the United States. In order to come into eventual compliance with the REAL ID Act to allow the majority of Michigan residents to use Michigan licenses for federal purposes and to provide driver's licenses to those without proof of citizenship or legal immigration status, the State of Michigan should:

1. Provide two forms of driver's licenses: one for those with United States citizenship or proof of legal status ("standard operator's license"); one for individuals without proof of legal status ("limited purpose operator's license");
2. Set standards for documentation required for the limited purpose operator's license;
3. Set standard for documentation required for the standard operator's license to come into compliance with the REAL ID Act;
4. Determine aesthetic differences between the standard operator's license and the limited purpose operator's license, including but not limited to: symbol(s) on the front of each license; disclaimer on back of limited purpose operator's license (e.g., "This card is not acceptable for official federal

28 See, e.g., Michigan Farm Bureau policy position citing shortage of farmworkers and need for immigration reform, available at:

https://www.michfb.com/MI/Policy_and_Politics/Issues/Immigration_Reform_Quick_Facts/

29 The Migrant and Seasonal Farmworkers' Workgroup report is available at www.michigan.gov/documents/mdcr/MSFW_Progress_Report_415366_7.pdf.

30 Erika Nava, *Share the Road: Allowing Eligible Undocumented Residents Access to Driver's Licenses Makes Sense for New Jersey* (2014). Available at: <http://www.njpp.org/reports/share-the-road-allowing-eligible-undocumented-residents-access-to-drivers-licenses-makes-sense-for-new-jersey>

purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits”).

5. Increase penalties for providing fraudulent information to the Michigan Department of State, including fraudulent claims of state residency.

State Statutes Allowing Driver Licensing Without Proof of Citizenship or Legal Residence

Washington, DC

DC ST § 50-1401.05

- Proof of identity, date of birth, and residency.
- Mayor shall not provide a social security number or any document to prove the absence of a social security number.
- An applicant shall include a certified translation of a document provided that is not in English.
- Aesthetics
 - Following on the face of the card and in its machine-readable zone in a font size no larger than the smallest font size otherwise appearing on the card: “Not valid for official federal purposes.”
 - The Mayor may incorporate different features but only if doing so would result in a card that appears more similar to regular license.
- License/permit/ID card issued under this section shall not be used to consider an individual's citizenship or immigration status, or as a basis for a criminal investigation, arrest, or detention.

Illinois

625 ILCS 5/6-105.1

- The Secretary of State may issue a temporary visitor's driver's license to an applicant who has:
 - resided in this State for a period in excess of one year,
 - is ineligible to obtain a social security number, and
 - is unable to present documentation issued by the United States Citizenship and Immigration Services authorizing the person's presence in this country.
- The applicant shall submit a valid unexpired passport from the applicant's country of citizenship or a valid unexpired consular identification document.
- Valid for 3 years.
- May not be accepted for proof of the holder's identity.
- Aesthetics
 - Shall contain a notice on its face, in capitalized letters, stating that the temporary visitor's driver's license may not be accepted for proof of identity.
 - The Secretary of State shall adopt rules for design.
- License invalid if unable to provide proof of liability insurance upon the request of a law enforcement officer.

Maryland

MD Code, Transportation, § 16-122

- Have to provide documentation for 2 years of a filed Maryland income tax return or evidence the applicant has resided in Maryland and been claimed as a dependant by an individual who has filed a Maryland income tax return.
- Aesthetics
 - Clearly state on its face and in its machine-readable zone that it is not acceptable by federal agencies for official purposes
 - Have a unique design or color indicator that clearly distinguishes it from the design or color of an identification card
- Expiration date similar to a normal license's expiration date.
- Not valid for federal identification purposes.

New Mexico

N. M. S. A. 1978, § 66 -5 -9

- For foreign nationals applying for driver's licenses, the secretary shall accept the individual taxpayer identification number as a substitute for a social security number regardless of immigration status.
- The secretary is authorized to establish by regulation other documents that may be accepted as a substitute for a social security number or an individual tax identification number.

California: Assembly Bill 60 (“AB 60”) (2013), see Cal. Veh. Code §§ 12801, 12801.9. Grants original driver’s licenses to applicants who have never received a social security number *and* who are not presently eligible for a social security number. Applicants must meet all other qualifications for licensure and provide proof of identity and California residency. The statute sets forth a non-exhaustive, enumerated list of acceptable documents for identity and residency purposes, and grants authority to the California Department of Motor Vehicles (“CA DMV”) to adopt emergency regulations specifying additional acceptable documentation. Original driver’s licenses issued pursuant to this program are required to have a small recognizable, distinguishing feature on the front (specifically, the letters “DP” replace the existing “DL”) and a disclaimer on the back (“This card is not acceptable for official federal purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits.”). The statute also: prohibits discrimination on the basis of holding a driver’s license issued pursuant to this program; prohibits the CA DMV from disclosing information obtained by applicants (including immigration-related information) except as required by law; prevents employers from disclosing applicant’s driver’s license information; and prevents driver’s licenses issued pursuant to this program from being used to consider an individual’s immigration status or as a basis for investigation or arrest.

Connecticut: House Bill 6495 (“HB 6495”) (2013), see Conn. Gen. Stat. Ann. §§ 14-36, 14-36m. Grants driver’s license to applicants who do not have proof of legal presence in the U.S. *or* who do not have a social security number. Applicants must submit proof of Connecticut residency and identity; acceptable residency and identity documents are defined by statute. Applicants must also submit an affidavit attesting that he/she has filed an immigration application *or* that he/she intends to file such application once eligible to do so. Applicants who have been convicted of felonies in Connecticut are not eligible for the license. Driver’s licenses issued pursuant to this section are required to contain a disclaimer that the license is not valid for federal identification purposes. This driver’s license may not be used for voting purposes and is “for driving purposes only.”

Colorado: Senate Bill 251 (“SB 251”) (2013), see Colo. Rev. Stat. Ann. § 42-2-505. Grants driver’s licenses to applicants not lawfully present in the U.S. Applicants must: sign an affidavit attesting to Colorado residency and provide proof of residency; apply for and provide proof of an individual taxpayer identification number (“ITIN”) issued by the U.S. IRS; sign an affidavit attesting that the applicant has applied for lawful presence or will do so as soon as eligible; *and* present one of three enumerated identity documents from the applicant’s country of origin (passport, consular ID card, or military ID card). A driver’s licenses issued pursuant to this section must clearly display the following disclaimer on its face: “Not valid for federal identification, voting, or public benefit purposes.”

Nevada: Senate Bill 303 (“SB 303”)(2013), see Nev. Rev. Stat. Ann. § 483.291, allows applicants, regardless of status, to obtain driver authorization cards (DACs) by providing foreign birth certificates or passports as proof of age and identity. Applicants must also prove their residency in the state, which can be done by providing two original or certified copies of documents such as a rent receipt or lease, a bank or credit card statement, an employment pay stub, among others. DACs are valid for one year and cost \$22.25 (plus an additional \$25 for testing). DACs appear identical to standard driver’s licenses, except it states “not valid for identification” in the top right and states “Driver Authorization Card” instead of “Driver License.” In addition to DACs and standard driver’s licenses, Nevada began issuing REAL-ID compliant licenses on November 12, 2014. SB 303 also prohibits the release of information relating to one’s legal status for purposes of enforcing immigration laws. See Nev. Rev. Stat. Ann. § 481.063.

Utah: Senate Bill 227 (“SB 227”)(2005), see Utah Code Ann. § 53-3-207 provides for the issuance of driving privilege cards for individuals who do not have proof of lawful presence. The card is not valid as proof of age for any government purpose and is valid for one year. To obtain a driving privilege card, applicants must submit fingerprints and a photograph conducted by the Bureau of Criminal Investigation or another applicable law enforcement agency. There is a \$25 licensing fee and fingerprinting costs \$25 as well. Applicants who do not have a social security number must present proof of residency for six months and provide a tax identification number. The card states “for driving privileges only” on it. After the enactment of the driving privilege card, Utah saw a decline in its uninsurance rate, in alcohol-related car crashes, and in the number of fatal car crashes. The law also requires the Bureau or agency to notify DHS (through ICE) if the applicant has any felony convictions in her criminal history or if there is an outstanding arrest warrant. The Bureau or agency is also required to inform DHS if the applicant is subsequently convicted of a crime for which there was a warrant. See Utah Code Ann § 53-3-205.5.

Vermont: Senate Bill 38 (“S38”)(2013), see Vt. Stat. Ann. tit. 23, § 603, allows individuals unable to establish legal presence to obtain an “operator’s privilege card” or alternate identification card. Applicants must have proof of their name, date and place of birth, and Vermont residency. Proof of name and date and place of birth can be achieved through valid foreign passports and certified records of birth, marriage, or divorce. Proof of residency can be established with two pieces of mail received within 30 days with the applicant’s name and address on it, a vehicle title or registration, a bank statement, an insurance card or bill, state or federal tax documents, or medical health bills, receipts, or records. Vermont’s operator’s privilege card is also available to residents who can establish legal presence but who otherwise fail to comply with the REAL ID requirements. The operator privilege card states on its face that it is not valid for federal identification or official purposes. The card expires at midnight on the eve of the applicant’s second birthday following the date of issuance, or, if the applicant pays a fee, on the eve of the applicant’s fourth birthday following the card’s issuance.

Washington: House Bill 1444 (“H 1444”)(1993), see Wash. Rev. Code Ann. § 46.20.035, allows applicants for driver’s licenses or “identcards” who lack social security numbers to obtain licenses or cards with alternate documentation to prove Washington residency. Such documentation includes utility bills and tax identification numbers. Washington was the first state to provide licenses for undocumented individuals. It has a uniform license system.

To: Michigan Law Revision Commission

From: Valerie Brannon, Research Assistant

Re: A New Cyber Business Court

Michigan's existing business courts grew out of the now-defunct cyber courts. See 2012 PA 333, MCL 600.8031 *et. seq.* The business courts, however, resolve disputes offline, as subsidiary dockets of traditional circuit courts. See MCL 600.8031. This memo proposes the creation of an online business court: one that would handle large business or commercial claims completely online, rendering dispositive, appealable decisions through online procedures.

First, existing models for online resolution of business disputes are reviewed, starting with Michigan's cyber and business courts and moving on to private models, international and academic models, and state attempts to integrate new technology into traditional courts.

Next, the memo reviews the core values and practical considerations in creating an online business court. Any court should be guided by considerations of efficiency, expertise, legitimacy, finality, and fairness. Building on the success of Michigan's business courts, resolving national commercial suits online would make the business courts more attractive forums, since they would combine greater efficiency and expertise with the trust, finality, and due process traditionally associated with the judicial process.

Finally, the memo makes recommendations about the structure of the new cyber business court.

I. Background: Michigan's Specialized Cyber and Business Courts

Michigan has previously established both cyber courts and business courts. Michigan's cyber courts were created in 2001. See 2001 PA 262. The cyber courts, however, were never funded. Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, 2013 Bus. L. Today 1 (Jan 2013). The cyber court legislation was repealed in 2012 and replaced by Michigan's currently-functioning business courts. See 2012 PA 333, MCL 600.8031.

Both the cyber and business courts were intended as economic development initiatives—to create a technology-driven process that efficiently resolves business disputes and encourages high-tech companies to come to Michigan. See Shulman, *Cyber Court in Michigan*, 80 Mich. B.J. 45, 46 (Nov 2001); *The New Michigan Business Court Legislation: Twelve Years in the Making*, 2013 Bus. L. Today at 2. This is why the jurisdiction of the two courts is almost identical: both courts governed “business and commercial disputes.” See MCL 600.8005, MCL 600.8035. The business court's jurisdictional definition, at MCL 600.8031, is almost identical to the definition used in the cyber court statute, 2002 PA 663, at MCL 600.8005.³¹ The business courts, however, do not live online in the same way the cyber court would have. Compare MCL 600.8001 with MCL 600.8039.

³¹ The business court legislation diverges from the cyber court's jurisdictional provision only in its lists of examples of actions that are and are not included within the court's jurisdiction. Compare MCL 600.8005(4)(c) with MCL 600.8031(2)(c); and MCL 600.8005(5) with MCL 600.8031(3).

A. Cyber Court

The cyber court was “an ambitious experiment,” as “the first courtroom in the nation to fully operate over the Internet.” Koscielniak & Wasson, *Cyber Court*, 82 Mich. B.J. 48 (Jan 2003). All hearings and proceedings were “to be conducted by means of electronic communications,” accommodating “parties or witnesses . . . located outside of” Michigan. MCL 600.8001. Open proceedings would be “broadcast on the internet.” *Id.* The physical and virtual facilities of the cyber courts were separate from the circuit courts. See MCL 600.8001(h); MCL 600.8001(3). The Michigan Supreme Court would have assigned judges to the cyber court under MCL 600.8003.

The cyber court had “concurrent jurisdiction over business or commercial disputes in which the amount in controversy exceeds \$25,000.00.” MCL 600.8005. Participation in the cyber courts was voluntary, so that jurisdiction operated by consent. See MCL 600.8011. By proceeding with an action in the cyber court, the parties also waived the right to a jury trial. MCL 600.8013. The cyber court was a court of record. MCL 600.8001; see also MCL 600.1416 (generally designating courts of record).

B. Business Court

The business court is not a separate court in the same way as the cyber courts were—instead, it is a “special docket” of Michigan’s circuit courts. See MCL 600.8031, MCL 600.8033. The business court docket is similarly defined, however, by reference to subject matter jurisdiction over business and commercial disputes. See MCL 600.8035. For those circuit courts required to have this special docket, jurisdiction is mandatory rather than concurrent. See MCL 600.8033, MCL 600.8035. The Michigan Supreme Court assigns sitting circuit judges to the business court “in a number reasonably reflecting the caseload of the business court.” MCL 600.8037.

The business courts have been functional since 2013, and more information can be found on the Michigan courts’ website. Michigan Judiciary, *Business Courts*, <<http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx>> (accessed March 4, 2015). See also Toering, *Michigan's Business Courts and Commercial Litigation*, 93 Mich. B.J. 26 (Aug 2014).

C. A New Cyber Business Court

The business court legislation expresses a purpose to resolve business and commercial disputes within its jurisdiction “with the expertise, technology, and efficiency of the information age economy.” MCL 600.8033. However, the only carryover from the “cyber” portion of the cyber courts is section 600.8039’s direction to file by electronic communications “whenever possible” and to meet any other “minimum standards” for technology prescribed by the state court administrative office. The business courts could resolve national commercial disputes with greater efficiency if they did more to incorporate new technology. By creating a special online court that models the old cyber court, Michigan could realize those benefits and leap to the forefront of legal technology.

II. Online Justice: Existing Models

Michigan is not the only actor to attempt to build a system of justice that incorporates new technologies, but there are no public systems that resolve disputes online. The following review of other high-tech justice systems is not intended to be comprehensive; it simply reflects the models discussed in the literature.

A. Private Sector: Online Dispute Resolution

The private sector has expanded the arena of online dispute resolution (ODR), an online version of alternative dispute resolution. A number of articles canvass these technologies, exploring the various strengths and weaknesses of the models in resolving various kinds of disputes. See, e.g., Schmitz, *“Drive-Thru” Arbitration in the Digital Age: Empowering Consumers through Binding ODR*, 62 *Baylor L. Rev.* 178 (2010). These tools are most appropriately used to resolve small claims that originate online, and usually require consent of both parties to the determination of the mediator. *Id.*

B. Virtual Courthouses

Apart from the never-operational Michigan cyber court, there are not many examples of fully virtual courts. These courts are distinguished from ODR by the traditional and binding nature of the proceedings.

1. Academic Model: Courtroom 21

The Center for Legal and Court Technology, previously known as Courtroom 21, is billed as “the world’s most technologically-advanced courtroom.” Center for Legal and Court Technology <<http://www.legaltechcenter.net>> (accessed March 7, 2015). The Center is located at William & Mary’s Marshall-Wythe Law School and run in partnership with the National Center for State Courts. *Id.* The space models a partially virtual courthouse that can be used by academics and practitioners for training and experimentation. See Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 *N.C. J. L. & Tech.* 51, 53 n 5 (2002); Lederer, *The Courtroom 21 Project: Creating the Courtroom of the Twenty-First Century*, 43 *No. 1 Judges’ J.* 39, 41-42 (2004) (mentioning a test of “fundamental concepts that were then planned for the Michigan CyberCourt”).

2. International Examples

Though neither Israel nor Singapore has moved to a completely online system, they have gone a long way to transferring case management and courtroom procedures to the virtual realm.

An Israeli court digitization project called the “New Generation Court System” implemented a wide-ranging online case management program in “all courts subject to the jurisdiction of the Court Administration Office.” See Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 2008 *UCLA J.L. & Tech.* 1. The project includes “five basic features: electronic file, work space, calendar, e-filing and task assignment.” *Id.*

Singapore has also made extensive court reforms to incorporate new technology in all stages of court proceedings. See Magnus, *The Confluence of Law and Policy in Leveraging Technology: Singapore Judiciary's Experience*, 12 Wm. & Mary Bill Rts. J. 661, 662-663 (2004) (discussing Singapore's use of "video link [including for witness testimony], electronic data interchange, and broadband technologies," as well as "systems for judicial-decision support, case management, performance measurement, and public service extension").

(1) Integrating Online Procedures into Existing Courts

There are many examples of states integrating new technologies into brick-and-mortar courts. A few highlighted in the literature are mentioned below.

(1) Arizona's Division Two

Division Two of the Arizona Court of Appeals is "virtually paperless." Espinosa, *A Word from the Future*, 49 No. 3 Judges' J. 10, 10 (2010). That court has implemented electronic filing (e-filing) as well as an electronic document management system. *Id.* Further, all judges and staff are encouraged to "give up the paper security blanket," providing tools such as new display screens and tablets and reaching a "consensus that *everyone* would have to . . . go 'paperless.'" *Id.* at 11.

(2) Florida's Courtroom 23

The Ninth Judicial Circuit Court of Florida worked with William & Mary's Center for Legal and Court Technology to implement an advanced high-tech courtroom. Technology Support, *Ninth Judicial Circuit Court* < <http://www.ninthcircuit.org/services/technology-support> > (accessed March 7, 2015). The court incorporates a variety of audio and visual equipment, including many evidence presentation devices, automated reporting, and cameras that can broadcast proceedings on the Internet. *The Michigan Cyber Court*, 4 N.C. J. L. & Tech. at 54 n 7.

(3) Michigan E-Filing

Michigan courts do not uniformly allow e-filing. The Michigan Court of Appeals has allowed e-filing for several years, and the system was recently extended to the Michigan Supreme Court. See Administrative Order No. 2014-23 (2014). Additionally, there are a number of successful e-filing pilot projects currently running in the circuit courts. See Administrative Order No. 2014-24 (2014).

III. Online Justice: Core Values and Considerations

Any new court should be designed to capture the benefits associated with specializing in business litigation online, most notably, efficiency and expertise, without compromising the core values necessary to traditional court systems: public legitimacy, finality through enforceable judgments, and due process.

Using new technologies almost inherently increases efficiency. Moving disputes online saves parties money and time, and can be significantly more convenient for out-of-state litigants used to conducting business over the Internet. See Fernandez & Masson, *Online Mediations: Advantages and*

Pitfalls of New and Evolving Technologies and Why We Should Embrace Them, 81 Def. Couns. J. 395, 399 (2014) (citing flexibility, convenience, and reduced costs among benefits of online mediations); Gilliéron, *From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?*, 23 Ohio St. J. on Disp. Resol. 301, 312-315 (2008) (emphasizing convenience, low cost, and speed of online dispute resolution); Schmitz, *“Drive-Thru” Arbitration in the Digital Age: Empowering Consumers through Binding ODR*, 62 Baylor L. Rev. 178, 200-202 (2010) (addressing aspects of online dispute resolution that enhance efficiency); Sommer, *Business Litigation and Cyberspace: Will Cyber Courts Prove an Effective Tool for Luring High-Tech Business into Forum States?*, 56 Vand. L. Rev. 561, 597-601 (2003) (evaluating whether Michigan’s cyber court will improve efficiency).

Specialization of judges in one subject matter—here, national business disputes—should also enhance expertise, hopefully leading to higher quality decisions and more predictable outcomes. See, e.g., *Business Litigation and Cyberspace*, 56 Vand. L. Rev. at 567, 584 (reviewing arguments for specialization in the form of business courts and exploring subsequent increases in the quality of decision-making).

Michigan’s online forums, however, must not sacrifice crucial aspects of the judicial process in pursuit of efficiency and expertise. Most important are legitimacy, in the form of public trust; finality, achieved through the binding and enforceable nature of judgments; and fairness, best exemplified by due process concerns.

Litigants must trust the cyber process before they will use and respect it. See *Business Litigation and Cyberspace*, 56 Vand. L. Rev. at 593 (stressing foundational nature of legitimacy of court systems). Relocating judicial processes to the Internet may undermine the trust generally placed in courts in a few ways. Most obviously, online dispute resolution eliminates face-to-face communication, potentially weakening the relationship between the parties by dehumanizing the other side. See *Online Mediations*, 81 Def. Couns. J. at 399 (discussing loss of face-to-face experience). It may also be harder for the judge to act as a mediator, by making it harder to perceive emotions and nonverbal cues. See *id.* at 400; *“Drive-Thru” Arbitration in the Digital Age*, 62 Baylor L. Rev. at 220. These concerns, however, may be less salient in the context of a national business dispute, where the parties are large corporations and the subject of the litigation is, at least theoretically, less personal.

Online procedures must also be secure to be seen as legitimate. Both online and offline judicial proceedings must balance privacy against public access, but online proceedings present both greater opportunity for access to justice and greater concerns about confidentiality. See Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J. L. & Tech. 51, 85-86 (2002). But see *From Face-to-Face to Screen-to-Screen*, 23 Ohio St. J. on Disp. Resol. at 320 (suggesting encryption technology is a sufficient solution for at least small claims). Authentication procedures for parties and judges can protect sensitive information and ensure parties are interacting with each other, rather than with hackers. See *Online Mediations*, 81 Def. Couns. J. at 401.

Enforceable judgments create finality, supporting the efficiency and legitimacy of a dispute resolution system. See Galves, *Virtual Justice as Reality: Making the Resolution of E-Commerce Disputes More Convenient, Legitimate, Efficient, and Secure*, 2009 U. Ill. J.L. Tech. & Pol'y 1, 3. See also *The Michigan Cyber Court*, 4 N.C. J. L. & Tech. at 73-73 (emphasizing the importance of enforceable decisions for successfully attracting parties). Michigan's cyber courts, even though they were located online, were courts of record. See MCL 600.8001. Any similar system should have the same safeguard.

Arguably, the most important values guiding any judicial system are fairness and due process. If online procedures largely mirror traditional courtrooms, they will likely contain the same due process safeguards. Transparency and predictability of decision-making can enhance perceptions of fairness in online systems. See *From Face-to-Face to Screen-to-Screen*, 23 Ohio St. J. on Disp. Resol. at 317. Perhaps the biggest concern of commentators is how differential access to online justice systems can jeopardize due process. See *Online Mediations*, 81 Def. Couns. J. at 400; *"Drive-Thru" Arbitration in the Digital Age*, 62 Baylor L. Rev. at 218-220. However, it seems safe to assume that in a national commercial dispute, both parties will have similar access to the Internet and any other necessary technology.

IV. Building a Cyber Business Court: Structural Considerations

Michigan, then, can build on its previous cyber and current business courts, drawing from models elsewhere to create a court that combines the efficiency of the Internet with the expertise of a business court, to achieve the honored judicial goals of legitimacy, finality, and fairness. A new cyber business court must be carefully designed to capture these principles and ensure the new procedures fit within the State's existing judicial framework. A focus on high-tech litigants can differentiate Michigan from the business courts in other states that "already ha[ve] a strong grip" on larger corporations. Sommer, 56 Vand. L. Rev. at 592-93.

A. Statutory Locus: Creating Separate Courts or Adding on to Business Courts

The first question to be answered is whether any new online court should exist separately from the circuit courts, as the cyber court did, or whether it should instead be built into the circuit courts, as the business courts are. See MCL 600.8001 (designating separate facilities of cyber courts); MCL 600.8031 (creating business courts as "special dockets").

The virtual proceedings fit naturally within the current business courts, as they would deal with a subset of business disputes that can be appropriately handled online. Locating the new cyber court within currently operating courts could resolve some of the funding issues that led to the demise of the old cyber court. Compare Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, 2013 Bus. L. Today 1 (Jan 2013).

An appropriate first step to locate the new cyber court within the business court docket would be to strengthen the language of MCL 600.8039, the provision of the business court legislation that currently encourages use of e-filing and other electronic communications. Any amendments could pull from the repealed MCL 600.8001, which required the cyber court to "sit in facilities designed to

allow all hearings and proceedings to be conducted by means of electronic communications,” and to “schedule hearings or other proceedings to accommodate parties or witnesses who are located outside of this state.”

Statutory language creating this category of specialized online judicial proceedings should capture and build on the technological advances already being used in Michigan’s Court of Appeals and select counties, including e-filing, videoconferencing and phone conferences. See Administrative Order No. 2014-23 (2014); Administrative Order No. 2014-24 (2014). Procedures surrounding e-discovery should be updated. Compare 22 NYCRR 202.70, Appendix A. New York’s Commercial Division utilizes e-filing and allows parties to appear at conferences and conduct discovery through electronic means. The Chief Judge’s Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York* (June 2011); 22 NYCRR 202.70. Upgrades to Michigan’s physical courtrooms should implement new audio and visual technologies in the courtroom. See Florida’s Courtroom 23, *supra*, which includes evidence presentation devices, automated reporting, and cameras that can broadcast proceedings on the Internet.

B. Factfinders and Decision-makers

Adding a new specialized docket might require reassigning judges, and probably training judges and other court personnel on new technology. Any legislation should ensure necessary funding is provided for technological upgrades and capacity. Judges are assigned to the business court dockets from circuit courts. See MCL 600.8037; Michigan Judiciary, *Business Courts* <<http://courts.mi.gov/administration/admin/op/business-courts/pages/business-courts.aspx>> (accessed March 8, 2015). If cyber cases are assigned from the existing jurisdiction of the business court, the judges assigned to the business court docket are more likely to have the capacity to preside over the online disputes. This would take advantage of the expertise those judges have developed in handling complex commercial cases; but, because the business court judges sit within the circuit courts, might also guard against the concerns of overspecialization, or insulation from general legal scholarship. See Sommer, 56 Vand. L. Rev. at 588 (comparing Michigan’s cyber courts to Delaware business courts).

The cyber court legislation was less specific on where the assigned judges should be drawn from, but suggested that the Supreme Court should consider the experience, interest, and personal characteristics of the judge. See MCL 600.8003. The statutory language also seemed to invite the courts to utilize retired judges. See *id.*

Retired judges have case management expertise and, perhaps, more capacity than current judges to handle a new load of cases; however, they may need more training on new technologies. Michigan’s Constitution and some statutes permit the Michigan Supreme Court to assign retired judges for limited purposes. See Const 1963, art 6, § 23; MCL 600.226 (authorizing retired judges to preside over cases); MCL 600.557 (defining senior judges and applicable requirements and duties, authorizing assignment to cases). The constitutional provision is not limited to judicial vacancies, but “allows the Court to designate retired judges for limited judicial duties or specific assignments.” *People v. Booker*,

208 Mich App 163, 177; 527 NW2d 42 (1994) (establishing also that the age limitation in Const 1963, art 6, § 19, does not apply to retired judges thus authorized). Temporary assignments are valid even though the term of the visiting judge may be open-ended. See *People v. Fleming*, 185 Mich App 270, 274-275; 460 NW2d 602 (1990).

Absent statutory authorization, retired judges may not resolve disputes, or even act only as fact-finders. See *Oakland Co Prosecutor v. Beckwith*, 242 Mich App 579, 584; 619 NW2d 172 (2000). See also *Brockman v. Brockman*, 113 Mich App 233, 237; 317 NW2d 327 (1982) (confirming that circuit courts may not implement statutes explicitly giving Supreme Court power to authorize performance of judicial duties). A court cannot assign judicial functions to retired judges acting as a discovery facilitator. See *Neal v. James*, 252 Mich App 12, 24; 651 NW2d 181 (2002), overruled on other grounds by *Henry v. Dow Chemical Co.*, 484 Mich. 483, 505 (2009). The Michigan Constitution prohibits “master[s] in chancery.” Const 1963, art 6, § 5. See also *Karibian v. Palletta*, 122 Mich App 353, 355-356; 332 NW2d 484 (1983) (citing *Brockman*, 113 Mich App 233, to suggest trial courts should not allow masters of chancery to find facts).

On balance, however, because of their experience and expertise, assigning current business court judges to the new cyber business court is recommended.

C. Finality of Decisions: Binding, Enforceable, Appealable

Legislation creating a new cyber business court should provide for finality of its decisions. The cyber court was a court of record, MCL 600.8001, generally giving it the power to enforce its own judgments. 1 Michigan Court Rules Practice, Forms, § 1:2. Appeals of its cases went to the Court of Appeals. MCL 600.8021. Appeals from business court decisions also go to the Court of Appeals. MCL 600.8041. These are appeals as of right within MCL 600.309.

D. Subject Matter Jurisdiction

Defining the jurisdiction of an online business court will help to determine where it should sit within the existing current court system. As discussed above, the former cyber court and current business court legislation contain almost identical jurisdiction over “business and commercial disputes.” See MCL 600.8005, MCL 600.8035. This term is currently defined broadly in the business court statute:

- (i) An action in which all of the parties are business enterprises.
- (ii) An action in which 1 or more of the parties is a business enterprise and the other parties are its or their present or former owners, managers, shareholders, members, directors, officers, agents, employees, suppliers, or competitors, and the claims arise out of those relationships.⁵¹ arise out of that party's organizational structure, governance, or finances.
- (iv) An action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise. MCL 600.8031(c).

The business court's jurisdictional provision also contains an amount in controversy requirement of \$25,000. MCL 600.8035.

The jurisdiction of an online cyber business court should be differentiated from that of the business court by reference to the amount-in-controversy and description of the national nature of a dispute. A higher amount-in-controversy requirement and a higher filing fee would ensure the new cyber court deals with larger disputes. The New York County Commercial Division has a monetary threshold of \$500,000, increased from \$150,000 in 2014. 22 NYCRR 202.10. New Jersey's Complex Business Litigation Program has a \$200,000 threshold, but allows some judicial discretion. *Notice to the Bar: Complex Litigation Program* <<http://www.judiciary.state.nj.us/notices/2014/n141113b.pdf>> (accessed April 22, 2015). Cases could be routed into online proceedings by request of the parties and approval by a judge, as with the old cyber court. See MCL 600.8011. Building consent into a case's assignment to the online court would also ensure that the court will have personal jurisdiction over the litigants.

If the online court is to be separate from the business court, an exception must be built into MCL 600.8035, since jurisdiction of the business court over cases covered by MCL 600.8031(c) is otherwise mandatory.



CRC MEMORANDUM



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USE OF IMMEDIATE EFFECT IN MICHIGAN

Introduction

While Michigan lawmakers have lived within the written word of the 1963 Constitution, they have ignored the spirit of a certain provision for almost as long as the Constitution has been in effect. The provision states that laws do not take effect until 90 days after the end of the legislative session, unless the legislature, by a super-majority vote, grants immediate effect. Under the immediate effect mechanism, a law takes effect immediately upon being signed by the governor. The original intent behind this provision, based on the higher vote requirement, was for immediate effect to be the exception, as opposed to the standard practice for the effective date of laws. However, legislative practice has made immediate effect more of the rule than the exception.

Lawmakers from both parties have opted to forgo the 90-day provision and instead have chosen to give almost all laws immediate effect. In 2014, 93 percent of the 406 laws enacted by the legislature were

given immediate effect. The high percentage of laws granted immediate effect last year is not a recent phenomenon. Over the past 50 years, 90 percent of all enacted legislation has been given immediate effect, while only 10 percent has taken effect 90 days following the expiration of the legislative session.

Citizens should be able to understand the basic operations of their government from reading their state constitution. In the case of the provisions dealing with the effective date of Michigan laws, many would be surprised to find out that lawmakers have routinely bypassed what is understood to be the standard method and have opted instead for the alternative method. Lawmakers should consider either proposing a constitutional amendment so that the effective date provisions reflect longstanding legislative practice or honor the spirit of the Constitution by treating immediate effect as an exception rather than the rule in the law making process.

About Immediate Effect

A review of the descriptions of how a bill becomes a law in Michigan or an interstate comparison of the effective date of enacted laws will show that Michigan laws take effect 90 days after the expiration of the session at which they are passed. An alternate provision in the Michigan Constitution bypasses the 90-day provision and allows a law to become effective immediately, or on any date prior to the 90-day point that the legislature wants to designate, contingent upon two-thirds support in each house. The rationale behind the alternative effective date provision is that if a legislative issue is of such importance to preempt the default provision, then

each legislative chamber should have little trouble amassing the additional support needed to allow a law to take effect immediately.

The provision describing the effective date of state laws is found in Article IV, Section 27 of the 1963 Michigan Constitution:

No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts by a two-thirds vote of the members elected to and serving in each house.



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Interstate Comparison. Every state has its own laws and practices related to the effective date of legislation. In general, states fall into one of four categories with respect to when legislation takes effect: 1) immediately (six states); 2) after a certain number of days following enactment (seven states); 3) after a certain number of days following adjournment (15 states, including Michigan); and 4) on a specific date (22 states). In addition to these standard provisions, a number of states that require some type of delay also permit laws to take effect immediately under certain circumstances, such as for an emergency or if approved by a super-majority vote in each legislative chamber. Michigan fits into this category.

Michigan is one of eleven states with a full-time legislature, meaning there is no limit on the length of the legislative session. Since the early 1960s, Michigan lawmakers have met in session year-round.

Nearly all of the states with full-time legislatures require laws to take effect immediately, after a certain number of days following enactment, or on a specific date. Among the full-time legislatures, Michigan is an outlier because it requires laws to take effect after a certain number of days following the end of the legislative session. This means that under the standard procedure in Michigan, laws do not become effective until mid to late March of the year after their passage.

Michigan's procedure more closely resembles that used by part-time legislatures that operate within limited legislative sessions. In states with effective dates tied to the end of the legislative session, laws generally take effect within the same year in which they were passed. In Michigan, this only happens when the regular effective date provision is bypassed and lawmakers give a law immediate effect.

Brief History

The first Michigan constitution, adopted upon statehood in 1835, contained no provisions on the matters of the effective date of legislation. From a constitutional standpoint, a law was effective as soon as it was approved by the governor and filed with the secretary of state (or after a successful legislative override vote, in the case of a veto by the governor) or on a date designated in the legislation. This is the case for laws passed by the Congress of the United States.

In 1838, the Michigan Legislature passed a law requiring that an act would become effective 30 days after approval. The purpose of this change was to provide the necessary time to communicate the law throughout the state before it became effective. This provision was amended in 1846 to extend the effective date to 60 days after approval to provide additional time to communicate the law. Since the mid-1800s, the procedures for determining when laws take effect have been contained in the Constitution and have been modified multiple times.

The 1850 Michigan Constitution

The 1850 Constitution contained an effective date provision (Article IV, Section 20), which stated:

... No public act shall take effect or be in force until the expiration of ninety days from the end of the session at which the same is passed, unless the legislature shall otherwise direct, by a two-thirds vote of the members elected to each house.

The new language significantly extended the then-existing 60-day waiting period by making laws effective 90 days following the end of the legislative session. Operating with a part-time legislature during the time meant that laws not given immediate effect became effective at some time between late August and the end of September in the year of enactment, contingent on the length of the legislative session.

Additionally, the new language authorized the legislature to direct another effective date, including immediate effect, by a two-thirds vote of the members

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electd to each house. This provided lawmakers with two options for the effective date of enacted legislation. It was believed that if a legislative issue were so pressing to demand that the law take effect immediately, the legislature would have little trouble assembling a super-majority vote.

The 1850 provision apparently permitted immediate effect of local acts without the two-thirds vote, because the language was specific as to the type of act passed by the legislature; “. . . No public act shall take effect [emphasis added].” Under the 1850 Constitution, the legislature enacted literally hundreds of local acts at each regular session that created laws or ordinances for particular local governments. (The grant of home rule powers to cities and villages in the 1908 Constitution effectively put an end to local acts, although they are still provided for in the 1963 Michigan Constitution with a super-majority vote.) Most often, local acts were given immediate effect.

The 1908 Michigan Constitution

Among the goals of the 1907-08 constitutional convention, two major objectives included slowing down the pace of legislation and placing limits on the powers of immediate effect. To this end, the architects of the 1908 Constitution included new language to allow immediate effect as an exception to the normal 90-day delay and only for certain acts. Additionally, immediate effect had to garner support from two-thirds of the members elected to each house. Specifically, the new language limited immediate effect to appropriation acts and acts necessary to preserve public peace, health, or safety. Article V, Section 21 of the 1908 Constitution stated:

No act shall take effect or be in force until the expiration of 90 days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house.

Through this modified provision, the convention delegates made granting immediate effect more difficult by limiting the universe of eligible laws. The delegates maintained the requirement that immedi-

ate effect had to receive a two-thirds vote. It was believed that the new language, coupled with the two-thirds vote requirement, would greatly reduce the number of acts granted immediate effect.

Floor debate among the convention delegates on the revised language was limited. One issue that gained attention was a proposed amendment specifying that an immediate effect vote should be by record roll call, meaning votes and names are entered in the journal of each chamber. Ultimately, the amendment was not adopted as it was noted that legislative practice at the time required a “rising vote” to verify that the two-thirds vote requirement was met. A “rising vote” does not require that an actual count of members voting yea or nay is conducted. Therefore, the actual vote total and names are not recorded in the official journal

The 1963 Michigan Constitution

The 1963 Constitution modified two aspects of lawmaking that significantly influenced the dynamic of when newly enacted laws take effect. First, the Constitution retained many of the provisions that contemplate a part-time legislature. However, soon after the new constitution took effect, it became common for the legislature to meet throughout the year and adjourn late in the year. Prior to the mid-1960s, the legislature operated on a part-time basis. Lawmakers met most years in regular session until late May or early June before adjourning. On occasion, the legislature would convene in special session, at the request of the governor, later in the same year. Although the 1963 Constitution does not explicitly require the legislature to meet on a full-time basis, that has become the norm.

Second, the provision for the effective date of newly enacted laws was altered in the new constitution. The framers of the 1963 Constitution made one significant change to the 1908 Constitution. While the current constitution retains the 90-day provision as to the effective date of statutes, by removing the restriction as to the types of acts that may be given immediate effect, the new language authorizes the legislature to give immediate effect to any act by a two-thirds vote.

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In making the change, the constitutional convention delegates noted that the earlier language was not always attended to and that a number of bills received immediate effect, but did not appear to meet the public health and safety requirements. It was their belief that immediate effect was routinely used and only withheld when the legislature failed to secure a two-thirds vote on final passage, which often resulted from policy disagreements that were rooted in differences of party affiliation.

Debate during the convention indicates that many delegates believed that the immediate effect provision of the 1908 Constitution was abused by the legislature and that this abuse reflected a lack of

respect for the purpose and intent of the immediate effect device. In granting immediate effect under the 1908 Constitution, lawmakers were not required to substantiate that a law fit into one of the eligible categories. The lack of this requirement, along with no enforcement mechanism, caused many delegates of the 1961-62 constitutional convention to question the value of limiting immediate effect to certain acts. Thus, they opted to provide the legislature with more discretion in determining which laws should be granted immediate effect.

In approving the language changes, the 1963 Constitution effectively re-established the effective date provisions that existed under the 1850 Constitution.

The Use of the Immediate Effect Provision

As previously noted, one major goal of the 1908 Constitution was to slow the legislative process and curb the misuse of immediate effect. The drafters modified existing constitutional language to make granting immediate effect to public acts more the exception than the rule. This appears to have been the case. Over the last 24 years that the 1908 Constitution was in effect (1940-1963),¹ 39 percent of the 4,996 bills enacted were given immediate effect.

With the easing of the immediate effect provisions in the 1963 Constitution, immediate effect became a commonly used tool of the legislature. In fact, granting immediate effect to laws became more the norm than the exception almost immediately after the new constitution took effect. Since 1965, 90 percent of all enacted laws were given immediate effect (see **Chart 1**). In some years, as few as 57 percent of all laws received immediate effect, while in other years, 99 percent of all laws were granted immediate effect. From 2000 through 2014, the legislature granted immediate effect to 94 percent of the laws it passed.

¹ Extra Sessions were not included in this calculation due to the nature of the bills considered. Extra sessions were called by the governor to act on issues that were of such significance that they could not wait until the next scheduled session or that they needed to be considered without the interference or confusion of other issues.

Granting Immediate Effect

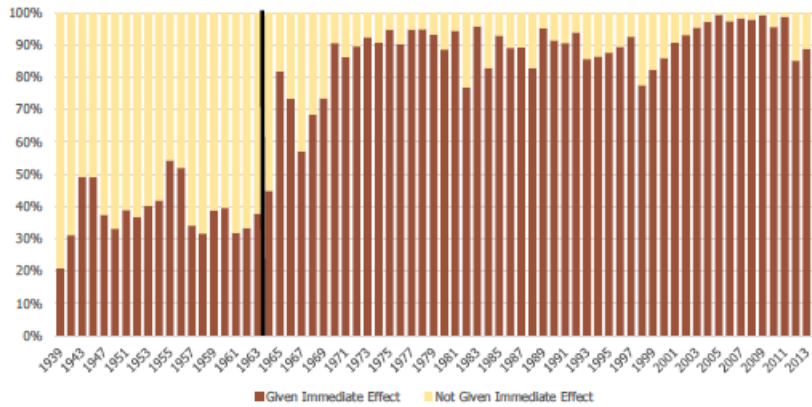
It may come as a surprise to many people that a bill that is approved by the legislature with less than two-thirds affirmative vote in each chamber can be granted immediate effect. This is because, in each chamber, a vote for immediate effect is taken separately from a vote for final passage of a bill. The 1963 Constitution contains provisions unique to each vote.

To become law, a bill needs the concurrence of a majority of the members elected to and serving in each house (Article IV, Section 26). The Michigan Legislature consists of the 110-member House of Representatives and the 38-member Senate. To gain final approval, a bill must receive at least 56 affirmative votes in the House and at least 20 affirmative votes in the Senate (assuming all seats are filled in both chambers). Section 26 further requires that a final passage vote must be by record roll call.

Under current practice in each chamber, if lawmakers want to grant immediate effect to a bill a separate immediate effect vote is taken. Similar to the final passage vote, the Constitution is clear regarding the support needed for immediate effect (two-thirds of the members elected and serving in each chamber). This means that immediate effect must be supported by 74 members of the House of Representatives and 26 members of the Senate. While the Constitution is specific as to the vote threshold, it is silent as to

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Chart 1
Michigan Laws Enacted with Immediate Effect: 1939 to 2014



Note: The 1963 Michigan Constitution includes new language regarding immediate effect. The impact before and after these changes are indicated by the vertical black line in the chart.
Source: Michigan Legislature, Legislative Services Bureau

the type of vote that each chamber must take. This differs from the provision dealing with final passage where a recorded vote is required. In effect, the Constitution leaves it to each chamber to decide how it wants to handle immediate effect votes.

Each chamber of the Michigan legislature deals with the immediate effect vote differently. The published rules of the House of Representatives state that a motion for immediate effect must be made orally by a member and recognized by the presiding officer. Under this practice, the presiding officer of the chamber determines whether there is sufficient support for granting a bill immediate effect. If the presiding officer determines there is enough support (i.e., two-thirds of the House members), a bill receives immediate effect from the House of Representatives. This practice is commonly referred to as a "rising vote" and is also used to determine if there is support for other procedural motions, such as a request for a record roll call vote. A motion for recorded vote can be made with support of one-fifth of the members present in a chamber (Article IV, Section 18).

The "rising vote" mechanism used by the House is much different than a "division vote," which is used by the Senate in granting immediate effect. The latter requires that the specific votes of members favoring and opposing an issue are counted and the numerical result is recorded. The House's "rising vote" procedure effectively provides the presiding officer with discretion to determine whether the House will grant a bill immediate effect, without a counted vote. Further, the mechanism allows the presiding officer to determine the support for immediate effect, irrespective of the vote for the bill upon final passage.

In the Senate, the rules specifically state that immediate effect can be granted to bills only after an affirmative vote of two-thirds of the members elected and serving. For the past 40 years, the Senate has used the "division vote" mechanism to meet the constitutional requirement.

The use of a "rising vote" for granting immediate effect in the House of Representatives has been controversial and subject to court challenge. In 2012, the Michigan Court of Appeals ruled that the House's

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method of granting immediate effect complies with the state Constitution.² The Court opined that the Michigan Constitution does not specifically require a roll call vote for immediate effect. The Court ruled that unlike other sections of the Constitution that call for roll call votes (Article IV, Section 26 dealing with final passage of a bill), there is no specific type of vote required in the case of immediate effect. Further, because the Constitution (Article IV, Section 16) allows each chamber to determine its own rules and procedures, the Court argued that the House can determine the manner in which an immediate effect vote is conducted for purposes of meeting the constitutional two-thirds vote requirement.

The question of whether an immediate effect vote should be by "rising vote" or roll call vote was not a new issue in 2012. In fact, the issue was raised over 100 years earlier during the 1907-08 constitutional convention. As the 1908 Constitution was being drafted, delegates discussed whether the proposed immediate effect language should require a roll call vote, as opposed to the customary "rising vote" that had been used up until then. It was decided that the "rising vote" practice was sufficient to meet the two-thirds vote requirement and there was no need to include a new requirement for a roll call vote in

the Constitution.

The opportunity for either chamber of the legislature to use the "rising vote" mechanism to meet a constitutional requirement is not limited to granting immediate effect. There are numerous other instances where a super-majority vote is required by the Michigan Constitution to approve certain legislative actions. In some of these cases, the Constitution does not require a roll call vote, but in other cases it does. For example, to override a gubernatorial veto, each chamber must approve the measure by a two-thirds vote and each vote must be by recorded in the journal (Article IV, Section 33). In contrast, the Constitution requires "the assent of two-thirds of the members" in each chamber to appropriate public money or property for a local or private purpose (Article IV, Section 30). Because this section does not specifically require a roll call vote, a "rising vote" would suffice in this instance.

The use of the "rising vote" mechanism can effectively render certain constitutional vote requirements meaningless as considerable discretion is granted to the presiding officer of a chamber in determining whether a vote threshold is met.

Arguments For and Against

Arguments for Immediate Effect

Immediate effect is attractive for legislators for a number of reasons:

Response to Constituent Concerns. Immediate effect provides evidence of legislators' abilities to respond to constituent concerns, a legitimate role of lawmakers, by getting laws passed and implemented. Laws that do not go into effect until the end of March of the year after their passage give legislators little to campaign with in a November election.

For legislators, immediate effect provides instant results and concrete evidence that they are responsive to constituents. For those lawmakers that will be forced by term limits to leave their current positions following the end of the legislative term, immediate effect provides some degree of accountability while they are still in office. If, for some reason, a law requires modification, the legislator responsible for the law can be encouraged by his constituents to make the appropriate changes before leaving office.

Advances in Communication Technology. Communication technology has advanced to the degree that information on the passage of a bill and

² At issue in *Richard Hammel v. Speaker of the House of Representatives* was whether Public Act 4 of 2012 (emergency manager law) received the necessary votes for immediate effect in the House of Representatives. Upon final passage, the legislation that would become Public Act 4 did not receive two-thirds vote in the House. According to the House Journal, the legislation

passed the House with a 63 to 47 vote. However, the House, by way of a "rising vote," provided the necessary two-thirds vote for immediate effect. The Court of Appeals used the House journal as the official record to opine that Public Act 4 had received the requisite support for immediate effect.

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enactment of a law can be transmitted to the furthest reaches of the state in a matter of minutes. At the time immediate effect was initially introduced to the Michigan Constitution in 1850, the legislature met part-time and communication throughout the state relied either on railroads or on horse and buggy.

Clearly, the expectation of local units of government and citizens to comply with laws granted immediate effect was irrational, due to the significant delay in these parties being made aware of new legislation.

Even when the current Constitution was approved in 1963, communication was nowhere near as advanced as it is today. Modern communications happen at light speed; telephones, E-mail, the Internet, radio, and television all combine to provide opportunities for local governments and people in all corners of the state to learn about changes to law minutes after enactment. These advances allow for new laws to have immediate effect without being a detriment to the parties involved on the basis of communications.

Shift to Full-Time Legislature. The shift from a part-time legislature to a full-time legislature has changed the dynamics of waiting until 90 days after adjournment of the legislature. Prior to the 1960s, the norm was for the legislature to adjourn in late May or early June. If there was other business that the legislature needed to attend to after adjourning the regular session, the governor had the power to call an extra session. Legislation enacted during the regular session without immediate effect became effective sometime between late August and late September in the same year a law was passed, depending on the length of the legislative session. This allowed for laws to prove their worth before the start of the next session.

Today, the legislature convenes in early January and adjourns in late December most years. It is possible that a legislature, composed of a majority of a different mind than the legislature that passed an act the previous year, could take up the issue and amend the act before it has a chance to become effective. Given the workings of a full-time legislature, immediate effect allows a law passed during a session to be implemented before the next legislature has an opportunity to modify or repeal the law.³

Most of the states with part-time legislatures have a requirement that laws do not take effect until after the legislature adjourns for the session. In contrast, nearly all states with full-time legislatures make laws effective after a certain number of days, or immediately, following the enactment of a law. Michigan, with its full-time legislature, has a constitutional provision (absent the immediate effect provision) that is more in line with the provisions in states with part-time legislatures.

Practical Consideration. Lawmakers must pursue immediate effect for any instance that would grant a law effect prior to 90 days following the close of a legislative session. Even if the legislature wants to delay the effective date by 30, 60, or 90 days after the governor signs an enrolled bill, an immediate effect vote is required. Similarly, if an act is to take effect on a specific date, such as an appropriations act on the first day of a new fiscal year (October 1), it will require immediate effect. Immediate effect is used as a practical solution to the two extremes set up by the current constitutional provision; laws either take effect immediately or 90 days following the adjournment of a legislative session.

Why the Practice or Law should be Changed

Arguments can also be made that the current use of immediate effect should be changed. These include:

An Understandable Constitution. Michigan citizens served by the state constitution should be able to read the document and understand the process of government law making. Based on such a reading today, most people would be surprised to find out that 90 percent of the bills passed by the legislature each year become law as soon as they are signed by the governor and filed with the secretary of state. As written in the Constitution, immediate effect is established as the exception to the standard procedure for laws taking effect – 90 days after the

³ Michigan's transition to a full-time legislature has made other constitutional provisions far less meaningful, or in some cases, completely moot. In addition to provisions regarding immediate effect, language dealing with special legislative session (Article IV, Section 28), gubernatorial "pocket veto" (Article IV, Section 33), and referendum (Article II, Section 9) were included in the 1963 Constitution based on the assumption that the legislature would function in a part-time capacity.

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end of the legislative session. Given the fact that a primary reason for having a written constitution is to inform citizens of the fundamental law by which they are governed, the text of the Michigan Constitution should reflect the standard practice of state law making and vice versa.

Political Tool. Immediate effect has been used as a political tool by both the majority and minority party, regardless of which political party is in power. From the perspective of the minority party, the immediate effect device allows it to bargain for provisions desirable to its constituency. The common use of immediate effect, combined with the prevailing mindset that most bills should have immediate effect, has created a situation where the minority party, assuming it has sufficient representation in a chamber, can effectively use immediate effect as a sort of filibuster. The minority party is able to use the majority party's desire to obtain immediate effect as a bargaining chip in slowing down the process and inserting language that better satisfies its desires. This is not to criticize actions of the minority party, or to say that it should not use any tool available in bargaining for language that better serves its desires. The point is that immediate effect was not created to serve as a filibuster for the minority party. If that is the current purpose for which it is to serve, the Constitution should be amended to make that clear.

From the perspective of the majority party, the use of the "rising vote" mechanism to meet the constitutional super-majority vote requirement can make the vote for final passage of a bill meaningless. This mechanism is currently employed in the House of Representatives. In the House, any bill that garners just enough support on final passage (i.e., 50 percent plus one vote) can be given immediate effect. In the law making process, the majority party gains a political advantage with the "rising vote" tool and the discretion granted to the presiding officer for determining support of certain procedural motions, including immediate effect. Additionally, this device can be used by the majority party to neutralize the minority party's attempt to use immediate effect as a political tool in bargaining for what it wants.

Counter to Power of Referendum. The current practice of using immediate effect works counter to the power of referendum provided for in the Con-

stitution. The process by which citizens can petition for and vote to approve or disapprove laws enacted by the legislature is referred to as voter referendum. The power to call for voter referendum on enacted laws is provided in Article II, Section 9 of the 1963 Michigan Constitution.

Voter referendum in Michigan was first authorized in 1913 as an amendment to the 1908 Constitution. The 1913 amendment duplicated the language included in the constitution dealing with laws that receive immediate effect. Specifically, the power of voter referendum did not extend to acts granted immediate effect at the time, namely appropriation acts or those acts necessary to preserve public peace, health, or safety. Also, the amendment required that the voters had 90 days from the end of the legislative session at which a law was passed to collect the necessary petition signatures to call a referendum vote. This time frame aligned with the effective date of legislation that passed without immediate effect.

In drafting the 1963 Constitution, the framers retained the voter referendum process from the earlier constitution without substantive amendment. Unlike the 1908 Constitution, the 1963 Constitution extended the referendum power to all laws, except those making appropriations. The new constitution also retained the same timeline for invoking the referendum – 90 days from the end of the legislative session at which a law was passed.

Granting immediate effect to enacted legislation can have the effect of impairing the citizenry's right to referendum. When a law is granted immediate effect, the people do not have time to gather the required number of signatures to prevent the law from going into effect. A law granted immediate effect is subject to referendum, but only after it has been in effect for sometime. By constitutional design, the purpose of the referendum process established under the 1908 Constitution, and reconfirmed in the 1963 Constitution, is for voters to have a direct say (approve or disapprove) regarding laws passed by the legislature, before they take effect.

While giving an enacted bill immediate effect does not take away the right to referendum by initiative petition, it does greatly complicate the process. As the Constitution is written, the people have the right



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to halt enactment of a law before it becomes effective by filing petitions within the 90 days after adjournment. Given the common use of immediate effect,

it is possible for a law to have been implemented for as much as a year before petitions are filed calling for a referendum.⁴

Options

To reconcile the intent behind the immediate effect clause of the Michigan Constitution and longstanding legislative practice, two viable reform options are available. Option one requires the Michigan Legislature to reduce its reliance on the immediate effect mechanism and begin honoring the spirit of the Constitution by requiring legislation to take effect 90 days after the end of a legislative session. Nevertheless, given its near permanent status in the law making process, the legislature is unlikely to do an about-face and make immediate effect the exception rather than the norm.

The second option would not require modifying longstanding legislative practice. The Michigan Legislature could propose an amendment to the state Constitution to strike the provisions stating that enacted legislation will not take effect until 90 days after the end of the session at which it was passed. Alternative language could mirror that found in other states. New language could state that legislation takes effect immediately following

enactment, which is the current practice in Michigan for over 90 percent of all laws passed. Or, the language could read that legislation only takes effect after a set number of days (30, 60, 90, etc.) following enactment. This type of language allows those affected by state laws time to prepare for implementation.

Another reform that merits consideration deals with the method through which immediate effect is granted to enacted legislation. The state constitution requires a super-majority vote to grant immediate effect; however, because a recorded vote is not required by the constitution, each chamber has adopted its own voting practice. The use of the "rising vote" mechanism, which does not require an actual vote count, calls into question whether sufficient support is garnered for legislation granted immediate effect. To address this concern, language could be added to constitution to require a roll call vote in each chamber to determine support for immediate effect.

⁴ Imagine a scenario where a bill ordered to have immediate effect is approved by both chambers and signed by the governor early in an even numbered year. The law becomes effective upon signature of the governor. Assume the legislature adjourns sine die near the end of the calendar year. Citizens would then have roughly until the end of March of the next year to file petitions for a referendum. The effect of the petitions would be to halt the effectiveness of the law, pending the statewide vote at the next general election (held in November of even number years). Under this scenario, the law would have been in effect for approximately one year before effectively being placed "on hold" until the November general election when voters have an opportunity to weigh in on the merits of the law.

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