Michigan
Law Revision Commission

EIGHTEENTH ANNUAL REPORT
1983

MICHIGAN
LAW REVISION COMMISSION

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Ex-officio Members:

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TABLE OF CONTENTS

MICHIGAN LAW REVISION COMMISSION
Eighteenth Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Law Revision Commission hereby presents its eighteenth annual report pursuant to Section 14(e) of Act No. 412 of the Public Acts of 1965.

The Commission, created by Section 12 of that Act, consists of the chairperson and ranking minority members of the Committees on Judiciary of the Senate and House of Representatives, the Director of the Legislative Service Bureau, being the five ex-officio members, and four members appointed by the Legislative Council. Terms of appointed Commissioners are staggered. The Legislative Council designates the Chairman of the Commission.

Membership

The ex-officio members of the Commission during 1983 were Senator Basil W. Brown of Highland Park, Senator Dan L. DeGrow of Port Huron, Representative Perry Bullard of Ann Arbor, Representative Ernest W. Nash of Dimondale, and Elliott Smith, Director of the Legislative Service Bureau. The appointed members of the Commission were Tom Downs, David Lebenbom, Theodore W. Swift, and Richard C. Van Dusen. Mr. Tom Downs served as Chairman; Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary.

The Commission's Work in 1983

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 recommending 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 the defects and anachronisms in the law.

4. To recommend, from time to time, 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 law of this state, civil and criminal, into harmony with modern conditions.

The problems to which the Commission directs its studies are largely identified by a study of statute and case law of Michigan and legal literature by the Commission members and the Executive Secretary. 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 past year have been devoted primarily to three areas. First, Commission members met with legislative committees to secure disposition of 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 without the United States (e.g., California, New York, and British Columbia).

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, we found that the subjects treated had been considered by the Michigan legislature in recent legislation. In other instances, Uniform or Model Acts were not pursued as formal recommendations because similar or identical legislation was currently before the legislature upon the initiation of legislators having a special interest in the particular subject. In these situations, as in the case of the Uniform Conflict of Law -- Limitations Act, the Commission simply furnished its research on the subject to the legislative committee considering the proposal.

The Commission at this time recommends immediate legislative action on only one of the topics studied. On one additional topic, the Commission prepared a study report at the request of Senator Faust, the Senate Majority Leader. The two topics are:

(1) Amendments to the Uniform Limited Partnership Act

(2) Legislative Privilege (study report).

The recommendation and proposed statute on amending the Uniform Limited Partnership Act and the study report on Legislative Privilege accompany this report. The legislative recommendation on amending the Uniform Limited Partnership Act was submitted during the year to the Senate Committee on Corporations and Economic Development, the Committee which initially reviewed the Revised Uniform Limited Partnership Act prior to its adoption in 1982. Similarly, the study report was submitted to Senator Faust during the year, and contributed to the introduction of S.B. 436, 437, and 438.

Proposals for Legislative Consideration in 1983

In addition to the recommendation submitted in 1983, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1983.

(1) Appeals to the Tax Tribunal -- H.B. 4304. See Recommendations of 1978 Annual Report, page 9.

(2) In Rem Jurisdiction by Attachment or Garnishment Before Judgment -- H.B. 4303. See Recommendations of 1978 Annual Report, page 22.

(3) Disclosure of Treatment as an Element of the Psychologist/Psychiatrist-Patient Privilege -- introduced as H.B. 5297 in 1979. See Recommendations of 1978 Annual Report, page 28.

(4) Repeal of M.C.L. §764.9 -- H.B. 4903, passed by the House and now before the Senate Committee on Judiciary. See Recommendations of the 1982 Annual Report, page 9.

(5) Amendment of R.J.A. Section 308 (Court of Appeals Jurisdiction) in accordance with R.J.A. Section 861 -- introduced as H.B. 5223 in 1981. See Recommendations of the 1980 Annual Report, page 34.

(6) Uniform Extradition and Rendition Act. See Recommendations of the 1981 Annual Report, page 8. Certain modifications of this proposal will be added during the year.

(7) Disclosure in the Sale of Visual Art Objects Produced in Multiples -- H.B. 4300, 4301, and 4302, passed by the House and now before the Senate Committee on Commerce; also S.B. 87, 89, and 90. See Recommendations of the 1981 Annual Report, page 57.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Amendments to Article 8 -- Uniform Commercial Code
(2) Eliminating Statutory References to Justice of the Peace and Other Abolished Courts
(3) Inconsistent References to "Police Officer" and "Peace Officer"
(4) Transfer of A Business Having Liquor Sales As A Minor Portion of Its Activities
(5) Registration of Assumed Names
(6) Granting and Withdrawal of Medical Practice Privileges in Hospitals
(7) Uniform Transboundary Pollution Reciprocal Access Act
(8) Uniform Transfer to Minors Act
(9) Uniform Marital Property Act
(10) Uniform Law on Notarial Acts
(11) Amendment of Uniform Federal Lien Registration Act
(12) Uniform Unclaimed Property Act

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109-1215. By using faculty members at the several law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions.

The Legislative Service Bureau has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau, who acts as Secretary to the Commission, continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

Prior Enactments

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

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

1968 Legislative Session

Jury Selection	1967, p. 23	326
Emancipation of Minors	1967, p. 50	293
Guardian ad Litem	1967, p. 53	292
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Corporations as Partners	1966, p. 34	288
Stockholder Approval of Mortgaging Assets	1966, p. 39	287

1969 Legislative Session

Administrative Procedures Act	1967, p. 11	306
Access to Adjoining Property	1968, p. 21	55
Antenuptial Agreements	1968, p. 27	139
Notice of Tax Assessments	1968, p. 30	115
Anatomical Gifts	1968, p. 39	189
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1969, p. 29	63
Venue Act	1968, p. 19	333

1970 Legislative Session

Subject	Commission Report	Act No.
Appeals from Probate Court Act	1968, p. 32	143
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Warranties in Sales of Art Act	1969, p. 47	121
Minor Students Capacity to Borrow Act	1969, p. 51	107
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

1971 Legislative Session

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

Business Corporation Act	1970, Supp.	284
Summary Proceedings for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Constitutional Amendment re Juries of 12	1969, p. 65	HJR "M"

1973 Legislative Session

Technical Amendments to Business Corporation Act	1973, p. 8	98
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96

1974 Legislative Session

Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Attachment Fees Act	1968, p. 23	306
Amendment of "Dead Man's" Statute	1972, p. 70	305
Contribution Among Joint Tort-feasors Act	1968, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

1975 Legislative Session

Subject	Commission Report	Act No.
Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Uniform Child Custody Jurisdiction Act	1969, p. 22	297
Insurance Policy in Lieu of Bond Act	1972, p. 59	290
Uniform Disposition of Community Property Rights at Death Act	1973, p. 50	289
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288

1976 Legislative Session

Due Process in 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

Elimination of References to Abolished Courts		
Preservation of Property Act	1976, p. 74	237
Bureau of Criminal Identification	1976, p. 74	538
Charter Townships	1976, p. 74	553
Fourth Class Cities	1976, p. 74	539
Election Law Amendments	1976, p. 74	540
Home Rule Cities	1976, p. 74	191
Home Rule Village Ordinances	1976, p. 74	190
Village Ordinances	1976, p. 74	189
Public Recreation Hall Licenses	1976, p. 74	138
Township By-Laws	1976, p. 74	103
Study Report on Juvenile Obscenity Law	1975, p.133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Act Amendments	1973, p. 48	63
Amendments of the Plat Act	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Special Supplement	369

1980 Legislative Session

Condemnation Procedures Act	1968, p. 11	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

1981 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to the Justice of the Peace: Provision on the Sheriff's Service of Process	1976, p. 74	148

1982 Legislative Session

Revised Uniform Limited Partnership Act	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Amendment of Probate Code as to Interest on Judgments	1980, p. 37	412

1983 Legislative Session

Elimination of Various Statutory References to Abolished Courts	1979, p. 9	87
Uniform Federal Lien Registration Act	1979, p. 26	102

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

Respectfully submitted,

Tom Downs, Chairman
David Lebenbom
Theodore W. Swift
Richard C. Van Dusen

Ex-Officio Members

Sen. Basil W. Brown
Sen. Dan L. DeGrow
Rep. Perry Bullard
Rep. Ernest W. Nash
Elliott Smith, Secretary

Date: January 27, 1984

RECOMMENDATION RE AMENDMENTS TO THE UNIFORM LIMITED PARTNERSHIP ACT

Report of the N.C.C.U.S.L.*

On February 5, 1983, the Executive Committee adopted the following amendments to ULPA (1976):

SECTION 304. [Person Erroneously Believing Himself Limited Partner.]

(a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he:

(1) .....

(2) withdraws from future equity participation in the enterprise by executing and filing in the office of the Secretary of State a certificate declaring withdrawal under this section.

(b) .....

SECTION 403. [General Powers and Liabilities.]

(a) Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions ~~and liabilities~~ of a partner in a partnership without limited partners.

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* Memorandum from John M. McCabe, Legislative Director of the N.C.C.U.S.L.

(b) Except as provided in this Act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

Under the ULC Constitution, these amendments are thereby adopted by the ULC unless they are disapproved or modified by the ULC at the next following Annual Meeting on a special order requested by any Commissioner, not later than the third day of the meeting, in a written statement specifying by section the amendments objected to. Only disputed sections will receive consideration at the Annual Meeting. This memo constitutes the required report to Commissioners, to be delivered at least 20 days before the Annual Meeting commences.

The amendment to Section 304(a)(2) adds a more specific notice requirement to facilitate withdrawal from equity participation when a partner believes that he has limited partner status, but finds he has made a good faith mistake. The amendment was agreed to by the ULC Special Committee after problems with this provision were raised by the ABA Subcommittee on Limited Partnerships. The amendment satisfies all objections. It has no tax consequences.

The amendment to Section 403 is meant to clarify the meaning of Section 403 as originally adopted. Objections to Section 403 originated in the Internal Revenue Service's review of ULPA (1976). The I.R.S. asserted that the language of this Section might be interpreted to permit the limitation of liability of all general partners to persons outside the partnership. Following that interpretation, the I.R.S. balked at promulgating a final regulation that would declare the 1916 and 1976 Acts as the same for determining tax consequences.

It became apparent that clarification of Section 403 would be essential to gain the promulgation of an acceptable regulation, and the amendment adopted by the Executive Committee on February 5 eliminates the tax problem, while retaining the original flexibility in partnership agreements contemplated in the revision of 1976. The I.R.S. is expected to finalize an acceptable regulation within a few weeks, based on the amended Section 403.

IMPORTANT: If ULPA (1976) is being considered in your state or is to be considered, please make sure these amendments are included. Section 403 is particularly critical. The amended Section 403 will avoid any difficulties with the I.R.S. If your state has recently adopted ULPA (1976), I would urge you to propose the new Section 403 as quickly as possible, also. The expected regulation will refer to ULPA (1976) as amended in 1983. To avoid questions of tax status, every state should adopt the new Section 403.

Letter from Joel S. Adelman*

Re: Proposed Amendments to the Michigan Uniform Limited Partnership Act

This is in response to your letter of February 21st, a copy of which is enclosed for your reference, and our subsequent telephone discussion concerning the captioned matter. Both of the proposed amendments set forth and discussed in John McCabe's memorandum of February 9th, which was enclosed with your letter, should be adopted, with the following minor modifications and additions:

1. In Michigan, limited partnership filings are with the chief officer of the Michigan Department of Commerce (defined in the Act as the "administrator") and not with the Secretary of State. Accordingly, in Section 304(a)(2), the words "Secretary of State" should be deleted, and the word "administrator" should be inserted instead.

2. Since Section 304(a)(2) provides for the filing of a new type of certificate, it will be necessary to amend Section 1107(a), which sets forth the filing fees for the various certificates filed under the Act, to add an additional subsection (Subsection [10]) to set forth a filing fee for the certificate referred to in Section 304(a)(2).

The amendments set forth and discussed in John McCabe's memorandum are important amendments, particularly the amendments to Section 403. As indicated in John McCabe's memorandum, the amendments to Section 403 are intended to address objections of the Internal Revenue Service to the present wording of Section 403. It is therefore important that the amendments to Section 403 be enacted as soon as possible.

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* Mr. Adelman, a partner in the firm of Honigman, Miller, Schwartz, and Cohn, was the Commission's consultant on the initial review of the Uniform Limited Partnership Act. See 15th Annual Report, page 40.

AMENDMENT OF THE UNIFORM LIMITED PARTNERSHIP ACT

A Bill to amend sections 304, 403, and 1107 of Act No. 213 of the Public Acts of 1982, entitled "An Act to authorize the formation of limited partnerships; to define the rights and liabilities of the partners, the relation of partners to each other, and to persons dealing with limited partnerships; to provide for the dissolution and winding up of limited partnerships; to provide for registration of foreign limited partnerships; to provide certain causes of action; to impose certain duties on certain state departments; to make uniform the law relating to limited partnerships; and to repeal certain acts and part of acts," being sections 449.1304, 449.1403, and 449.2107 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Sections 304, 403, and 1107 of Act No. 213 of the Public Acts of 1982, being sections 449.1304, 449.1403, and 449.2107 of the Compiled Laws of 1970 are amended to read as follows:

Sec. 304. (a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he or she has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, the person does either of the following:

(1) . . . . .

(2) Withdraws from future equity participation in the enterprise by executing and filing in the office of the administrator a certificate declaring withdrawal under this section.

(b) . . . . .

Sec. 403. (a) Except as provided in this act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions ~~and liabilities~~ of a partner in a partnership without limited partners.

(b) Except as provided in this act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this act or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

Sec. 1107. (a) The fees to be paid to the administrator with respect to a limited partnership, for the purposes specified in this section, shall be as follows:

(1) . . . . .

(2) . . . . .

(3) . . . . .

(4) . . . . .

(5) . . . . .

(6) . . . . .

(7) . . . . .

(8) . . . . .

(9) . . . . .

(10) Examining, filing and copying a certificate filed pursuant to the provisions of Section 304(a)(2), $10.00.

STUDY REPORT ON LEGISLATIVE PRIVILEGE*

LEGISLATIVE PRIVILEGE

The Current Law

The Michigan Constitution, Art. 4, §11, now reads:

> "Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house."

The underlined passage -- "except as provided by law" -- was added by constitutional amendment adopted in 1982. The current constitutional provision is a revision of the 1908 section covering legislative privilege. The 1908 constitution had provided for a privilege against arrest, except in cases of treason, felonies and breach of the peace, and against civil process, which applied during sessions and for fifteen days before and after sessions. Const. 1908, Art. 5, §8. A 1935 Supreme Court decision declared the privilege to be against civil arrest only, following a United States Supreme Court decision that all criminal offenses are comprehended by the terms "treason, felony and breaches of the peace." In re Milkowsky, 270 Mich. 687 (1935); Opinion Atty. Gen. 1926-1928, p. 343; Williamson v. United States, 207 U.S. 425, 28 S.Ct. 163. Accordingly, the 1963 constitution provided for privilege against civil arrest and civil process, limiting the privilege to the time of session and five days before and after each session. Judicial decisions establish that this constitutional privilege extends to the entire period encompassed by the session, not simply to days of "'working sessions' when the Legislature is actually sitting." Bishop v. Wayne Circuit Judge, 395 Mich. 672, 676 (1976).

In addition to the constitutional provision, several statutory provisions in Chapter 18 of the R.J.A. also grant special protection to legislators. M.C.L. §600.1821(1) provides that "no officer of the senate or house of representatives is liable to arrest on civil process while in actual attendance upon the duties of his office." This

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* This Study Report was prepared by Jerold Israel, and is based upon a research memo of Cecille Lindgren, a student at the University of Michigan Law School.

section provides an exemption from civil arrest rather than a waivable privilege. M.C.L. §600.1825(2) provides: "Senators and representatives are privileged from arrest during sessions of the legislature and for 15 days next before the commencement and after the end of each session." A counterpart provision, M.C.L. §600.1831(3) adds: "Civil process shall not be served on any senator or representative during sessions of the legislature and for 15 days next before the commencement and after the end of each session." Like M.C.L. §600.1821(1), this section provides for an exemption rather than a privilege.

With the decriminalization of traffic violations in 1979, M.C.L. §600.1865 was added to Chapter 18. It provides: "This chapter shall not apply to the issuance or service of a citation pursuant to section 742 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.742 of the Compiled Laws." A subsequent opinion of the Attorney General of May 29, 1980 noted, however, that the constitutional privilege remained as a bar to the issuance of citations to legislators for Michigan Vehicle Code violations designated as civil infractions. Since the provision authorizing traffic citations, M.C.L. §257.742, by its own terms does not encompass civil arrest, the Attorney General's conclusion apparently rested on the constitutional privilege against service of civil process, although his opinion referred generally to "the legislative privilege from civil arrest and civil process."

The Need For A Privilege From Service of Citations For Traffic Infractions

In Auditor General v. Wayne Circuit Court Judge, 234 Mich. 540 (1926), the function of the constitutional privilege against civil process and civil arrest was stated as follows:

> The idea back of the constitutional provision was to protect the legislators from the trouble, worry, and inconvenience of court proceedings during the session, and for a certain time before and after, so that the State could have their undivided time and attention in public affairs.

This policy obviously has its limits. Legislators are not privileged, for example, against arrest and prosecution for criminal offenses. The degree of disruption to the legislative process must be balanced against the need for prompt adjudication of the particular type of claim. As part of the criminal process, traffic violations were viewed as matters as to which prompt adjudication outweighed potential interference with legislative duties. The legislature had indicated that the significance of traffic violations in this regard was not altered by the shift of such violations to civil infractions. Chapter 18 of the R.J.A. deals with a variety of different settings in which persons are privileged from service of civil process (e.g., subpoenaed witnesses going to or from court). However, with the change in status of traffic violations, the legislature adopted a special provision stating that Chapter 18 would not apply to the issuance or service of a citation for such civil infractions. See M.C.L. §600.1865 quoted above (added by P.A. 67 of 1979). Because of the constitutional protection of Article 4, §11, that provision could not apply to legislators. Proposal A was widely supported on the ground that it would, consistent with the policy of M.C.L. §600.1865, permit withdrawal of the constitutional privilege as to traffic violations. If the legislature wishes to do no more than achieve this result, it could readily do so by extending the language of §600.1865 to specifically note that legislative privilege from civil process, as declared in the constitution and in M.C.L. §600.1831(3), does not apply to issuance or service of a citation pursuant to M.C.L. §257.742.

The Need For Privilege From Service of Civil Process Generally

The experience of other states suggest that the policy expressed in Auditor General v. Wayne Circuit Court Judge may not require a legislative privilege with respect to the service of any type of civil process. Eight states currently have constitutional provisions granting a privilege from civil process in language almost identical to the Michigan constitution, Art. 4, §11. These provisions are: Alaska Const. Art. II, §6; Ariz. Const. Art. 4, (ii), §8; Calif. Const. Art. IV, §11; Idaho Const. Art. III, §7; Ind. Const. Art. IV, §8; Kan. Const. Art. II, §22; Wash. Const. Art. II, §16; and Wis. Const. Art. IV, §15. South Carolina reaches the same result pursuant to a more limited constitutional provision. See

Worth v. Norton, 56 S.C. 56, 33 S.E. 792 (1899). Rhode Island provides a constitutional privilege from attachment of property. R.I. Const. Art. 4, §5. Virginia, by statute, provides a privilege against "being subject to process as a witness in any case, civil or criminal." Va. Code §30-6. All of these privilege provisions, as in Michigan, apply to the entire legislative session and several days before and after.

On the other side, in the vast majority of the states, legislators are not privileged against service of process during the legislative session. These states seek to implement the policy announced in Auditor General v. Wayne Circuit Court Judge by granting the legislator a privilege against being required to appear in court or participate in a civil suit during the period of the legislative session. This generally is done by one of two different types of statutes. Several states have provisions stating that a legislator shall not be required to appear in court or answer to a civil complaint during the specified period. See e.g., Minn. Stat. §3-16; Ky. Rev. Stat. §6.05; W.Va. §4-1-17. Other states simply have provisions granting the legislator a right to a continuance. See e.g., Nev. Rev. Stat. §1.310; N.Dak. Cent. Code §54-03-22; Tenn. Code §20-7-106. Other states do not have either type of provision as to the legislator who is a party or witness; they apparently rely on the court granting a continuance in its discretion. See e.g., Md. Cts. & Jud. Proc. Code §6-402 (continuance provision applicable only to suits in which attorney of record is a legislator).

The approach of the majority of states apparently is based on the premise that the interference with the legislator's ability to devote his energies to his legislative function stems from his participation in the litigation of a civil action, not in his being served with process. The potential for interference through participation is underscored by the fact that even those jurisdictions granting privilege against service of civil process commonly also provide for continuances as a matter of right in those suits initiated between sessions but scheduled to be heard during the session. See e.g., Alaska Stat. §24.40.031; Kan. Stat. §46-125.

Assuming the legislature accepts the premise that adequate protection of the legislative function can be provided by eliminating the privilege from service of process and providing for a continuance or prohibition against scheduling during sessions, the first portion of that task -- eliminating the current constitutional privilege -- is easily accomplished. The appropriate provision may be modeled upon Ohio Rev. Code §2333.13, which simply provides that legislators are not privileged from being served with civil process. However, the

legislature may wish to consider one limitation upon the waiver of the current privilege. Courts have held that, where the privilege does not exist, legislators may even be served on the floor of the legislative chamber. See Doyle-Kidd Dry Goods v. Munn, 151 Ark. 629, 238 S.W. 40 (1922). Arguably this would constitute an unnecessary disruption of the legislative process and should be prohibited.

Choice Between A Continuance Provision and Prohibition Against Scheduling Proceedings During A Specified Period

As noted previously, some jurisdictions grant the legislator the right to insist upon a continuance, while others simply provide a prohibition against scheduling. West Virginia Code §4-1-3, for example, referring to suits commenced against legislators, provides that "no trial shall be had or judgment rendered in any such suit" during the legislative session. Apparently, the legislator need not formally request that the proceeding be postponed, it is sufficient that he simply not appear at any proceeding scheduled during the legislative session. The judge is required to take judicial notice of the legislator's status and reschedule the proceeding accordingly. See Ga. Code §81-402 (duty to continue when legislator is absent from court, "on or without motion"). However, that legislator can waive the privilege by appearing. Id. Although this approach places no burden on the legislator, it seems likely to create considerable confusion for the court and the other parties to the action.

Under the continuance statutes, a legislator is required to move for a continuance. See e.g., Indiana §2-3-5-1. Some require a special affidavit. See Tex. Stat. Art. 2168(a). In others, notice of an intention to apply for a continuance must be served within a certain number of days prior to the term in which the case is to be heard. See e.g., S.D. Code §15-11-5. Placing the burden on the legislator to move for a continuance would not appear to be oppressive provided normal Michigan motion practice is followed. See Gen. Ct. R. 110.2. Since granting the continuance would be mandatory, a hearing on the motion should not require the legislator's presence. If ordinary motion practice is thought to be too cumbersome, it could be provided that the continuance will be granted upon the filing of a proper affidavit in advance of the scheduled hearing.

Time Period Of The Continuance

Most of the state continuance provisions require continuance for the entire session of the legislature plus a certain number of days before and after. In Michigan, such a continuance provision would limit the postponed proceedings to the few days at the end of one year and start of the next year, the only period in which the legislature is not formally in session. The result would be that, while process could be served, a suit might not be heard for a substantial period of time.

Several jurisdictions have continuance provisions limited to legislators "in actual attendance" at the legislative session. See e.g., Ill. Rev. Stat. ch. 110A, §231(c)(2); Tex. Stat. Art. 2168a. The structure of these statutes suggests, however, that they refer simply to the legislator's attendance at the session as a whole, rather than his attendance in the legislative chambers on the particular date for which the hearing or trial was set. It would be possible, however, to break new ground and require continuances only as to days in which the legislature is actually meeting (i.e., days in which a journal of proceedings in produced). The argument against imposing such a limitation was set forth in Bishop v. Wayne County Circuit Judge, 395 Mich. at 672 (1976):

> [W]e decline the invitation to define "sessions" as meaning only "working sessions" when the Legislature is actually sitting. Constituent contact, research, committee assignments, and other legislative business are not always confined to days when the Legislature is actually sitting. Under defendant's "free time" exception, the legislator asserting the privilege could spend as much time and effort convincing the process-issuing court that he was about the public's business and therefore immune as he would subjecting himself to process. The policy which underlies the privilege and which is aimed at the potential as well as actual distraction from public duty would suffer. The Constitution specifies the period during which the privilege applies. If there is to be a judicial determination that the privilege must give way, our inquiry should be focused on whether the need for process in the individual case is compelling.

> Defendant contends, with merit, that consistent late December sine die adjournments could result in immunity continued from one regular session to the next, and therefore could totally frustrate access to the judicial process. This Court is mindful that unreasonably long periods of immunity could, in a hypothetical case not before us, amount to a denial of due process, particularly if the legislator were an essential party to the litigation. The need of a wife for a judgment of divorce or of a child for a decree of support may compel a legislator's participation in the judicial process. It is conceivable that immunity unreasonably extended could result in a loss of a cause of action without a judicial tempering of the privilege, such as a rule tolling the statute of limitations during the period of inability to pursue process. However, we are also mindful that we deal with a privilege created not by statute, but by our Constitution. Today, we decide the scope of the privilege on the facts before us. As to other facts "[c]hoice may prudently be postponed until choice becomes essential."

One response to the concerns expressed in the Bishop decision is to rely on the discretion of the trial court. A provision could be adopted requiring continuances only for meeting days but also directing the court, in scheduling hearings for other days, to seek to avoid scheduling that interferes with the legislator's ability to fulfill his obligations as a legislator. The latter direction would be precatory only. It would not preclude the court from scheduling a hearing on a non-meeting day if the court concluded that was appropriate. In a case in which there was special need for a prompt hearing -- e.g., the child support decree noted in the second paragraph of Bishop quoted above -- the hearing might be scheduled on a Friday during the session (a typical non-meeting day). Even when there is no particular urgency, a hearing might be scheduled during any lengthy recess period when the loss of a few days would not interfere with the legislator's non-meeting legislative business.

If the above approach is taken, with the required continuance limited to meeting days, it would have to be decided whether the meeting days exemption should extend beyond days of actual sessions to also include days on which the legislator has a committee meeting. Continuance provisions in several jurisdictions protect the legislator

against appearance on non-session days on which legislative committees are meeting. See e.g., Cal. Civ. Pro. Code §595; Minn. Stat. §3.16; Tenn. Code §20-7-106(2); Fla. Stat. 11.111 ("any period of required committee work").

Another issue to be considered is whether the required continuance should take into consideration travel time by including the day before and the day after an actual meeting day. See Fla. Stat. 11.111.

If The Continuance Covers The Entire Session, Should Certain Types of Proceedings Be Exempted

Another possible response to the concerns expressed in the Bishop case would be to require a continuance for the entire session as to most civil actions, but recognize certain exceptions where the continuance would only extend to meeting days. The second of the two paragraphs quoted from Bishop notes the possibility that unreasonably long delays could result in a denial of due process where prompt adjudication is required. Several jurisdictions seek to identify such causes of action. They provide exceptions to the continuance requirement when the legislator is a defendant in a particular type of proceeding. Thus, Cal. Civ. Pro. Code §595 provides:

> Granting a continuance pursuant to this section is mandatory unless the court determines that such continuance would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted.

Similarly, Tex. Stat. Art. 2168 provides for a mandatory continuance in all matters ancillary to a litigation "excluding temporary restraining orders." South Carolina Code §2-1-150 excludes "litigation [that] involves emergency relief and irreparable damage." South Dakota Rev. Cod. Law §15-11-5 requires a continuance in "any action or proceeding other than for attachment, garnishment, arrest and bail, claim and delivery, injunction, receivership, and deposit in court."

If an attempt is made to specify exceptions, it would seem preferable to refer generally to the emergency nature of the proceeding (see the South Carolina provision cited above) rather than specify the particular type of action. What constitutes an emergency action in one setting might not be in another. A comparison of the California and South Dakota listings suggests the difficulties involved in seeking to present an exhaustive list of emergency actions. Indeed, an even more general exception might be appropriate, allowing the court to schedule a hearing on a non-meeting day whenever the litigation involves emergency relief or the delay would otherwise work an undue hardship on one of the parties.

Of course, if the required continuance is limited to meeting days, there would probably be no need for an emergency litigation exception. The legislature rarely meets all five days in the week, and even then, Saturdays remain available. Indeed if the continuance provision is limited to meeting days, it arguably should extend to traffic offenses. On the other hand, if the required continuance extends to the entire session, civil traffic offenses probably should be added to the list of exceptions. In some instances, those infractions may result in the assessment of points and the withdrawal of a license, a remedy which should no more be delayed than a child support order.

Providing A Deposition Alternative For A Legislator/Witness

If the continuance is required for the entire legislative session, another means of accommodating the interests of the party seeking prompt adjudication is to provide for a deposition alternative when the legislator is not a party to the suit but merely a witness. Georgia Code §81-1407 provides for such an alternative:

> Any person summoned as a witness in any case shall be excused by the judge from attending the court by reason of his attendance as a legislator in the General Assembly. In all civil cases it shall be the right of either party thereto to take the deposition, as provided by law, of any person desired to be used as a witness in the case who is a member of the General Assembly when the session of the General Assembly conflicts with the session of the court in which such case is to be tried.

Proceedings To Be Included In The Continuance

Jurisdictions vary in the proceedings included within their continuance provisions. Some apparently require a continuance of any phase of the case. See e.g., Alaska Stat. §24.40.031 ("the action shall be continued"); Ohio Rev. Code (all "proceedings" to which a legislator is a party "shall be stayed"); Ga. Code §81-1402 (duty of the court to continue "any case" in which legislator is a party); Mo. Stat. §510.120 (continuance of "suit and any and all motions or other proceedings therein, of every kind and nature, including the taking of depositions"). These provisions would extend to elements of the civil action which do not require the legislator's attendance in court (e.g., the filing of a motion). Other jurisdictions limit the continuance to proceedings which involve a hearing in court, although not necessarily one that requires the legislator's presence. California, for example, requires a continuance of "a trial of any civil action . . . or hearing on any motion, demurrer, or other proceeding." Cal. Civ. Proc. Code §595. The Kansas provision is similar. See Kan. Stat. Ann. §46.125 (legislator "shall not be required to appear . . . and participate in the trial of any action . . . or the hearing of any motion, application, or other proceeding"). The theory here is apparently to encompass any proceeding in which the legislator/party is either required to be present or might have an interest in being present. However, as to depositions, Kansas limits the continuance to a deposition which the legislator would be "required to attend." See Kan. Stat. §46.125.

Obviously, a legislator who is a party to an action may have to devote some time even to those proceedings which involve no more than the filing of papers or the presentation of legal arguments. The primary burden, however, remains the personal appearance. To limit the continuance to proceedings in which a personal appearance is <u>required</u> would be inappropriate, however, since parties may have good reason to be at a proceeding in which their attendance is not mandatory (e.g., the taking of a deposition or an evidentiary hearing at which the party is not a witness). One possibility is to restrict the continuance to the trial, any hearing at which evidence is taken, and the deposition. On the other side, it might be argued that the legislator as much as any other party should be able to attend legal arguments presented by his counsel. Of course, if the continuance were limited to meeting days, then no great hardship would be imposed upon the opposing party by continuing all hearings (including even an appeal) to a non-meeting date.

Coverage Of Administrative Proceedings

Many of the state continuance provisions are not limited to civil actions brought before courts, but also include administrative proceedings. See e.g., Cal. Civ. Pro. Code §595 (applicable to "the trial of any civil action or proceeding in a court, or any administrative proceeding before a state board or commission or officer"); Minn. Stat. §3116 ("no cause or proceeding, civil or criminal, in court or before any commission or officer or referee thereof"); Mass. Code §11-1-9 ("any cause" before "any court . . . any administrative board, agency, or commissioner"). It is arguable that the interests at stake in administrative proceedings often will be such that more prompt adjudication is required (e.g., a license revocation proceeding), but this certainly would not be true in all such proceedings. Certainly the disruption involved in required attendance is the same whether that attendance relates to a court or administrative proceeding. If the continuance is limited to legislative meeting days, the costs to the administration agency is likely to be slight.

Immunity From Liability For Suits Arising Out Of The Legislator's Official Function

Assuming that legislative privilege from civil process is eliminated, is there need for a special provision ensuring that legislators are not held liable for their official acts? Experience would suggest not. Legislators have always been subject to service of process during inter-session periods, and for many years these periods were quite substantial. Nevertheless, the protection afforded by the state constitution through §11, article 4 (providing that legislators "shall not be questioned in any other place for any speech in either house") and through the common law apparently was sufficient. The legislature in the past found no need to adopt a special immunity provision.

Section 11, article 4 reproduces language found in the constitution of over 40 states and the United States Constitution (Article 1, §6). Those provisions were adopted as formulations of a common law privilege designed to protect the legislator from harassment or reprisals from individuals disturbed by what the legislator has done in carrying out his representative functions. Tenney v. Brandhone, 341 U.S. 367, 375 (1951). The privilege is intended to benefit the people by providing them with legislators able to focus on their duties, and consequently is to be liberally construed. Coffin v. Coffin, 4 Mass. 1 (1907), State ex rel. Oklahoma Bar Assoc. v. Nixon, 295 P.2d 286 (1956).

The scope of this constitutional and common law privilege from civil responsibility has been summarized as follows:

> Members of legislative bodies cannot be held personally responsible in civil actions based upon their vote cast in the exercise of discretion vested in them by virtue of their office either for or against any particular legislation, at least in the absence of corruption. It has been suggested that legislative privilege deserves greater respect in a case in which the defendants are members of a legislature than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. However, legislative officers who also act in an administrative capacity may be liable for their illegal diversion of funds although they acted in a legislative capacity in passing an invalid resolution authorizing the diversion. It has been held that legislative privilege does not apply to statements made after adjournment sine die and after legislators have returned to their homes. 72 Am. Jur. 2d States §55.

While there are no Michigan cases directly on point, there is no reason to believe that the Michigan Supreme Court would not follow the general standards of legislative immunity as developed by the courts of other jurisdictions. Relatively few states have chosen to provide legislators with statutory protection in addition to that provided by state constitutional provisions and common law. Such statutes almost all appear to be aimed at eliminating slander and libel suits against legislators. There is, however, a Minnesota statute that is broader. Minn. Stat. §540.13 provides: "No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done by him in pursuance of his duty as such legislator."

[continued on next page]

List Of Questions To Be Considered

1. Should the privilege as to service of civil process be eliminated as civil traffic infractions?

2. Should the privilege as to service of process be eliminated as to other civil actions as well?

3. If the privilege is generally withdrawn, should it nevertheless be retained as to service in the legislative chambers?

4. Should a mandatory postponement provision be adopted? If so, should it be in a form which prohibits the scheduling of proceedings during specified periods, or should it be in a form which requires the legislator to move for a continuance?

5. Should the postponement or continuance extend to the entire legislative session or to actual meeting days?

6. If the postponement or continuance is limited to meeting days, should it include committee meeting days?

7. Should the postponement or continuance include travel time?

8. If the required postponement or continuance is limited to meeting days, should an additional precatory provision be adopted directing the court to seek to schedule proceedings so as to avoid interference with the legislator's obligation where feasible?

9. If the postponement or continuance extends to the entire session, should there be an exception for emergency proceedings? If so should such proceedings be specified or simply described in general terms as actions involving "emergency relief and irreparable damage"? Should proceedings based on civil traffic infractions be included in this group?

10. Should a deposition alternative be provided where the legislator is a witness rather than a party?

11. Should the required postponement or continuance extend to the suit as a whole, or only to the trial, evidentiary hearings, and the taking of depositions?

12. Should the required postponement or continuance extend to administrative proceedings?

13. Is there need for a special immunity statute as to acts done in the line of duty?