Michigan
Law Revision Commission

THIRTY-SEVENTH ANNUAL REPORT
2002

MICHIGAN
LAW REVISION COMMISSION

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MICHIGAN LAW REVISION COMMISSION
Thirty-Seventh Annual Report to the Legislature
for Calendar Year 2002

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its thirty-seventh 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 Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 2002 were Senator Bill Bullard, Jr. of Highland; Senator Gary Peters of Bloomfield Township; Representative James Koetje of Grandville; and Representative Stephen Adamini of Marquette. As Legislative Council Administrator, John G. Strand was the ex-officio member of the Commission. The appointed members of the Commission were Richard McLellan, Anthony Derezinski, William Whitbeck, and George Ward. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kevin Kennedy of Michigan State University-Detroit College of Law served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 2002 Commission members and staff are located at the end of this report.

The Commission's Work in 2002

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 past 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 without 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.

In 2002, the Commission held meetings on the topic of medical information privacy. A study report is included in this annual report. In 2002, the Commission also examined a group of uniform laws promulgated by the National Conference of Commissioners on Uniform State Laws and several recent court opinions suggesting legislative action. The Commission's recommendations regarding those laws and opinions are set forth in the body of this report.

Proposals for Legislative Consideration in 2003

The Commission continues to recommend favorable consideration of the following recommendations of past years upon which no final action was taken by the Legislature in 2002:

(1) Revisions to the Michigan "Lemon Law", 1995 Annual Report, page 7.

(2) Consolidated Receivership Statute, 1988 Annual Report, page 72.

(3) Condemnation Provisions Inconsistent with the Uniform Condemnation Procedures Act, 1989 Annual Report, page 15.

(4) Amendment of Uniform Statutory Rule against Perpetuities, 1990 Annual Report, page 141.

(5) Amendment of the Uniform Contribution among Tortfeasors Act, 1991 Annual Report, page 19.

(6) International Commercial Arbitration, 1991 Annual Report, page 31.

(7) Tortfeasor Contribution under Michigan Compiled Laws §600.2925a(5), 1992 Annual Report, page 21.

(8) Amendments to Michigan's Estate Tax Apportionment Act, 1992 Annual Report, page 29.

(9) Amendments to Michigan's Anatomical Gift Act, 1993 Annual Report, page 53.

(10) Ownership of a Motorcycle for Purposes of Receiving No-Fault Insurance Benefits, 1993 Annual Report, page 131.

(11) The Uniform Putative and Unknown Fathers Act and Revisions to Michigan Laws Concerning Parental Rights of Unwed Fathers, 1994 Annual Report, page 117.

(12) Amendments to the Freedom of Information Act to Cover E-Mail, 1997 Annual Report, page 133.

(13) The Uniform Conflict of Laws-Limitations Act, 1997 Annual Report, page 151.

(14) Amendments to MCL § 791.255(2) to Create a Prison Mailbox Rule, 1997 Annual Report, page 137.

(15) Uniform Unincorporated Nonprofit Association Act, 1997 Annual Report, page 144.

(16) Clarify whether MCL § 600.1621 invalidates pre-dispute, contractual venue selection clauses, 1998 Annual Report, page 203.

(17) Amend the Government Tort Liability Act to cover court-appointed psychologists, 2000 Annual Report, page 84.

(18) Examine the guilty-but-mentally ill statute and the insanity statute, 2000 Annual Report, page 85.

(19) Amend the Persons with Disabilities Act to include within its scope of protection discrimination based on the possibility of a future disability, 2001 Annual Report, page 104.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Declaratory Judgment in Libel Law/Uniform Correction or Clarification of Defamation Act.
(2) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal).
(3) Health Care Consent for Minors.
(4) Health Care Information, Access, and Privacy.
(5) Uniform Statutory Power of Attorney.
(6) Uniform Arbitration Act.
(7) Legislation Concerning Teleconference Participation in Public Meetings.
(8) Michigan Legislation Concerning Native American Tribes.
(9) Revisions to Michigan's Administrative Procedures Act and to Procedures for Judicial Review of Agency Action.

(10) Intergovernmental Agreements under the Michigan Constitution, Art III, § 5.
(11) Electronic Transactions.
(12) Termination of Parental Rights of Biological Fathers.
(13) Government Ethics Legislation.
(14) Publishing updates of Executive Branch Reorganizations.
(15) Uniform Nonjudicial Foreclosure Act.
(16) Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are at Michigan State University-Detroit College of Law, East Lansing, Michigan 48824. The Executive Secretary of the Commission is Professor Kevin Kennedy, who was responsible for the publication of this report. By using faculty members at the several Michigan 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. 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 Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle 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, Chairman
Anthony Derezinski, Vice Chairman
William C. Whitbeck
George Ward
Senator Bill Bullard, Jr.
Senator Gary Peters
Representative James Koetje
Representative Stephen Adamini
John G. Strand

A RESOLUTION HONORING SENATOR BILL BULLARD, JR.

A resolution to honor and thank Bill Bullard, Jr.

Whereas, It is with great appreciation for his long and distinguished service to the structure and substance of Michigan's legal system that we commend Bill Bullard, Jr., for his service to the Michigan Law Revision Commission. As an attorney and as a member of the Michigan Legislature who distinguished himself in both houses, Bill Bullard has had a major impact on public policy in our state over the years; and

Whereas, A graduate of the University of Michigan and the Detroit College of Law, Bill Bullard worked with the Circuit and District Courts and in local government in Oakland County prior to his first election to the House of Representatives in 1982. During his twenty years as a legislator, he carved out a reputation for integrity and effectiveness. In his years with the Senate following his 1996 election in a special election, he continued to demonstrate sound leadership especially in his work on key committees, including the Judiciary Committee.

Whereas, The combination of his experience in practicing law, working in local government, and crafting legislation as a lawmaker has given Bill Bullard exceptional insights into the role of the law in our society. We thank him for his sense of commitment.

Resolved by the membership of the Michigan Law Revision Commission, That we offer our best wishes to Bill Bullard, Jr., in gratitude for his six years of service to this commission and his long and distinguished dedication to Michigan as an attorney, legislator, and local government official.

A RESOLUTION HONORING SENATOR GARY PETERS

A resolution to commend and thank Gary Peters.

Whereas, With gratitude for his commitment to public service, we are proud to salute Gary Peters and express our gratitude for his commitment to the work of the Michigan Law Revision Commission. Since joining the commission in June 1995, he has encouraged respect for the law through his support and work for consistency and clarity in our statutes. This effort has been consistent with his overall dedication to high standards in public policy.

Whereas, A graduate of Alma College, Gary Peters earned his master's degree at the University of Detroit and his juris doctorate from the Wayne State University Law School. A member of the Naval Reserve, he distinguished himself in the world of finance and securities, as an educator, and as a member of the Rochester Hills City Council prior to his election to the Michigan Senate in 1994.

Whereas, As a lawmaker, Gary Peters contributed to the work of several committees and served as the minority vice chair of the Judiciary Committee. His understanding of commerce and trade blended well with his legal training to make him a respected voice on key issues.

Resolved by the membership of the Michigan Law Revision Commission, That we offer our best wishes to Gary Peters as we thank him for his contributions to Michigan as a lawmaker and as a member of this body for seven years.

A RESOLUTION HONORING REPRESENTATIVE JAMES KOETJE

A resolution to honor and thank James Koetje.

Whereas, With gratitude for his commitment to the highest standards of consistency in our state's statutes, we are proud to commend the Honorable James Koetje for his work with the Michigan Law Revision Commission. In his work as a legislator, practicing attorney, and community leader, he has proven to be a gentleman with a strong sense of duty to others.

Whereas, A graduate of Calvin College and the Valparaiso University School of Law, James Koetje has distinguished himself in business and in his law practice in Grandville. He has also directed his energies to his responsibilities on the Grandville City Council and the city's Zoning Board of Appeals. His talents have benefited his church and the Grandville Christian School Foundation as well.

Whereas, Since his election to the Michigan House of Representatives in 1998, James Koetje has put his wide-ranging experience to good use through the legislative process. His committee responsibilities include his work on the House Judiciary Committee and chairing the House Oversight Committee during the Ninety-second Legislature.

Resolved by the membership of the Michigan Law Revision Commission, That we thank Representative James Koetje for his work with this body over the past two years and wish him well in his continuing efforts in public service and the law.

Medical Information Privacy:
A Study Report to the Michigan Law Revision Commission

In 2000, the Michigan Law Revision Commission retained the services of Elizabeth Price Foley, Professor of Law, Michigan State University-Detroit College of Law (now at Florida International University College of Law), and Vence L. Bonham, Jr., Associate Professor, Department of Medicine, College of Human Medicine, Michigan State University, to study the issue of patient privacy and to undertake research regarding federal and Michigan laws addressing the privacy of medical information. This study was prompted in part by congressional passage of the Health Insurance Portability and Accountability Act (commonly referred to as "HIPPA") and the promulgation in 2002 of implementing regulations by the U.S. Department of Health and Human Services. A preliminary study report was submitted in 2001. The final study report follows.

One of the primary purposes of a study report -- including the following study report -- is to spark discussion and generate comments from interested groups within the state. The views and opinions expressed in the following final study report are exclusively those of the authors and not those of the Commission or of any individual member of the Commission. ***The Commission wishes to make it clear that it takes no position on the recommendations and suggestions contained in the final study report.***

The Commission also wishes to make it clear that it has not made any recommendations to the Legislature, nor will it make any such recommendations until all interested persons have had an adequate opportunity to comment on Professor Foley's and Professor Bonham's final study report.

Written comments may be submitted to the Professor Kevin Kennedy, the Commission's Executive Secretary. Comments are welcome through the end of 2003.

Final Report to

THE MICHIGAN LAW REVISION COMMISSION

on

MEDICAL INFORMATION PRIVACY

Elizabeth Price Foley, J.D., LL.M.
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Florida International University College of Law

and

Vence L. Bonham, Jr., J.D.
Associate Professor, Department of Medicine,
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I. Introduction

In the summer of 2000, the Michigan Law Revision Commission (MLRC) commissioned research regarding federal and Michigan laws addressing the privacy of medical information. This report presents the final findings of that research project.

A preliminary report was issued to the Commission in the spring of 2001. The preliminary report surveyed Michigan and federal medical privacy laws, including a detailed discussion of final regulations implementing the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA).[1]

Since the preliminary report was issued, important changes have taken place. Most notably, on August 14, 2002, the Bush Administration issued final regulations[2] that significantly modified the original set of final regulations issued by the Clinton Administration on December 28, 2000. The Bush Administration's revisions to the HIPAA privacy rules primarily affected two provisions, both of which will be discussed in this final report: (1) patient consent; and (2) marketing. These new final regulations became effective on October 15, 2002,[3] although covered entities will not be required to comply with any of the HIPAA privacy rules until April 14, 2003 (one year later-April 14, 2004 – for small health plans).[4]

It is important to note that this report (unlike the preliminary report) is relatively narrow in its focus. It does not purport to re-summarize the ninety-one pages of new final regulations issued by the Bush Administration. Rather, the purpose of this final report is to summarize for the Commission the most significant changes contained in the new Bush Administration regulations and proceed to focus on the five specific areas identified by the Commission after receipt of the preliminary report as warranting further exploration: (1) medical privacy on the internet; (2) sensitive medical information; (3) marketing; (4) business associates; and (5) a private right of action.

II. Background on HIPAA

An individual's medical information is contained in numerous forms, including paper records and charts, electronic databases, and even oral information. Medical

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[1]Pub. L. No. 104-191, 110 Stat. 1936 (1996). The initial set of final regulations was issued in the waning days of the Clinton Administration. *See* 65 Fed. Reg. 82,801 (Dec. 28, 2000).

[2]67 Fed. Reg. 53, 182 (Aug. 14, 2002).

[3]*Id.*

[4]Press Release, U.S. Dep't of Health and Human Services, Modifications to the Standards for Privacy of Individually Identifiable Health Information—Final Rule (Aug. 9, 2002), *available at* http://www.hhs.gov/news/press/2002pres/20020809.html.

information is possessed by a dizzying array of health care providers, institutions, and business entities, including physicians, hospitals, nursing facilities, pharmacies, insurers, employers, governmental agencies, third party administrators, and marketing firms. Given the broad array of personal medical information that exists and its potentially wide dissemination (particularly in the computer age), Americans have begun to express concerns about protecting the privacy of personal medical information.

In an attempt to address public concern about the privacy of medical information, most states, including Michigan, have enacted numerous scattered, uncoordinated laws providing varying degrees of access to, and privacy protection for, medical information possessed by health care providers or institutions. Because these state laws are so varied and incomplete, Congress, as part of the Health Insurance Portability and Accountability Act of 1996 (HIPPA) imposed upon itself a three-year deadline for developing federal health privacy protections.[5] Recognizing that congressional agreement on health privacy protections may not be feasible, HIPAA mandated that, if Congress could not reach agreement within the three-year time period, the task would be delegated to the Secretary of the U.S. Department of Health and Human Services (HHS).[6] Congress did not, in fact, meet its self-imposed deadline for developing federal health privacy protections and the task thus fell to HHS, which promulgated final regulations on December 28, 2000.[7] Following the election of President Bush, pressure from various interested parties resulted in the issuance by HHS of proposed modifications to the Clinton Administration's final regulations.[8] On August 14, 2002, the new set of final regulations was published in the Federal Register.[9]

A. HIPAA's Scope

HIPAA's privacy regulations are limited to three types of entities:

(1) health plans (e.g., managed care organizations and traditional insurers);[10]

(2) health care "clearinghouses" (i.e., entities that process health claims information for providers and insurers);[11] and

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[5]Pub. L. No. 104-191, Title II, Subtitle F, § 264(c)(1), 110 Stat. 2033 (1996).
[6]*Id.*
[7]65 Fed. Reg. 82,801 (Dec. 28, 2000).
[8]66 Fed. Reg. 12,738 (Mar. 20, 2002).
[9]67 Fed. Reg. 53,182 (Aug. 14, 2002).
[10]65 Fed. Reg. 82,799 (Dec. 28, 2000) (defining "health plan"). The definition of health plan is quite broad, including, inter alia, self-insured ERISA plans, HMOs, traditional health insurance plans, Medicare, Medicaid, Medigap policy issuers, issuers of long-term care insurance, employee welfare benefit plans that offer health benefits, CHAMPUS, the Indian Health Service, and SCHIP plans. *Id. See also* Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936, at § 1171(5).

(3) health care providers[12] (e.g., physicians, hospitals, pharmacists) who transmit any health information in standard electronic format.[13]

It is only if a provider or entity falls within one of these three categories that the provider or entity will be considered a "covered entity" subject to HIPAA privacy regulations.[14] Thus, while health plans and clearinghouses are always considered covered entities (and hence, subject to the HIPAA privacy regulations), health care providers are covered entities only if they transmit health information in standard electronic format. This requirement is expected to encompass most health care providers, since most providers accept payments from insurers or managed care plans which generally require that providers transmit health information in electronic format (e.g., internet, e-mail, fax, phone, etc.). Moreover, another portion of HIPAA, the Electronic Data Interchange (EDI) standards, establishes a uniform standard for all electronic data interchange of health information by covered entities and requires that, by October 16, 2003, all claims for reimbursement by Medicare submitted by providers must be submitted electronically pursuant to the uniform standard.[15] With a few narrow exceptions, paper claims to Medicare will no longer be accepted.[16]

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[11]"Health care clearinghouse" is defined as a "public or private entity, including a billing service, repricing company, community health management information system or community health information system, and 'value added' networks and switches, that does either of the following functions:

(1) Processes or facilitates the processing of health information received from another entity in nonstandard format or containing nonstandard data content into standard data elements or a standard transaction.

(2) Receives a standard transaction from anther entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.

Id. at 82,799. *See also* Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936, at § 1171(2).

[12]"Health care provider" is defined to include "any [ ] person or organization who furnishes, bills, or is paid for health care in the normal course of business." 65 Fed. Reg. 82,799 (Dec. 28, 2000). See also Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936, at § 1171(3).

[13]Examples of the transmission of health information in electronic form include, *inter alia*, the filing of health claims or equivalent encounter information, enrollment or disenrollment in a health plan, determining eligibility for a health plan, health plan payment and remittance, and referral certification and authorization. See Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936, at § 1173(a)(2).

[14]65 Fed. Reg. 82,799 (defining "covered entity").

[15]Administrative Simplification Compliance Act, Pub. L. No. 107-105, 115 Stat. 1003, at § 3. This law was signed by President Bush on December 27, 2001.

[16]*Id.* The Administrative Simplification Compliance Act states that the Secretary of HHS "shall waive" the requirement for submission of claims in electronic format if: (1) there is no method available for the submission of claims in an electronic format; or (2) the

B. HIPAA Enforcement

Any person who believes that a covered entity is not complying with the HIPAA privacy regulation may file a complaint with the Secretary of HHS within 180 days of when the individual knew or should have known that the violation occurred.[17] The Secretary may, but is not required to, investigate such complaints.[18] If the Secretary opts to investigate and determines that non-compliance has occurred, the Secretary must notify the covered entity "and attempt to resolve the matter by informal means whenever possible."[19] If the Secretary determines that the matter cannot be resolved informally, the Secretary may, but is not required to, issue written findings (to both the covered entity and the complainant) documenting the non-compliance.[20]

The HIPAA statute established a general penalty for failure to comply with the requirements and standards of the Act. Specifically, the statute states that the Secretary of HHS "shall" impose upon any person who violates the Act a penalty of not more than $100 for each violation, up to a maximum of $25,000 per calendar year for all violations of an identical requirement or prohibition.[21] In addition, the Act specifically addresses "wrongful disclosure of individually identifiable health information" and provides that a person who knowingly obtains or disclose individually identifiable health information in a manner prohibited by the Act "shall" be punished by a fine of not more than $50,000 and/or imprisonment for now more than one year.[22] If the violation is committed under false pretenses, the punishment escalates to a fine of not more than $100,000 and/or imprisonment for not more than 5 years.[23] If the violation is committed "with an intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain or malicious harm," the punishment again escalates to a fine of not more than $250,000 and/or imprisonment of not more than 10 years.[24]

Neither the HIPAA statute nor regulations permits a private right of action for violations of the privacy provisions.

C. HIPAA Preemption

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entity submitting the claim is a small provider of services or supplier; and (3) may waive the requirements in such unusual circumstances as the Secretary finds appropriate. *Id.* *See also id.* at § 3(a)(2) (defining "small provider").

[17] 65 Fed. Reg. at 82,801. The Secretary may waive the 180 day time limit for good cause. *Id.*

[18] *Id.* at 82,802.

[19] *Id.*

[20] *Id.*

[21] 42 U.S.C. § 1320d-5 (2003).

[22] *Id.* at § 1320d-6(b)(1).

[23] *Id.* at § 1320d-6(b)(2).

[24] *Id.* at § 1320d-6(b)(3).

While the HIPPA privacy regulations have provided new federal protections for the privacy of medical information, they are considered to be a minimum, or floor, of protection. State laws contrary to and less protective than HIPAA's protection are preempted; state laws that are "more stringent" than the HIPAA protections are not preempted,[25] even if they are contrary to HIPAA.[26] Three categories of state laws are explicitly *not preempted* by HIPAA (even if they are less stringent that the protection afforded under HIPAA): (1) state laws that authorize or prohibit disclosure of protected health information about minors to parents, guardians, or persons acting *in loco parentis* (i.e., parental notification laws);[27] (2) state laws that provide for the reporting of disease or injury, child abuse, birth, or death, or for the conduct of public health investigations;[28]

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[25]*See* Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, Title II, Subtitle F, § 264(c)(2), 110 Stat. 2033 (1996) ("A [health privacy] regulation promulgated [by HHS] shall not supercede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are more stringent than the requirements, standards, or implementation specifications imposed by regulation.").

[26]*See id.* at 82, 801. The final regulation defines a "more stringent " state laws one which meets one or more of the following criteria:

(1) With respect to a use or disclosure, the law prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted under this subchapter, except if the disclosure is:
    (i) required by the Secretary in connection with determining whether a covered entity is in compliance with this subchapter, or
    (ii) To the individual who is the subject of the individually identifiable health information.
(2) With respect to the rights of an individual, who is the subject of the individually identifiable health information, regarding access to or amendment of individually identifiable health information, permits greater rights of access or amendment, as applicable
(3) With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, provides the greater amount of information.
(4) With respect to the form, substance, or the need for express legal permission from an individual, who is the subject of the individually identifiable health information, for use or disclosure of individually identifiable health information, provides requirements that narrow the scope of duration, increase the privacy protections afforded (such as by expanding the criteria for), or reduce the coercive effect of the circumstances surrounding the authorization or consent, as applicable.

Id.

[27]*Id.* at 82,800. *See also* 67 Fed. Reg. 53182, 53,266 (Aug. 14, 2002) (amending definition of "more stringent").

[28]*Id.* at 82,801.

and (3) state laws that require health plans to report or grant access to information for the purpose of audits, evaluation, or licensure, or certification of facilities or individuals.[29]

A state (acting through its chief elected official or his/her designee) or others may request, in writing, that the Secretary except a state law from preemption.[30] The Secretary may except a state law from preemption of the Secretary finds one of the following: (1) that the state law is necessary to prevent health care fraud and abuse; (2) that the state law is necessary to ensure appropriate state regulation of insurance and health plans; (3) that the state law is necessary for state reporting on health care delivery or costs; (4) that the state law is necessary for purpose of serving a compelling need related to public health, safety, or welfare, and, if a privacy standard is at issue, if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served; or (5) that the state law has as its principal purpose the regulation of the manufacture, registration, distribution, dispensing, or other control of any controlled substances.[31]

D. August 2002 Final Regulations

(1) Consent

The recent regulations issued by the Bush Administration in August 2002 significantly altered the earlier Clinton Administration final regulations regarding the issue of patient consent. Specifically, the final regulations issued by the Clinton Administration stated that any health care provider with a direct treatment relationship with a patient was required to obtain the patient's *written consent* in order to use or disclose protected health information for the purpose of treatment, payment, or health care operations.[32] This written consent had to be signed and dated by the patient,[33] and the patient had the right to revoke consent (in writing) at any time.[34] The Clinton Administration final regulations permitted health care providers to condition treatment or enrollment on obtaining the patient's written consent.[35]

The August 2002 regulations issued by the Bush Administration deleted the consent requirement. Although covered entities may--if they so choose--obtain patient consent prior to using or disclosing protected health information for treatment, payment or health care operation, they are *no longer required to obtain consent* prior to such use or disclosure to third parties.[36] Instead of requiring written patient consent prior to such use/disclosure, the revised rules require only that covered entities send a written copy of

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *See* 65 Fed. Reg. 82,510, at § 164.506(a).
[33] *Id.* at 82,810.
[34] *Id.*
[35] *Id.* at 82,810, at § 164.506(b).
[36] 67 Fed. Reg. 53,182, 53,208-53,211.

their privacy practices to their patients.[37] This written notice may be sent by mail or email and is not required to be contained in a separate and distinct mailing (i.e., the notice may be combined with other materials).[38] Providers are required to make a good faith effort to obtain a written acknowledgement of the patient's receipt of this notice.[39] If the patient's written acknowledgement is not obtained by the provider, the provider will not be in violation of the privacy rules so long as the provider can document its good faith effort to obtain the patient's written acknowledgement.[40]

Because the August 2002 regulations have eliminated the requirement of patient consent, covered entities are now free to use or disclose personally identifiable health information for treatment, payment, and health care operations, subject only to the requirement that they notify their patients of their privacy practices every three years. This significant modification thus creates a *new gap* in HIPAA that states such as Michigan may want to fill. Specifically, Michigan may want to enact a statute that would re-institute the original final regulations' requirement of patient consent prior to use/disclosure of health information for treatment, payment or health care operations. Montana, for example, has enacted a statute that requires written patient authorization before a health care provider (or his/her agent/employee) may disclose a patient's health information for most purposes.[41]

(2) Marketing

The Clinton Administration's final regulations permitted covered entities to disclose protected health information for marketing purposes, so long as the covered entity obtained written consent from the patient.[42] Moreover, the patient was given a right to "opt out" of any future marketing activities of the covered entity.[43] As pointed out in the preliminary report to the Commission, this initial final regulation was criticized by privacy advocates as essentially giving covered entities "one free pass" to use/disclose protected health information for marketing or fundraising purposes. The preliminary report suggested that Michigan may want to consider enacting legislation to prohibit covered entities from using/disclosing protected health information to engage in any

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[37] *See* 67 Fed. Reg. 53,238-53,243 (discussing modifications to Section 164.520, dealing with notice of privacy practices for protected health information).
[38] 67 Fed. Reg. at 53,243 ("The Department clarifies that no special or separate mailings are required to satisfy the notice distribution requirements.").
[39] 67 Fed. Reg. at 53,239.
[40] *Id.*
[41] *See* MONT. CODE ANN. § 50-16-525(1) (2002); *id.* at § 50-16-526. The statute permits unauthorized disclosure on a "needs to know" basis in certain specific situations. *Id.* at § 50-16-529-530. State officials may enforce the Act, *id.* at § 50-16-552, or aggrieved citizens may institute private rights of action if harmed by unlawful disclosure. *Id.* at §50-16-553.
[42] 65 Fed. Reg. 82,510, 82,810, at § 164.506(a).
[43] *See* 65 Fed. Reg. 82,819 at § 164.514(e)(2)(C); *see also id.* at § 164.514(e)(3)(i).

marketing or fundraising unless the patient has provided specific *authorization* for such use.

The Bush Administration's final regulations now require that covered entities obtain specific *authorization* before they may send marketing materials to individuals.[44] While this modification seems, at first blush, to provide *greater* privacy protections for consumers than those contained in the Clinton Administration's final regulations, this not the case.[45] By creating several new exceptions to the definition of "marketing," the Bush Administration's final regulations have narrowed the term significantly, with the result that many communications previously considered marketing no longer are. The new final regulation's definition of marketing is complex, but it essentially defines marketing as one of two types of communications: (1) those flowing from a *third party* directly to patients as the result of the covered entity selling its patient lists to the third party; or (2) those flowing from a *covered entity* to an individual in which the covered entity has received remuneration for recommending a product or service *not related to health.*[46] An

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[44]The final regulation states:

> Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of protected health information for marketing, except if the communication is in the form of:
>
> (A) A face-to-face communication make by a covered entity to an individual; or
>
> (B) A promotional gift of nominal value provided by the covered entity.

67 Fed. Reg. at 53,268, § 164.508(a)(3)(i).

[45]Joanne Hustead of the Health Privacy Project at Georgetown University stated:

> Due to the final modifications released in August 2002, the HIPAA privacy regulation has been furthered weakened. The Health Privacy Project is particularly concerned by HHS's decision to eliminate the provider consent requirement and to open up people's medical files for marketing activities with prior authorization. While HHS claims to have strengthened the marketing provisions by requiring prior authorization for marketing, the Department has done quite the opposite: HHS has defined the term 'marketing' in a way that effectively legalizes some of the most egregious marketing tactics of the chain drug stores and their partners, the pharmaceutical industry.

Oversight Hearing on Privacy Concerns Raised by the Collection and Use of Genetic Information by Employers and Insurers Before the House Comm. on the Judiciary, Subcomm. on the Constitution, 107th Cong. (Sept. 12, 2002) (statement of Joanne L. Hustead, Senior Counsel, Health Privacy Project, Georgetown Univ.), *available at* http://www.healthprivacy.org/usr_doc/House_Genetics_Testimony902.pdf.

[46]The new definition is found in § 164.50, which states as follows:

> Marketing means:
>
> (1) To make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service, unless the communication is made:
>
> (i) To describe a health-related product or service (or payment for such

example of the former type of marketing communication would be a communication sent to patients taking anti-anxiety drugs from a drug manufacturer as a result of a covered entity (e.g., pharmacy) selling its patient lists directly to the drug manufacturer[47]. An example of the latter would be communications sent to patients taking anti-anxiety medications by a pharmacy (a covered entity) that advertises for relaxing vacations (a product or service not related to health), if the communication is paid for by a travel agency. These communications are considered "marketing" under the new final regulations and therefore cannot be made without the individual's explicit prior authorization.

The types of communications that are *not* considered marketing under the new final regulations (and which therefore may be made *without* authorization or consent of the patient) are: (1) communications made by a covered entity to a patient wherein the covered entity is *not paid for* making the communication; and (2) communications made by a covered entity to a patient wherein the covered entity is *paid for* recommending a *health related* product or service.[48] An example of situation number one (unremunerated

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product or service) that is provided by, or included in a plan of benefits of, the covered entity making the communication, including communications about: the entities participating in a health care provider network or health plan network; replacement of, or enhancements to, a health plan; and health-related products or services available only to health plan enrollee that add value to, but are not part of, a plan of benefits.

(ii) For treatment of the individual; or

(iii) For case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual.

(2) An arrangement between a covered entity and any other entity whereby the covered entity discloses protected health information to the other entity, in exchange for direct or indirect remuneration, for the other entity or its affiliate to make a communication about its own product or service that encourages recipients of the communication to purchase or use that product or service.

67 Fed. Reg. at 53,267, § 164.501.

[47]*See* 67 Fed. Reg. at 53,187 ("[M]any were concerned that a pharmaceutical company could pay a provider for a list of patients with a particular condition or taking a particular medication and then use that list to market its own drug products directly to those patients. The commenters believed the proposal would permit this to happen under the guise of the pharmaceutical company acting as a business associate of the covered entity . . . . Therefore, the Department is adding language that would make clear that business associate transactions of this nature are marketing. . . . These communications are marketing and can only occur if the covered entity obtains the individual's authorization . . . .")

[48]*See* 67 Fed. Reg. at 53,188 ("Covered entities may, however, use protected health information to communicate with individuals about the covered entity's own health related products or services, the individual's treatment, or case management or coordination for the individual. The covered entity does not need an authorization for

communications) would be a pharmacy that sends, on its own initiative and at its own expense, a communication to a patient that recommends that the patient switch medications to avoid a possible adverse drug reaction. An example of situation number two (remunerated communications recommending health-related products or services) would be a pharmacy that is paid by a drug manufacturer to send refill reminders to patients taking the manufacturer's drugs.[49] Another example would be a pharmacy that is paid by a drug manufacturer to identify patients taking a competitor's drug and send such patients letters encouraging them to switch to the manufacturer's drug.[50] Although these communications from the covered entity involve remuneration from a third party, such communications are not "marketing" under the new final regulations because they flow *directly from the covered entity* rather than the third party. The Department's revised final regulations characterize these communications as provider-patient communications, not marketing and they may accordingly be made without prior authorization, notification that the communication is the result of remuneration, or identification of the party providing the remuneration.[51] Patients do not have the right to "opt out" of these types of health-related communication,[52] even though they are inherently predicated on the use/disclosure of intimate, personally identifiable health information.

These "non-marketing" health-related communications may be made either directly by the covered entity or, more likely, by a business associate of the covered entity. This means that a covered entity can share protected health information with a telemarketer if the covered entity has a business associate relationship with the telemarketer.[53] Given the inability of HIPAA to directly regulate business associates,[54] the August 2002 final regulation's narrowed definition of marketing creates additional

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these types of communications and may make the communication itself or use a business associate.").

[49] *See* 67 Fed. Reg. at 53,187 ("The Department does not agree that the simple receipt of remuneration should transform a treatment communication into a commercial promotion of a product or service. For example, health care providers should be able to and can send patients prescription refill reminders regardless of whether a third party pays or subsidizes the communication.").

[50] *See* 67 Fed. Reg. at 53,188 ("The Department believes that certain health care communications such as refill reminders or informing patients about existing or new health care products or services are appropriate, whether or not the covered entity receives remuneration from third parties to pay for them.").

[51] *See* 67 Fed. Reg. at 53,188 ("Requiring disclosure and opt-out conditions on these communications. . . would add a layer of complexity to the Privacy Rule that the Department intended to eliminate. Individuals, of course, are free to negotiate with covered entities for limitations on such uses and disclosures, to which the entity may, but is not required to, agree.").

[52] *Id.*

[53] *General Overview of Standards for Privacy of Individually Identifiable Health Information,* Office of Civil Rights, U.S. Dep't of Health and Human Services, at 70 (Dec. 3, 2002), *available at* http://www.hhs.gov/ocr/hipaa/privacy.html.

[54] *See infra* Section III(C).

opportunities for breaches of patient confidentiality. Certainly most Americans would be concerned if they understood that telemarketers under contract with a covered entity had access to their health information and would want the telemarketers held to the same standards of confidentiality as the covered entity. Michigan may wish to consider filling this new gap in HIPAA by enacting legislation to prohibit covered entities from using/disclosing protected health information to engage in *any* marketing communications (whether health-related or not) unless the patient has provided specific authorization.

III. HIPAA Gaps Identified in Preliminary Report

A. Electronic Data/Internet Issues

The electronic collection, storage and transfer of health information has become commonplace. E-health is touted as the future of health care, promising to transform the way health care entities conduct business and change the way patients relate to their health care providers.[55] Although e-health holds the promise of providing easier and more efficient dissemination of information (thus reducing health costs for everyone), it also poses a greater risk of invasion of individual privacy, since unauthorized access to electronic records may result in instant and wide dissemination of personally identifiable health information in a way that unauthorized access to paper records would not. Of all the various places in which e-health information may be found, perhaps the greatest risk to privacy is presented by information collected and stored by health-related websites.

There are thousands of health-related web sites. Individuals can surf the web for any and all types of health information and advice. More than sixty-five million American internet users have sought health and medical information online, and a significant number of them admit that they use this information to make important medical decisions.[56] Of those individuals who surf the net for health-related information and advice, personal privacy is their top concern.[57]

The public's concern about medical privacy on the internet is warranted. A 1999 report of the Health Privacy Project of Georgetown University documented that major

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[55]"eHealth has been defined as the 'the use of emerging information and communication technology, especially the Internet, to improve or enable health and health care." T.R. ENG, THE EHEALTH LANDSCAPE: A TERRAIN MAP OF EMERGING INFORMATION AND COMMUNICATION TECHNOLOGIES IN HEALTH AND HEALTH CARE, THE ROBERT WOOD JOHNSON FOUNDATION 20 (2001).

[56]HEALTH PRIVACY PROJECT, PEW INTERNET & AM. LIFE PROJECT EXPOSED ONLINE: WHY THE NEW FEDERAL HEALTH PRIVACY REGULATION DOESN'T OFFER MUCH PROTECTION TO INTERNET USERS 1 (2001) [hereinafter *Pew Report*].

[57]Margaret A. Winker, et al., *Guidelines for Medical and Health Information on the Internet*, Am. Medical Ass'n, *available at* http://www.ama-assn.org/ama/pub/printcat/1905.htm.

health web sites lack adequate privacy policies and their practices are often in conflict with their existing privacy statements.[58] Moreover, many health-related websites require individuals to provide personally identifiable health information, sometimes without the individual's knowledge. For example, an individual may participate in a chat room where his/her e-mail address is visible. Or a website may track users through the use of cookies. Cookies allow a website owner/operator to know when a user has visited their site and know precisely where the user went while visiting the site. Cookies help the owners/operators of websites create online user profiles of individuals, which, in turn help sites determine what information, products, and services the visitor may find interesting. They also allow sites to deliver specific content to users based on the individual's previous online activities. Although cookies are only numbers assigned by a site to each user, personal data can be linked to the number when an individual provides identifiable information to the site (e.g., completing health assessments). This kind of user profiling is not generally disclosed or explained to visitors of a site.

A recent example of internet privacy lapse involved Eli Lilly Pharmaceutical Company's website for the drug Prozac. On Prozac.com, the pharmaceutical company established a message service in which individuals enrolled received messages reminding them to take the company's anti-depressant drug. In June 2000, the pharmaceutical company discontinued the program and, in its notice to enrollees of the program's discontinuance, it disclosed the email addresses of everyone who had signed up for the service.[59] Upon receiving a request to investigate by the American Civil Liberties Union, a complaint was filed by the Federal Trade Commission, alleging that Lilly's privacy statement on its website was deceptive because Lilly had failed to maintain or implement measures to protect sensitive consumer information.[60] According to the FTC's complaint, Lilly failed to provide appropriate training for its employees regarding consumer privacy and information security; failed to provide appropriate oversight and assistance for the employee who sent out the e-mail; and failed to implement appropriate checks and controls on the process, such as reviewing the computer program with experienced personnel and pre-testing the program internally before sending out the e-mail.[61] Lilly's failure to implement appropriate measures also violated a number of its own written security procedures.[62] Lilly ultimately agreed to settle the complaint.[63] Although Lilly's breach of consumers' privacy was unintentional, it was a serious breach of those consumers' trust. Companies that obtain sensitive information in exchange for a promise to keeps it confidential must take appropriate steps to ensure the security of that information.

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[58] *Pew Report* at 5.
[59] *Id.* at 23.
[60] Press Release, Federal Trade Comm'n, Eli Lilly Settles FTC Charges Concerning Security Breach (Jan. 18, 2002), *available at* http://www.ftc.gov/opa/2002/01/elililly.htm.
[61] *Id.*
[62] *Id.*
[63] *Id.*

(1) Michigan Law

Michigan law does not provide any special protections for personally identifiable health information that is transmitted electronically.

(2) HIPAA

HIPAA applies to health plans, health care clearinghouses, and health care providers who transmit any health information in an electronic format in connection with a transaction covered by the Act. Because many health-related websites are not owned or operated by a covered entity, they are not regulated by HIPAA.[64] Whether or not a health-related web site is covered by HIPAA thus hinges upon who owns or controls the website, a determination that the average consumer is not in a position to make. Indeed, because of HIPAA's limited scope, two virtually identical web sites can be regulated differently, one subject to the stringent HIPAA protections, the other subject only to voluntary privacy policies (if any).[65]

One large category of health-related websites that are often unregulated by HIPAA is websites that are information-based. Such sites are extremely popular and provide information about general fitness and nutrition or specific diseases, condition, or medications They may offer a broad range of information (e.g., www.foodfit.com or www.familydoctor.org).or specialize in a certain drug (e.g., www.xanax.com or www.viagra.com), disease or medical condition (e.g., www.thebreastcancersite.com or www.aids.org). Some of these information websites assess health status and ask the user to provide information regarding personal health. For example, www.healthstatus.com offers free general health assessments as well as disease-specific assessments to determine an individual's risk for some of the leading causes of death.[66] These sites collect personally identifiable health information of a potentially sensitive nature that can be used or sold to third parties if the owner/operator of the site does not have an "offline existence" whereby the owner/operator engages in covered activities under HIPAA (e.g., treating patients). Thus, because such sites merely furnish health information and the owners/operators do not provide "health care" as defined in the federal regulation, they are not subject to HIPAA. The bottom line is that consumers' privacy is protected under HIPAA only if they visit a narrow, specific type of website (i.e., one owned/operated by a covered entity such as a health plan or health provider), and consumers will not be able to determine, in most instances, whether the websites they visit are regulated by HIPAA. More often than not, consumers will visit and use websites *not* covered by HIPAA.

(3) Potential Michigan Strategies

Michigan may wish to consider enacting a statute to regulate the privacy practices of health-related websites. Texas, for example, has enacted a comprehensive post-

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[64] *Pew Report* at 7.
[65] *Id.*
[66] *Id* at 17.

HIPAA medical privacy law that, *inter alia*, applies the HIPAA privacy rules to any "person who maintains an Internet site."[67]

States wishing to regulate health-related internet sites face several potential problems. First, the chances are good that any websites that violate state privacy laws would not be located within the geographic boundaries of the state. The ability to enforce the law within the state's own court system would therefore be limited by the concept of personal jurisdiction over non-resident defendants. If the internet site owner/operator engaged in activity that caused injury within the state, the state may be able to exercise specific personal jurisdiction over the non-resident website owner/operator,[68] provided the owner/operator has the requisite "minimum contacts"[69] with the forum state.

Even assuming that personal jurisdiction within the state's court system could be satisfied (or that the aggrieved state/citizen would be willing to institute litigation in another forum where minimum contacts could be established), a question would certainly arise as to whether the state privacy law violated the Dormant Commerce Clause. A neutral state law (i.e., a law that is even-handed in application and not discriminatory against out-of-state interests) may be held to violate the Dormant Commerce Clause if it imposes an *undue burden* on interstate commerce.[70] In the face of a facially non-discriminatory law, courts will generally apply a balancing test, considering the non-discriminatory benefits to the state enacting the law and the harms to interstate commerce resulting from the law. Strong state interests and a minimal burden on interstate commerce, in other words, will result in the state law being upheld.[71] The Supreme Court has recognized that state laws designed to protect citizens' privacy are strong and legitimate interests that may warrant some restrictions on the free flow of interstate commerce.[72] If Michigan wished to adopt a law regulating the privacy practices of

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[67]TEX. HEALTH & SAFETY CODE ANN. § 181.001(b)(1)(A) (2002).

[68]Application of specific personal jurisdiction concepts to internet defendants has been difficult for the courts. Most courts seemed to have embraced a "sliding scale" approach that permits the exercise of specific personal jurisdiction only when the internet defendant knowingly reaches out to interact with citizens of the forum state. *See, e.g.,* Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997); Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002).

[69]This is, of course, the famous test pronounced in *International Shoe*. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[70]*See, e.g.,* Consolidated Freightways Corp. v. Kassel, 450 U.S. 662 (1981) (invalidating Iowa statute banning the use of double-trailer trucks as placing an undue burden on interstate commerce); Edgar v. MITE Corp., 457 U.S. 624 (1982) (invalidating Illinois statute restricting corporate takeovers because of undue burden on interstate commerce).

[71]*See, e.g.,* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[72]*See* Breard v. Alexandria, 341 U.S. 622 (1951) (upholding local ordinance prohibiting unsolicited door-to-door solicitation).

health-related internet sites, therefore, strong documentation of the benefits flowing to state residents from such a law would be advised.

As an alternative to enacting a statute regulating all health-related internet sites, the state could opt to enact a narrower statute regulating only those health-related internet sites physically maintained in servers located within the state of Michigan. Such sites would include, for example, websites of Michigan-based managed care organizations, hospitals, provider groups, and trade associations. Because such a statute would regulate only those entities located within the physical territory of Michigan, there presumably would be no difficulty obtaining personal jurisdiction for enforcement actions[73] or dormant commerce issues presented.

Another alternative would be to require all health-related internet sites to comply with a specific set of internet private privacy guidelines, such as those developed by the American Medical Association.[74] Likewise, the state could enact a statute that simply requires health-related internet sites to adopt a privacy policy and recognize an explicit private right of action if the site violates its own privacy policy.[75] A final alternative would be to statutorily authorize the creation of a statewide advisory board to act as ombudsman on issues regarding health information privacy. The State of Maryland, for example, has created an advisory board to provide its General Assembly with information and recommendations on emerging issues in the confidentiality of medical records and monitor developments in federal law regarding health information technology, telemedicine, and provider/patient communication.[76] In addition, the state could ask an advisory board to develop model health privacy practices for voluntary or mandatory use by internet site owner/operators within the state.

B. Sensitive Medical Information

Certain types of medical information are undoubtedly more sensitive in nature than others because disclosure could result in stigmatization or discrimination against the patient or the patient's loved ones. Medical information arguably falling within this category would include information about HIV/AIDS, pregnancy/abortion, sexually transmitted diseases, or genetic conditions

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[73]*See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory."); Burnham v. Superior Court, 495 U.S. 604, 610 (1990) ("Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over nonresidents who are physically present in the State.").

[74]Margaret A. Winker, et al., *Guidelines for Medical and Health Information Sites on the Internet*, *available at* http://www.ama-assn.org/ama/pub/printcat/1905.html.

[75]81% of those who seek information on the internet want the right to sue a site that violates its own privacy policy. *Pew Report* at 5.

[76]*See* MD. CODE ANN. § 4-3A-01-05 (2002).

(1) Michigan Law

Existing Michigan statutes that specifically address sensitive medical information[77] should remain in effect post-HIPAA because they are more stringent than the federal privacy rules and thus not subject to preemption.[78] The one area in which Michigan has not yet acted, however, relates to genetic information. Specifically, although Michigan has enacted *anti-discrimination* statutes relating to genetic information,[79] these statutes do not address or provide *privacy* protections. Michigan's lack of protection for genetic information is likely based, in part, on the 1999 recommendations of the Michigan Commission on Genetic Privacy and Progress, which concluded that it would not recommend special legal protections for the privacy of genetic information.[80] The Commission's reticence to recommend special protection for genetic privacy was, however, at least partially due to the fact that the HIPAA privacy regulations had not yet been promulgated, thus making any state initiatives on genetic privacy premature.[81]

Since the HIPAA final regulations are now in effect and do not contain any heightened protection for genetic information, state legislation providing such protection may be warranted at this time. Additional privacy protection for genetic information may be desirable due to the stigmatization often associated with such information,[82] as well as the potentially broad-ranging adverse psychological and social effects on the individual as well as third parties (e.g., family members).[83] Indeed, the adverse impact on third parties caused by the dissemination of genetic information makes genetic information unique from other types of sensitive health information and thus may necessitate additional protection here where it may not be warranted or necessary elsewhere.

(2) HIPAA

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[77]See the Preliminary Report for a detailed discussion of these Michigan laws relating to sensitive medical information.

[78]*See supra* Section II© for a discussion of HIPAA's preemptive scope.

[79]*See* MICH. COMP. LAWS § 37.1202 (workplace discrimination); *Id.* at § 550.1401 and § 550.3407b (health insurance discrimination).

[80]*See* MICH. COMM'N ON GENETIC PRIVACY & PROGRESS, FINAL REPORT & RECOMMENDATIONS 46 (Feb. 1999).

[81]*Id.* ("After the federal government enacts privacy legislation the state can conduct an analysis to determine the need for any state legislation.").

[82]*See* Janet L. Dolgin, *Personhood, Discrimination and the New Genetics,* 66 BROOKLYN L. REV. 755, 765 (2001).

[83]*See* Eric Mills Holmes, *Solving the Insurance/Genetic Fair/Unfair Discrimination Dilemma in Light of the Human Genome Project,* 85 KY. L. J. 503, 571-575 (1997) (documenting the stigmatization and psychological trauma associated with genetic information).

The HIPAA privacy regulations establish one category of specially protected health information-- psychotherapy notes—which a covered entity may not disclose without prior specific patient authorization.[84] Moreover, under HIPAA, a health plan may not condition enrollment in the plan or provision of benefits under the plan upon the individual providing such authorization.[85] Other sensitive health information that can be stigmatizing is not provided a heightened level of protection.

(3) Potential Michigan Strategies

The Michigan legislature may want to consider enacting additional statutes to provide heightened privacy protection for genetic information and/or other health information that has greater sensitivity. Perhaps the greatest case can be made for special privacy protection for genetic information, as its availability is growing exponentially and its potential for harm to third parties make it unique.

The amount of genetic information that clinicians will have about their patients will increase substantially in the next several years. The completion of the mapping of the human genome and the identification of increasing number of markers for predisposition for disease will create new complexities regarding how such information is used and maintained to protect the privacy of the individual and the individual's family. Unlike most medical information, genetic information provides information about other relatives that could be inappropriately released and cause harm to third parties.

Recognizing the special problems posed by genetic information, some states, such as California,[86] New York[87] and Missouri[88] have enacted special privacy protections for genetic information that require the use of a specific written *authorization* for the release of such information and penalties for breach of privacy relating to such information. Michigan may wish to emulate these states and enact specific privacy protections for genetic information. Alternatively, Michigan could enact a more comprehensive statute to heighten privacy protection for all types of sensitive medical information. One efficient approach, for example, would be to enact a statute modeled on HIPAA's heightened protection for psychotherapy notes and require prior written authorization in order to use or disclose sensitive medical information (which could be defined as broadly or narrowly as the legislature deemed appropriate).

C. Business Associates

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[84] 65 Fed.Reg. at 82,811. There are a few limited exceptions in which authorization is not required. *See id.*

[85] *Id.*

[86] *See* CAL. INS. CODE §§ 742.407, 10123.35 (Deering 2003).

[87] *See* N.Y. CIV. RIGHTS LAW § 79-1(Consol. 2003).

[88] *See* MO. REV. STAT. § 375.1309 (2003).

HIPAA does not permit direct regulation of business associates of covered entities.[89] A "business associate" is a person or entity that performs certain functions or activities that involve the use or disclosure of protected health information it receives or creates on behalf of the covered entity.[90] HIPAA attempts to indirectly regulate these business associates by requiring covered entities to include contractual language with business associates that limit the business associate's use or disclosure of protected health information to that provided for by the contract or as required by law.[91] Furthermore, the contract must require that business associates notify the covered entity of any non-permitted use/disclosure of which the business associate becomes aware.[92] If a business associate breaches these contractual provisions, the covered entity may be held responsible under HIPAA, but only if the covered entity knew of a pattern of activity by the business associate that constituted a material breach of their contractual obligations.[93] Moreover, even if the covered entity has such knowledge, the covered entity will escape responsibility under HIPAA if it takes reasonable steps to cure or end the business associate's breach.[94]

(1) HIPAA

HIPAA's inability to directly regulate business associates is viewed as a significant shortcoming within the privacy regulations. Certain business associates of covered entities are in constant possession of individually identifiable health information which, if used or disclosed, could violate the privacy of patients. For example, third party administrators (TPAs) that process claims for a covered entity, independent medical transcriptionists who work on a contractual basis for a covered physician or entity, or pharmacy benefit managers (PBMs) that manage a health plan's pharmacist network—all of these business associates are not directly regulated by HIPAA and thus lack an independent, professional responsibility of confidentiality. At most, such business associates are merely contractually liable to the covered entity in the event of a breach of patient confidentiality.

(2) Potential Michigan Strategies

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[89] 67 Fed. Reg. at 53,252 ("The Department does not have the statutory authority to hold business associates, that are not also covered entities, liable under the Privacy Rules.").
[90] *See* 65 Fed. Reg. 82,798, § 160.103 (defining "business associate").
[91] *Id.* at 82,808, § 164.504(e)(2)(i)-(ii).
[92] *Id.* at 82,808, § 164.504(e)(1).
[93] *Id.*
[94] *Id. See also* 67 Fed. Reg. at 53,252 ("The Privacy Rule does not require a covered entity to actively monitor the actions of its business associates nor is the covered entity responsible or liable for the actions of its business associates. Rather, the Rule only requires that, where a covered entity knows of a patter of activity or practice that constitutes a material breach or violation of the business associate's obligations under the contract, the covered entity take steps to cure the breach or end the violation.").

Michigan may wish to enact its own statute(s) to extend the HIPAA privacy protections to business associates. Texas, for example, has enacted a comprehensive post-HIPAA medical privacy law that, *inter alia*, directly regulates business associates by applying the same standards to business associates as HIPAA imposes on covered entities.[95] Similarly, Michigan could opt to provide greater privacy protections to Michiganians by extending the HIPAA requirements directly to all business associates, or perhaps only to specified types of business associates (e.g., Third Party Administrators). Enacting such a state law would essentially require the HIPAA privacy rules to "pass through" to business associates in the State of Michigan and impose civil and criminal penalties for business associates who violate those rules.

D. The "Enforcement Gap": Creating State Enforcement Authority and/or Private Rights of Action

The office within HHS that has been charged with enforcing the HIPAA privacy regulations recently admitted that, given its limited resources, the office would need to adopt a triage approach to enforcement, pursuing first those covered entities which have engaged in potentially the most broad-ranging violations.[96] Given this environment, it is reasonable to expect that many violations of the privacy rules will not be pursued by the Department; thus, there is an important regulatory void that states are well-positioned to fill. As stated previously, HIPAA's enforcement scheme does not permit an aggrieved individual (whose right of privacy or of access has been violated) to recover damages or seek injunctive relief. HIPAA allows only the Secretary of HHS to seek civil and/or criminal penalties against covered entities that violate the privacy regulations. Moreover, HIPAA does not preempt states from enacting laws that are "more stringent" than the federal rules.

There are thus two primary approaches that states could take in order to fill the enforcement void and help ensure that the federal privacy protections are more than a paper tiger: (1) enforcement via common law; and (2) enforcement via enactment of specific enforcement statutes permitting the state and/or private citizens to seek civil remedies upon violation. For reasons discussed below, it is the authors' belief that the latter approach (enactment of specific enforcement statutes) is preferable.

(1) Enforcement Via Common Law

As an initial matter, it should be noted that the existence of the HIPAA privacy rules themselves could be interpreted as creating new common law duties owed to

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[95] *See* TEXAS HEALTH & SAFETY CODE ANN. § 181.001(b)(1) (2002) (including business associates in the definition of "covered entity").

[96] Joy L. Pritts, *Altered States: State Health Privacy Laws and the Impact of the Federal Health Privacy Rule*, 2 Yale J. Health Pol'y L. & Ethics 325, 344 (2002) (citing Louis Altarescu, Address at the Health Privacy Project's National Consumers' Summit on Navigating the New Federal Health Privacy Regulations (Feb. 5, 2001)).

patients by covered entities.[97] A court embracing this interpretation of the privacy rules could therefore be expected to acknowledge an actionable tort upon the breach of such duties by a covered entity.

Even if a court did not believe that HIPAA created new duties under tort law, existing duties defined by tort law could potentially provide a means to enforce the privacy rules, above and beyond any action taken (or not taken) by HHS. Specifically, existing torts such as invasion of privacy (publication of embarrassing private facts)[98] or breach of fiduciary duty/confidentiality[99] could be used to impose liability upon a covered entity that uses or discloses protected health information in violation of the federal privacy rules. Each of these existing tort theories, however, poses difficulties for a plaintiff who wants to invoke them to remedy a violation of the HIPAA privacy rules.

(a) Invasion of Privacy

The tort of invasion of privacy based upon public disclosure of embarrassing private facts, for example, requires that the plaintiff establish three prima facie elements: (1) the disclosure of information; (2) that is highly offensive to a reasonable person; and (3) that is of no legitimate concern to the public.[100] Although the Michigan courts have made it clear that a person's medical treatment or condition is generally considered private information,[101] it would, in certain instances, be difficult to prove that disclosure of a person's medical information is "highly offensive" or of "no legitimate concern to the public."

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[97] *See Summary of HIPAA Privacy Rule*, Health Privacy Project, Institute for Health Care Research & Policy, Georgetown University, Sept. 13, 2002, at 33 ("[B]ecause the new regulation creates a new 'duty of care' with respect to health information, it is possible that violations may be the grounds of state tort actions.").

[98] *See, e.g.*, Winstead v. Sweeney, 205 Mich. App. 664, 517 N.W.2d 874 (Mich. Ct. App. 1994); Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 300 N.W.2d 687 (Mich. Ct. App. 1980). Tennessee has enacted a specific statute explicitly acknowledging that a civil action based on invasion of privacy may be brought in the event of inappropriate use/disclosure of a patient's medical information. *See* TENN. CODE ANN. § 68-11-1504 (2002).

[99] *See* Saur v. Probes, 190 Mich. App. 636, 476 N.W.2d 496 (Mich. Ct. App. 1991).

[100] Doe v. Mills, 212 Mich. App. 73, 80, 536 N.W.2d 824 (Mich. Ct. App. 1995); *see also* Winstead v. Sweeney, 205 Mich. App. 664, 668, 517 N.W.2d 874 (Mich. Ct. App. 1994); Fry v. Ionia Sentinel-Standard, 101 Mich. App. 725, 728-29, 300 N.W.2d 687 (Mich. Ct. App. 1980) (citing RESTATEMENT (SECOND) OF TORTS § 652D).

[101] *Doe*, 212 Mich. App. at 82-83 (holding that plaintiffs' plans to obtain an abortion is private information) (citing Swickard v. Wayne Co. Medical Examiner, 438 Mich. 536, 560, 475 N.W.2d 304 (Mich. 1991). *See also* Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488 (Mo. Ct. App. 1990) (concluding that non-consensual publicity of plaintiff's participation in IVF process stated a claim for invasion of privacy).

A recent decision by the Michigan Court of Appeals, *Doe v. Mills,* is illustrative.[102] In *Mills*, the plaintiffs sued anti-abortion protesters who learned of the plaintiffs' intent to obtain abortions and, while protesting outside the clinic, held up large signs with the plaintiffs' names on them.[103] The Michigan trial court judge granted summary disposition of plaintiffs' claim of invasion of privacy based upon publication of private facts,[104] reasoning that publication of the plaintiffs' intent to obtain an abortion could not be viewed as highly offensive by a reasonable person[105] and that "abortion, no matter how one views this subject, is unquestionably a matter of great public concern . . . ."[106]

Although the Michigan Court of Appeals ultimately rejected the trial court's reasoning and reversed in favor of the plaintiff, the trial court's decision suggests that there will be instances in which uncertainty will exist as to whether disclosure of medical information is sufficiently "offensive" or lacking in "public concern" so as to warrant recovery under the invasion of privacy tort. This uncertainty, in turn, means that there will be instances in which disclosure of medical information will not be actionable, leaving those patients affected by the disclosure potentially without a civil remedy.

(b) Medical Malpractice (Breach of Duty of Confidentiality)

The Michigan courts have likewise recognized the existence of a viable tort action based on medical malpractice when a licensed health care provider breaches her ethical duty to maintain patient confidentiality.[107] This common law duty of confidentiality, however, is not absolute and is subject to several defenses, including voluntary waiver, justification, and waiver by operation of law.[108] The shortcoming of this remedy is that it applies only to licensed health care providers[109] who are subject to evidentiary privileges,

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[102]212 Mich. App. 73, 536 N.W.2d 824 (Mich. Ct. App. 1995).
[103]212 Mich. App. at 77.
[104]*Id.* at 78.
[105]*Id.* at 80-81 (noting that the trial judge's opinion suggested that the disclosure of an individual's intention to obtain an abortion was not actionable as a matter of law when he stated, "Would plaintiffs seriously suggest or argue that one who contemplates or schedules an abortion has committed an act that is highly offensive to a reasonable person?").
[106]*Id.* at 83.
[107]Saur v. Probes, 190 Mich. App. 636, 476 N.W.2d 496 (Mich. Ct. App. 1991).
[108]*Saur*, 190 Mich. App. at 639-40.
[109]The Court of Appeals in *Saur* justified its recognition of tort liability for breach of confidence as follows:

> Also particularly compelling in favor of recognizing a legal duty to maintain patient confidentiality is this state's medical licensing statute. . . . A physician is ethically obligated under the licensing statute not to disclose information obtained through the physician-patient relationship. In light of a psychiatrist's ethical obligation to maintain patient confidences, as well as the state's interest in preserving its policy of protecting physician-patient confidences, we conclude that

such as physicians, psychiatrists, and psychologists.[110] Thus, a tort action for breach of confidentiality would presumably not lie against health care providers who are neither subject to evidentiary privileges (e.g., nurses, physician assistants, home health aides, physical therapists, etc.) nor licensed by the state (e.g., certain alternative health care providers). Moreover, this tort would not apply to health care institutions (e.g., hospitals, nursing homes, rehabilitation facilities, etc.), that are either not subject to evidentiary privileges or not subject to a duty of confidentiality pursuant to the relevant licensing statute. In short, there are simply too many providers and institutions that are likely not within the ambit of this tort, rendering it an ineffective remedy for patients who have been harmed by the use or disclosure of confidential medical information.

(2) Enforcement Via Specific Statutes

The other possible enforcement mechanism that Michigan may wish to consider for those harmed by uses and disclosures of medical information is the enactment of a specific statute that supplements HIPAA by allowing enforcement of state and/or federal privacy protections by either: (1) citizens acting as "private attorneys general" (i.e., private right of action statutes); or (2) by state agencies who are specifically authorized to enforce state and/or federal health privacy laws. Several states, both pre- and post-HIPAA have opted to enact such statutes.

(a) Pre-HIPAA Private Right of Action Statutes

Prior to the enactment of HIPAA, various states had enacted statutes to permit private rights of action to remedy a violation of the state's access or disclosure statutes. These state statutes vary, however, with regard to the kinds of remedies available to aggrieved patients. If a patient is denied access to his/her own medical records, state statutes often permit the patient to bring a civil action for equitable relief forcing disclosure to the patient. Connecticut law, for example, states that a patient who has been refused access to his/her own medical records may file a civil action requesting that the court order the health care provider to disclose such records.[111] Illinois law is a bit more stringent, stating that a patient denied access may recover expenses and reasonable attorney's fees incurred in connection with any court ordered enforcement of his/her right to access.[112]

Other states have opted to permit the recovery of monetary damages beyond merely costs and attorney's fees. Louisiana law, for example, states that failure to

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a legal duty does exist on the part of a psychiatrist not to disclose privileged communications.

See id. at 639.

[110] *See id.* at 638-39 ("[T]hese statute [creating evidentiary privileges for psychiatrists, psychologists and physicians] do exhibit this state's policy of promoting physician-patient confidences absent a superseding public or private interest.").

[111] CONN. GEN. STAT. § 20-7c (2001). *See also* N.H. REV. STAT. ANN. § 151:30 (2002).

[112] 735 ILL. COMP. STAT. ANN. 5/8-2003 (West 2002).

provide medical records to a patient within 15 days of a written request subjects the provider to a civil action not only for injunctive relief, reasonable attorney fees and expenses,[113] but also that "except for their own gross negligence, such health care providers shall not otherwise be held liable in damages by reason of their compliance with such request or their inability to fulfill the request[,]"[114] thereby implying that providers are also subject to monetary damages in instances of gross negligence. Montana takes a similar approach, permitting a civil action not only to recover costs/expenses in forcing compliance, but also to recover an additional compensation of up to $5,000 in the event that the provider acted willfully or with gross negligence.[115]

Some states even permit recovery of punitive damages. For example, for violation of its disclosure statute, Rhode Island allows recovery against a provider for attorney's fees, actual damages, and punitive damages.[116] California permits a private right of action to recover compensatory damages, attorney's fees of up to $1,000 and punitives of up to $3,000.[117]

An intriguing approach to enforcement permits private citizens to bring private civil actions not only to recover personally, but also on behalf of the state. The Maine statute is a good example. Under Maine law, intentional disclosures of protected health information (in violation of the comprehensive Maine medical privacy statute) may be the subject of a private civil action by an aggrieved patient, who may obtain not only personal remedies such as injunctive relief and costs, but also civil monetary penalties, which, if awarded by the court, is payable to the State.[118]

(b) Post-HIPAA Enforcement Statutes—the Texas Approach

Another approach can be found in Texas, which enacted a medical information privacy law post-HIPAA which created private civil actions to fill the perceived gap in federal enforcement of HIPAA. The Texas statute is specifically designed to pick up where HIPAA leaves off, by adding protections not afforded by the federal regulations

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[113]LA. REV. STAT. ANN. § 40:1299.96(A)(2)(c) (West 2002).
[114]*Id.*
[115]MONT. CODE ANN. § 50-16-553 (2002).
[116]R.I. GEN. LAWS § 5-37.3-4(a)(1) (2002). In addition, the Rhode Island statute permits the state to seek recovery of a civil monetary penalty of up to $5,000 per violation and/or imprisonment for up to 6 months. *Id.* at § 5-37.3-4(a)(3).
[117]CAL. CIVIL CODE §56.35 (Deering 2001).
[118]ME. REV. STAT. ANN. tit. 22, § 1711-C(13) (West 2001). The CMPs may not exceed $5,000, plus costs, unless the court finds the violations occurred after "due notice of the violation conduct with sufficient frequency to constitute a general business practice," in which case the CMPs may be imposed up to $10,000 for individual health care providers and $10,000 for health care facilities. *Id.* The Maine statute also states that the aggrieved patient may pursue, in a private civil action "all available common law remedies, including but not limited to an action based on negligence." *Id.*

and by making the federal regulations enforceable by both private citizens and the state.[119]

In some important respects, the Texas statute is broader in reach than HIPAA because it applies to all health care providers (not just those who submit health information in standard electronic format) and directly regulates those who receive or possess such information including, for example, internet sites and business associates.[120] In addition, the Texas law employs a broader definition of "marketing" than the federal HIPAA regulations[121] and regulates the use of protected health information much more stringently than the federal regulations.[122] Specifically, the Texas law forbids covered entities from using, disclosing or selling protected health information "without the consent or authorization of the individual who is the subject of the protected health information."[123] Recall that the revised regulations issued by the Bush Administration in August 2002 now permit a covered entity to use protected health information to recommend a health-related product or service, even if it is paid by a third party to make such a recommendation.[124] This means that, under HIPAA, a pharmacy is permitted to send information to patients recommending that they switch to another medicine, even if the pharmacy is paid to do this by a drug company, because this kind of information is health-related.[125] Under HIPAA, however, a pharmacy could not (without written patient authorization) receive money from a third party to identify patients receiving anti-depressant medications in order to send those patients information about soothing vacation destinations (because such information is not "health-related").

Texas law, by contrast, states that if a covered entity receives (directly or indirectly) any financial incentive or remuneration for the use, access, or disclosure of protected health information, it is considered "marketing"[126] As such, the covered entity could not sell, use or disclose protected health information unless it obtains the consent or authorization of the patient.[127] Moreover, even if the individual consents or authorizes the covered entity to sell, use or disclose their protected health information, any written marketing communication must provide the patient with a toll-free number of the entity

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[119]*See* TEXAS HEALTH & SAFETY CODE ANN. § 181.001 *et seq.* (Vernon 2002).
[120]*Id.* at § 181.1001(b)(1).
[121]*Id.* at § 181.1001(b)(4).
[122]*Id.* at § 181.152.
[123]*Id.* at § 181.152(a). The statute also prohibits coercing an individual's consent. *Id.*
[124]*See* 67 Fed. Reg. 53,182, 53,187 ("The Department does not agree that the simple receipt of a remuneration should transform a treatment communication into a commercial promotion of a product or a service.").
[125]67 Fed. Reg. at 53,187 ("For example, health care providers should be able to, and can, send patients prescription refill reminders regardless of whether a third party payors subsidizes the communication.").
[126]TEX. HEALTH & SAFETY CODE ANN § 181.001(b)(5) (Vernon 2002).
[127]*Id.* at § 181.152(a).

that is sending the communication and explain the patient's right to have his/her name removed from the sender's mailing list.[128]

The Texas statute is enforceable by both the state and private citizens. Specifically, the Texas Attorney General is authorized to enforce the statute through actions for injunctive relief and civil monetary penalties.[129] The statute also explicitly states that violation of the law will subject a licensed health care provider/facility to investigation and disciplinary proceedings by the relevant licensing authority.[130] If there is evidence that violations of the law "constitute a pattern or practice," the statute authorizes the state licensing agency to revoke the individual's/facility's license[131] and requires that the individual/entity be "excluded from participating in any state-funded health care program,"[132] such as Medicaid. Finally, the Texas law explicitly leaves open the possibility of private rights of action by aggrieved citizens, stating that "[t]his chapter does not affect any right of a person under other law to bring a cause of action or otherwise seek relief with respect to conduct that is a violation of this chapter."[133]

Because the Texas statute was enacted post-HIPAA, its continued viability (in terms of preemption issues) is not in doubt. Moreover, by making direct reference to HIPAA and explicitly "taking up where HIPAA leaves off," it creates a simpler, more efficient regulatory scheme. Another benefit of the Texas approach is that it creates three layers of possible enforcement of the federal privacy rules: (1) HHS; (2) the state; and (3) private citizens. In this manner, if the federal government is unwilling or unable to bring an enforcement action, either the state or private citizens may step in fill the regulatory void. It is the authors' belief that the Texas approach would be the best approach for the state of Michigan, should the state legislature wish to enact medical information privacy laws post-HIPAA.

IV. Conclusion

Although the federal government has recognized the importance of protecting the privacy of medical information through the enactment of HIPAA and the promulgation of its privacy rules, the federal law clearly offers only a minimum level of privacy protection. It is incumbent upon the states, therefore, to fill the regulatory gaps in HIPAA by enacting laws that provide greater protections to their citizens.

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[128] *Id.* at § 181.152(b).
[129] *Id.* at § 181.201. CMPs may be imposed of up to $3,000 per violation or, if the court finds violations "constitute a pattern or practice," CMPs may be assessed up to $250,000. *Id.*
[130] *Id.* at § 181.202.
[131] *Id.*
[132] *Id.* at § 181.203.
[133] *Id.* at § 181.204.

This report takes the first step toward providing those protections for the citizens of Michigan by identifying the major gaps in HIPAA and suggesting possible state actions to fill those gaps. Although there are many ways to address these regulatory voids, perhaps the simplest, most efficient and comprehensive approach is exemplified by the new privacy law enacted in Texas, which explicitly references the HIPAA final regulations and proceed to "pass through" those regulations to state law (for enforcement purposes) and expand upon them by regulating entities (e.g., business associates and internet sites) and activities (e.g., employing a broader definition of marketing) not covered by HIPAA. At a minimum, it seems likely that, in order for the HIPAA regulations to be meaningful, some sort of expanded enforcement legislation needs to be enacted at the state level, either by permitting state authorities to sue/prosecute for violations of the federal regulations, or by permitting private individuals to bring civil actions for damages. We urge the MLRC to consider the recommendations in this report and look forward to assisting the Commission in its continued effort to improve the privacy of health information for Michigan's citizens.

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

I. Introduction.

As part of its statutory charge to examine current judicial decisions for the purpose of discovering defects in the law and to recommend needed reforms, the Michigan Law Revision Commission undertook a review of three Michigan Supreme Court opinions and two Michigan Court of Appeals' decisions released in 2002. These opinions identify state statutes as potential candidates for legislative reform. The five opinions are:

> *State Farm Fire & Casualty Co. v. Old Republic Ins. Co.*, 466 Mich. 142, 644 N.W.2d 715 (2002)(holding that the "household exclusion" provision of M.C.L. § 500.3123 applies where a person owning damaged property is insured under a no-fault property protection policy that does not cover the vehicle that person was operating at the time of the accident).
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> *Koontz v. Ameritech Services, Inc.*, 466 Mich. 304, 645 N.W.2d 34 (2002)(coordination of unemployment benefits with pension benefits).
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> *Paulitch v. Detroit Edison Co.*, 208 Mich. App. 656, 528 N.W.2d 200 (1995); and *Buzzitta v. Larizza Industries, Inc.*, 466 Mich. ___, 641 N.W.2d 593 (2002)(issue of Michigan's statutory provision on prejudgment interest).
>
> *Equivest Limited Partnership v. Brooms*, 253 Mich. App. 450 (2002)(adequacy of notice in order to trigger running of statutory redemption period).
>
> *In the Matter of Wentworth*, 251 Mich. App. 560, 651 N.W.2d 773 (2002)(public disclosure of juvenile sex offender's record once he/she reaches majority)

II. The Scope of the "Household Exclusion" Provision of M.C.L. § 500.3123.

A. Background.

A no-fault insurer's liability to pay property protection benefits to its insured is subject to exceptions, including the "household exclusion," M.C.L. § 500.3123(1)(b), which provides:

(1) Damage to the following kinds of property is excluded from property protection insurance benefits:

* * * *

(b) *Property owned by a person named in a property protection insurance policy,* the person's spouse or a relative of either domiciled in the same household, *if the person named,* the person's spouse, or the relative *was the* owner, registrant, or *operator of a vehicle involved in the motor vehicle accident out of which the property damage arose.* [Emphasis added.]

In *State Farm Fire & Casualty Co. v. Old Republic Ins. Co.*, Ibrahim Mroue was the insured under a real property casualty policy issued by State Farm. Mroue drove a rented Ryder truck into a bakery that he owned, causing damage to real and personal property. The Ryder truck was insured under a no-fault policy issued by defendant Old Republic Insurance Company. Plaintiff State Farm Fire and Casualty Company, the insurer of the real property, paid Mroue for the damages.

As Mroue's subrogee, State Farm filed an action seeking indemnification from Old Republic for the amount that State Farm had paid to Mroue. The circuit court granted summary disposition for Old Republic on the ground that Mroue, the owner of the real property, was a named insured in the Old Republic policy. Thus, since Mroue could not recover, State Farm could not recover as his subrogee.

The Court of Appeals reversed, holding that the exclusion in M.C.L. § 500.3123(1)(b) did not apply because Mroue was not a named insured in the Old Republic policy. Old Republic appealed, and the Supreme Court remanded to the Court of Appeals for reconsideration. The Supreme Court's order directed the Court of Appeals to consider whether M.C.L. § 500.3123(1)(b) excluded coverage only if a property protection insurance policy covered a "vehicle involved in the motor vehicle accident out of which the property damage arose," or if the statute precluded coverage regardless of whether the vehicle insured under a property protection insurance policy was involved in the accident.

On remand, the Court of Appeals again reversed. It concluded that the phrase "by a person named in a property protection insurance policy" refers to the policy on the vehicle or vehicles involved in the accident.

B. The *State Farm Fire & Casualty Co. v. Old Republic Ins. Co.* Decision.

The Supreme Court reversed the Court of Appeals, stating that the use of the article "a" was not significant and that the grammatical construction of the sentence dictated the use of the article "a." In reversing, the Supreme Court began with the observation that M.C.L. § 500.3123(1)(b) excludes property damage from no-fault property protection coverage if the property owner, the person's spouse, or a relative of either residing in the same household, is "named in *a* property protection insurance policy" and was "the owner, registrant, or operator of a vehicle involved" in the accident. The statute does not require that the individual be named in a property protection insurance policy covering a vehicle involved in the motor vehicle accident out of which the property damage arose. Rather, the Court continued, the plain meaning of M.C.L. § 500.3123(1)(b) indicates that if Mroue was named in *a* property protection insurance policy and was the "operator of a vehicle involved" in the accident, coverage for damage to his property would be excluded. 466 Mich. at 147. Whether the no-fault policy covered a vehicle involved in the accident is not relevant under the plain language of the statute. Therefore, if Mroue was named in a no-fault policy covering, for example, a personal vehicle, the statute would exclude property protection coverage. "Stated another way," the Court concluded, "M.C.L. § 500.3123(1)(b) allows a party in Mroue's circumstances to recover from the rental vehicle's insurer only if he was not named in a no-fault policy." 466 Mich. at 147.

In rejecting the Court of Appeals' and dissent's construction of the statute, the majority stated "that a difference exists between the indefinite article 'a' and the definite article 'the.' We presume that the Legislature understood the distinct meanings of these terms. We are not free to conflate their meanings." 466 Mich. at 148. The majority summarized:

> It is not the role of the judiciary to second-guess the wisdom of a legislative policy choice; our constitutional obligation is to interpret -- not to rewrite -- the law. The Legislature apparently determined that where the household exclusion applies, damaged property should be covered, if at all, by a form of insurance other than a mandatory no-fault policy. Not only does our interpretation of the statute comport with the plain language of the text, but it is also consistent with the legislative intent that may reasonably be inferred from the text, i.e., to preclude a person who damages his own property from collecting property protection insurance benefits under that person's no-fault policy. In this case, the property damage clearly would have been excluded if Mroue had been driving his own vehicle. The result should not be different merely because he was driving a rented one.

466 Mich. at 149-50.

Question Presented

Should the "household exclusion" provision of M.C.L. § 500.3123(1)(b) be revisited by the Legislature for the purpose of clarifying legislative intent?

Recommendation

The Commission recommends that the Legislature review the result in *State Farm Fire & Casualty Co. v. Old Republic Ins. Co.*, to ensure that its result accurately reflects the Legislature's intent when it enacted the "household exclusion" provision of M.C.L. § 500.3123(1)(b)

III. Whether M.C.L. § 421.27(f)(1) mandates coordination of unemployment benefits with pension benefits.

A. Background.

M.C.L. § 421.27(f)(1), which mandates coordination of unemployment benefits with pension benefits, has existed in essentially the same form since 1954 PA 197. It states:

> [N]otwithstanding any inconsistent provisions of this act, the weekly benefit rate of each individual who is receiving or will receive a "retirement benefit," as defined in [M.C.L. § 421.27(f)(4)], shall be adjusted as provided in subparagraphs (a) . . . . However, an individual's extended benefit account and an individual's weekly extended benefit rate under [M.C.L. § 421.64] shall be established without reduction under this subsection unless [M.C.L. § 421.27(f)(5)] is in effect . . . .
>
> (a) If and to the extent that unemployment benefits payable under this act would be chargeable to an employer who has contributed to the financing of a retirement plan under which the claimant is receiving or will receive a retirement benefit yielding a pro rata weekly amount equal to or larger than the claimant's weekly benefit rate as otherwise established under this act, the claimant shall not receive unemployment benefits that would be chargeable to the employer under this act.

M.C.L. § 421.27(f)(1) thus requires an offset in unemployment compensation for

retirement benefits if the employer charged with unemployment benefits funded the retirement plan. This type of reduction is known as "narrow coordination."

Before 1980, federal law did not address coordination of unemployment and retirement benefits. In March 1980, Congress amended 26 U.S.C. § 3304(a)(15) of the FUTA to require the coordination of unemployment benefits with employer-funded retirement benefits, regardless of whether the employer who had funded the retirement benefits was the same employer whose account would be charged for the unemployment benefits. This type of coordination is known as "broad coordination." Section 3304, particularly subsection (a)(15), of the FUTA requires the states to conform to federal policy regarding coordination of unemployment benefits to insure eligibility for federal funds or tax credits. In response to the federal amendment, the Michigan Legislature promptly adopted broad coordination to the extent required by federal law. M.C.L. § 421.27(f)(5) states:

> Notwithstanding any other provision of this subsection, for any week that begins after March 31, 1980, and with respect to which an individual is receiving a governmental or other pension and claiming unemployment compensation, the weekly benefit amount payable to the individual for those weeks shall be reduced, but not below zero, by the entire prorated weekly amount of any governmental or other pension, retirement or retired pay, annuity, or any other similar payment that is based on any previous work of the individual. This reduction shall be made only if it is required as a condition for full tax credit against the tax imposed by the federal unemployment tax act, chapter 23 of subtitle C of the internal revenue code of 1986, 26 USC 3301 to 3311.

The federal mandate for broad coordination was short-lived. In September 1980, Congress amended 26 U.S.C. § 3304(a)(15) to its present form, which requires only narrow coordination, i.e., that coordination specified in M.C.L. § 421.27(f)(1). Despite the federal amendment, the Michigan Legislature has never amended M.C.L. § 421.27(f)(5). M.C.L. § 421.27 thus retains both broad and narrow coordination provisions. The interplay of those provisions was addressed in *Koontz v. Ameritech Services, Inc.*

Plaintiff Koontz began working for Ameritech in its Traverse City office in 1965. Thirty years later, Ameritech closed its Traverse City office and offered to continue plaintiff's employment in another office. She declined, electing instead to retire. Ameritech's retirement incentive program entitled plaintiff to a $1,052.95 monthly pension allowance, which Ameritech fully funded. In lieu of monthly payments, however,

plaintiff elected to receive her pension in a lump-sum in the amount of $185,711.55. Plaintiff also chose to transfer the lump-sum directly into her individual retirement account (IRA).

Plaintiff then applied for unemployment compensation. Ameritech argued that M.C.L. § 421.27(f) of the Michigan Employment Security Act allowed coordination of plaintiff's unemployment benefits with the amount of pension payments plaintiff would have received if she had elected the monthly payment option. The Unemployment Agency agreed and directed coordination under M.C.L. § 421.27(f). This coordination resulted in a reduction in plaintiff's unemployment benefits in the amount of $243 weekly, rendering her ineligible to receive any unemployment benefits. (Because plaintiff's pro-rata retirement benefits would have been equal to or greater than her weekly unemployment benefits, she was not eligible to receive unemployment benefits chargeable to Ameritech.)

Plaintiff thereafter appealed the redetermination. A referee reversed the decision of the Unemployment Agency on the ground that neither M.C.L. § 421.27(f)(1) nor (5) required coordination since plaintiff had transferred the pension funds directly into her IRA and thus had not "received" the funds within the meaning of the act. The referee relied on the Unemployment Agency's Revised Benefit Interpretation No. 20.641, which indicates that an employee who rolls a pension amount over into an IRA does not incur immediate income tax liability because the Internal Revenue Service does not consider the payment "received" for income tax purposes.

Ameritech in turn appealed the referee's decision to the Michigan Employment Security Board of Review, which reinstated the Unemployment Agency's determination in a split decision. The Board of Review ruled that the taxability of plaintiff's pension benefit did not affect the operation of M.C.L. § 421.27(f) and that the lump-sum distribution was a "retirement benefit" under the plain language of the act. Accordingly, the board concluded that coordination was required under M.C.L. § 421.27(f)(1)(a).

The circuit court affirmed the Board of Review's decision. The Court of Appeals reversed the circuit court. It held that another subsection, M.C.L. § 421.27(f)(5), governed and did not require coordination of benefits. The Court of Appeals determined that M.C.L. § 421.27(f)(5) is controlling over M.C.L. § 421.27(f)(1). Alternatively, the Court of Appeals stated in dictum that even if M.C.L. § 421.27(f)(1) applied, coordination was not required because (1) plaintiff had not received a "retirement benefit" within the meaning of M.C.L. § 421.27(f)(4), and (2) the phrase "receive or will receive" in M.C.L. § 421.27(f)(1) does not include the direct rollover of a pension fund to an IRA. Accordingly, the Court of Appeals held that M.C.L. § 421.27(f)(5) exempted plaintiff's

benefits from coordination.

B. The *Koontz v. Ameritech Services, Inc.* Decision.

In reversing the Court of Appeals, the Supreme Court criticized the Court of Appeals for having acknowledged the phrase, "Notwithstanding any other provision of this subsection" in M.C.L. § 421.27(f)(5), but then having failed to give effect to similar language in M.C.L. § 421.27(f)(1) that states, "notwithstanding any inconsistent provisions of this act." In addition, in finding that M.C.L. § 421.27(f)(5) controls over M.C.L. § 421.27(f)(1), the Court of Appeals rendered nugatory M.C.L. § 421.27(f)(1), contrary to established rules of interpretation, according to the Supreme Court. The text of M.C.L. § 421.27(f)(1) requires coordination where the claimant's unemployment benefits are chargeable to the employer who contributed to the financing of the claimant's retirement benefits. Thus, the Court concluded, "narrow coordination" is required "notwithstanding any inconsistent provisions of this act . . . ."

M.C.L. § 421.27(f)(5), on the other hand, broadens the coordination required in M.C.L. § 421.27(f)(1) by compelling a reduction not only with regard to pension funds that the chargeable employer contributes, but also with regard to pension funds "based on *any* previous work," regardless of whether the chargeable employer contributed the funds. M.C.L. § 421.27(f)(5) requires such "broad coordination" only when necessary to conform to federal law.

Because M.C.L. § 421.27(f)(5) does not apply here, the Court stated, the question remains whether M.C.L. § 421.27(f)(1) required coordination of plaintiff's benefits. The Court of Appeals stated in dictum that even if M.C.L. § 421.27(f)(1) governed, it did not require an offset because plaintiff did not receive a "retirement benefit" within the meaning of M.C.L. § 421.27(f)(4)(a). That subdivision provides:

> (4)(a) As used in this subdivision, "retirement benefit" mean a benefit, annuity, or pension *of any type* . . . that is:
>
> > (*i*) Provided as an incident of employment under an established retirement plan, policy, or agreement, including federal social security if subdivision (5) is in effect.
> >
> > (*ii*) Payable to an individual because the individual has qualified on the basis of attained age, length of service, or disability, whether or not the individual retired or was retired from employment. *Amounts paid to individuals in the course*

> *of liquidation of a private pension or retirement fund because of termination of the business or of a plant or department of the business of the employer involved shall not be considered to be retirement benefits.* [Emphasis added.]

The Court of Appeals determined that plaintiff's pension was not a retirement benefit within the meaning of M.C.L. § 421.27(f)(4)(a) because the fund was liquidated upon plaintiff's termination when Ameritech closed its Traverse City office.

The Supreme Court rejected the Court of Appeals' conclusion, observing that "[a]lthough the Ameritech Traverse City office was closed, the record does not reflect that the pension fund was liquidated." 466 Mich. at 316. The Court added:

> In the context of the statute, the term "liquidation" pertains to multiple accounts rather than to an individual account. The statute exempts from the category of "retirement benefits" those amounts "paid to individuals in the course of liquidation of a private pension or retirement fund." Therefore, the text contemplates that liquidation pertains to multiple accounts and not merely the single account of an individual pensioner.

466 Mich. at 318.

In sum, the Court concluded that M.C.L. § 421.27(f)(1) required coordination of plaintiff's unemployment benefits with her pension benefits. Plaintiff received a "retirement benefit" within the meaning of M.C.L. § 421.27(f)(1). That subsection required coordination, whether or not the funds were subject to taxation at the time of their receipt.

Question Presented

Because the underlying federal statute that required broad coordination of pension benefits and unemployment benefits has been repealed, should the Legislature revisit M.C.L. § 421.27(f)(5) which was enacted in response to this repealed federal law?

Recommendation

The Commission recommends that the Legislature examine M.C.L. § 421.27(f)(1) and M.C.L. § 421.27(f)(5) to determine what state policy should be regarding the scope of coordination of pension benefits and unemployment benefits.

IV. Michigan's statutory provision on prejudgment interest.

A. Background.

M.C.L. § 600.6013(1) states:

> Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest shall not be allowed on future damages from the date of filing the complaint to the date of entry of the judgment. As used in this subsection, "future damages" means that term as defined in section 6301.

M.C.L. § 600.6301 on definitions in turn provides:

> (a) "Future damages" means damages arising from personal injury which the trier of fact finds will accrue after the damage findings are made and includes damages for medical treatment, care and custody, loss of earnings, loss of earning capacity, loss of bodily function, and pain and suffering.
>
> (b) "Personal injury" means bodily harm, sickness, disease, death, or emotional harm resulting from bodily harm.

The plain text of § 6013(1) requires an award of prejudgment interest on a civil judgment except for "future damages." The statutory definition of "future damages," however, is limited to damages arising from personal injury. The statutory scheme thus appears to require courts to award prejudgment interest on future damages in any case that does not involve a personal injury.

B. The *Paulitch v. Detroit Edison Co.* and *Buzzitta v. Larizza Industries, Inc.* Decisions.

The Court of Appeals addressed this scheme in *Paulitch v. Detroit Edison Co.*, 208 Mich. App. 656, 528 N.W.2d 200 (1995). It applied the plain statutory text: "We find there can be no interpretation of this plain language other than that a plaintiff is entitled to prejudgment interest when the suit does not result from a personal bodily injury." *Id.* at 662-663, 528 N.W.2d 200. The panel nonetheless observed that the statutory scheme is troubling:

> We are sympathetic to defendant's position for the following reasons. First,

> this Court has repeatedly held that the purpose of prejudgment interest is to compensate the prevailing party for the delay in recovering money damages. There is no delay in paying plaintiff money to which he became entitled only as a result of the jury verdict. Second, although the amended Revised Judicature Act did define future damages as only applying to personal bodily injury, the Legislature distinguished between prejudgment interest on future damages and other damages. *However, we believe that any modifications of this system should originate with the Legislature, not the courts.*

Id. at 663, n. 2, 528 N.W.2d 200 (citations omitted; emphasis supplied).

In *Buzzitta v. Larizza Industries, Inc.*, the Supreme Court denied leave to appeal from the Court of Appeals. In a concurring opinion, Justice Corrigan agreed with the analysis of the Court of Appeals in the earlier case of *Paulitch*:

> The analysis of the statutory text in *Paulitch* appears to be sound. A policy basis is not apparent for the legislative choice to require an award of interest on damages *that have not yet accrued.* Nonetheless, courts are bound to apply the statute as written. This Court lacks authority to rewrite statutes to conform to our view of sound public policy. Indeed, we must apply statutory text even where we view the result as "absurd" or "unjust." *People v. McIntire,* 461 Mich. 147, 156, n. 2, 599 N.W.2d 102 (1999). In short, the proper role of the judiciary is to interpret and not rewrite the law.

641 N.W.2d at 594. Justice Corrigan urged the Legislature to examine the provisions regarding prejudgment interest on future damages, adding that "[t[he Legislature may wish to consider the concerns expressed in *Paulitch* in determining whether the statutory scheme implements a sound public policy." *Id.*

Question Presented

Should the Legislature revisit the provision on prejudgment interest contained in M.C.L. § 600.6013(1)?

Recommendation

The Commission recommends that the Legislature review M.C.L. § 600.6013(1) which allows an award of prejudgment interest on future damages in all non-personal

injury cases, with a view to possible amendment so that prejudgment interest in not available on an award of any type of future damages.

V. Adequacy of notice in order to trigger the running of the statutory redemption period.

A. Background.

M.C.L. § 211.72 provides that "tax deeds convey an absolute title to the land sold, and constitute conclusive evidence of title, in fee, in the grantee, subject, however, to all taxes assessed and levied on the land subsequent to the taxes for which the land was bid off." M.C.L. § 211.72 further authorizes a person holding a state tax deed to bring an action to quiet title against all parties who have a recorded interest in the property. However, under M.C.L. § 211.141, interested parties are given a final redemption period that lasts for six months after the tax deed holder complies with the notice requirements of M.C.L. § 211.140. M.C.L. § 211.140 provides in pertinent part:

> (1) A writ of assistance or other process for the possession of property the title to which was obtained by or through a tax sale . . . shall not be issued until 6 months after the sheriff of the county where the property is located files a return of service with the county treasurer of that county showing service of the notice prescribed in subsection (2). The return shall indicate that the sheriff made personal or substituted service of the notice on [the interested parties as specified] . . . .
>
> (2) The notice served shall be in substantially the following form:
>
> (3) If the grantee or grantees, or the person or persons holding the interest in the land as described in subsection (1) are residents of a county of this state other than the county in which the land is situated, the notice shall be served on that person by the sheriff of the county in which that person or persons reside or may be found . . . .
>
> * * * *
>
> (5) If the sheriff of the county where the property is located is unable, after careful inquiry, to ascertain the whereabouts or the post office address of the persons on whom notice may be served as prescribed in this section, service of the notice shall be made by publication. The notice shall be

published for 4 successive weeks, once each week, in a newspaper published and circulated in the county where the property is located. . . . . This publication shall be instead of personal service upon the person or persons whose whereabouts or post office address cannot be ascertained as set forth in subsection (3).

(6) Service may be made on a resident of this state by leaving the notice at that person's usual place of residence with a member of that person's family of mature age. . . .

If the proper statutory notice is not served, the six-month redemption period never begins to run and the right to redemption continues to exist. Moreover, "strict compliance with the tax sale notice provisions is required," and even "[a]ctual notice is not enough to satisfy the statute's notice requirements." *Brandon Twp v. Tomkow*, 211 Mich. App. 275, 284; 535 NW2d 268 (1995).

B. The *Equivest Limited Partnership v. Brooms* Decision.

This case involves a parcel of land located in Oakland County. When an earlier owner of the property defaulted on her taxes, a tax sale was held, and defendants received tax deeds from the state with regard to the 1991 and 1992 taxes. Later, plaintiff's predecessor in interest, Equifunding, Inc., obtained a tax deed with regard to the 1993 taxes. Equifunding sought to quiet title to the property and prepared a notice for service upon defendants. According to a letter from the Wayne County Sheriff's Office, the office attempted service nine times at defendants' Detroit residence but was unable to serve defendants because they refused to answer their door. Equifunding filed the Wayne County Sheriff's Office letter with the Oakland County Treasurer's Office. Thereafter, Equifunding's notice to defendants was published four times in the Lake Orion Review, an Oakland County newspaper. Equifunding later conveyed its interest in the property to plaintiff.

After defendants failed to respond to the published notice, plaintiff filed a complaint to quiet title and a request for writ of assistance to take possession. Defendants answered and as an affirmative defense claimed that they were not properly notified of their six-month redemption rights under M.C.L. § 211.140. Plaintiff then moved for summary disposition, and the trial court granted the motion, concluding that the Wayne County Sheriff's Office letter was sufficient to constitute a return of service for purposes of complying with subsection M.C.L. § 211.140(1).

On appeal, defendants claimed that under M.C.L. § 211.140(5), the Oakland

County Sheriff was required to file an affidavit or return of service disclosing that he could not ascertain defendants' whereabouts before service by publication was warranted. Defendants contended that because the Oakland County Sheriff did not do so, the statutory redemption period never began running. Defendants further made the general contention that because plaintiff did not strictly comply with the notice provisions of M.C.L. § 211.140, the redemption period never began to run and the trial court erred in granting summary disposition to plaintiff.

The Court of Appeals agreed that the notice given was insufficient under the prescribed statutory scheme. First, giving M.C.L. § 211.140(5) its plain meaning, that subsection does not apply to the facts of this case. It provides that if the sheriff of the county in which the property is located is unable to ascertain the whereabouts of an interested party, then service by publication in the county where the property is located is valid. In the instant case, there is no dispute that the whereabouts of defendants were in fact known. Moreover, subsection five provides for the alternative of notice by publication *in the county where the property is located;* it seems counterintuitive to commence publication in this specified county when it is known that the interested parties reside in a different county. Subsection five is simply not applicable to this case.

Subsection three does apply, the Court observed. Defendants had a known Wayne County address and were subject to service by the Wayne County Sheriff. Subsection three, however, includes no alternative means of providing notice if the interested party deliberately evades service. Although the subsection does allow for service by certified mail, that applies only to nonresidents of the state. Subsection six, in turn, allows service by leaving the notice at the interested party's residence, but then only with a member of the person's family.

The expedient of resorting to publication notice in Oakland County in response to frustrated attempts to effect personal service in Wayne County, upon the filing of Wayne County's notice of failure of personal service in Oakland County, cannot be reconciled with the statutory requirements, the Court noted. The statutory notice provisions at issue simply do not provide for this alternative. The choice confronting the Court of Appeals, then, was whether to read the statute in its most literal sense, in which case the publication notice that occurred here was insufficient, or whether to interpret the statute as allowing for the publication notice that occurred here as a reasonable response to a willful refusal to cooperate with efforts at personal service. The Court of Appeals felt constrained by case law to read the statute in its most literal sense. As the Court noted, within the realm of tax sales of real property, strict compliance with statutory requirements is an overriding policy.

In its concluding observations, the Court made the following appeal to the Legislature:

> M.C.L. § 211.140 must be strictly construed, even if doing so produces anomalous results. We thus feel constrained to hold that the notice attempts that occurred in this case did not serve to commence the six-month redemption period. The statute simply does not allow for publication notice in the county where the property is located in response to frustrated attempts at personal service upon residents of another county. We invite our Legislature to revisit the provisions of M.C.L. § 211.140 in order to provide alternatives for situations in which a party whose whereabouts are known obstinately refuses service.

Question Presented

Should the provisions of M.C.L. § 211.140 be amended to provide alternatives for service of process in situations where a party whose whereabouts are known refuses service?

Recommendation

The Commission recommends that the Legislature amend M.C.L. § 211.140 to provide for alternative methods of service in situations where a party whose whereabouts are known refuses or otherwise avoids service of process.

VI. Public disclosure of juvenile sex offender's record once he/she reaches the age of majority.

A. Background.

Pursuant to the Sex Offenders Registration Act (SORA), M.C.L. § 28.721 *et seq.*, a juvenile for whom an order of disposition is entered for commission of one of several sex offenses is required to register with the local law enforcement agency. M.C.L. §§ 28.722(a)(iii) and 28.723(1)(a); *In re Ayres,* 239 Mich. App. 8, 15, 608 N.W.2d 132 (1999). When the Legislature first enacted the SORA in 1994, the act simply required that offenders register with local law enforcement agencies. *People v. Pennington,* 240 Mich. App. 188, 191, 610 N.W.2d 608 (2000). In 1999, in response to a federal mandate, the Legislature amended the SORA adding public notification provisions. Under that

amendment, the Department of State Police is charged with maintaining a computer database that allows persons living within the same zip code as an offender to access information that includes the offender's name, address, physical description, and the offense. *Id.;* M.C.L. § 28.728(2). A juvenile offender is initially exempt from inclusion within the public database; however, for CSC II violations, that exemption ends when the individual becomes eighteen years old. M.C.L. § 28.728(2).

B. The *In the Matter of Wentworth* Decision.

In *In the Matter of Wentworth*, the respondent appealed as of right an order of disposition entered following delinquency proceedings in which the family court determined that respondent, a minor, committed second-degree criminal sexual conduct (CSC II) with a six-year-old minor, M.C.L. § 750.520c(1)(a). Respondent raised several issues, including a constitutional challenge to the registration and public notification requirements of the SORA, M.C.L. § 28.721 *et seq.*

The Court addressed the constitutional challenges to the SORA, holding that the SORA is not an unconstitutional deprivation of respondent's liberty or privacy interests. Nevertheless, the Court expressed concern over the "draconian nature of this act." Under the requirements of the SORA, respondent's registration would remain confidential while she remains a juvenile; however, once she reaches the age of majority, that information would be added to the public database and would remain there for the rest of her life. Although conceding the seriousness of the circumstances surrounding the offense in this particular case, the Court questioned the propriety of publicly and permanently labeling juveniles as convicted sex offenders:

> Traditionally, our justice system has distinguished between juvenile delinquency and adult criminal conduct. M.C.L. § 712A.1(2), which confers jurisdiction over juveniles on the family division of the circuit courts, specifically states that "proceedings under this chapter are not criminal proceedings." M.C.L. § 712A.23 also limits the admissibility of juvenile records in both criminal and civil proceedings in an attempt to "hide youthful errors from the full glare of the public...." *People v. Poindexter,* 138 Mich. App. 322, 326, 361 N.W.2d 346 (1984). The public notification provisions of the SORA appear to conflict with our traditional reluctance to criminalize juvenile offenses and our commitment to keep juvenile records confidential.

In the *Ayres* case, the Court of Appeals held that the juvenile registration

requirements of the SORA did not constitute cruel or unusual punishment in part because juveniles were exempt from the public notifications requirements of the act. *Ayres, supra* at 20-21, 608 N.W.2d 132. The Court of Appeals also concluded that "[i]n light of the existence of strict statutory safeguards that protect the confidentiality of registration data concerning juvenile sex offenders," the act did not offend the premise of our juvenile justice system that "a reformed adult should not have to carry the burden of a continuing stigma for youthful offenses." *Id.* at 21, 608 N.W.2d 132. However, in the Court's view, "the recent amendment of the statute removing those confidentiality safeguards raises questions about the continuing validity of our holding in *Ayres*. Because respondent did not raise this issue on appeal, we will not address it in this opinion." However, the Court stated in conclusion:

> [W]e invite the Legislature to reconsider whether the implied purpose of the act, public safety, is served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression.

Question Presented

Should the provisions of the SORA that require public disclosure of a juvenile sex offender's record upon reaching the age of majority be amended?

Recommendation

The issue in this case raises an important public policy question. It is for this reason that the Commission draws the matter to the Legislature's attention. However, the Commission makes no recommendation to the Legislature.

UNIFORM LAWS PROMULGATED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS: A REPORT AND RECOMMENDATIONS TO THE LEGISLATURE

The Commission is charged by statute with several duties, among which is the duty to receive and consider proposed changes in law recommended by the National Conference of Commissioners on Uniform State Laws (NCCUSL). In carrying out this statutory charge, in 2003 the Commission undertook a review of the following uniform laws promulgated by the NCCUSL:

- Uniform Athlete Agents Act
- Uniform Interstate Family Support Act
- Uniform Interstate Enforcement of Domestic Violence Protection Orders Act
- Uniform Foreign Money Claims Act
- Uniform Principal and Income Act
- Uniform Custodial Trust Act
- Uniform Arbitration Act
- Uniform Computer Information Transactions Act
- Uniform Parentage Act
- Uniform Trust Code
- Uniform Partnership Act
- Uniform Anatomical Gift Act
- Uniform Limited Partnership Act
- Uniform Apportionment of Tort Responsibility Act
- Uniform Child Witness Testimony by Alternative Methods Act
- Uniform Disclaimer of Property Interests Act

• Uniform Nonjudicial Foreclosure Act

• Uniform Securities Act

The Commission recommends adoption of the Uniform Athlete Agents Act, the Uniform Interstate Family Support Act, the Uniform Foreign Money Claims Act, the Uniform Custodial Trust Act, and the Uniform Anatomical Gift Act (the Commission recommended adoption of this last Act in 1993 and renews that recommendation here).

The NCCUSL summary of these proposed laws follows. The text and commentary of these proposed laws are available on-line at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

UNIFORM ATHLETE AGENTS ACT

PURPOSE: This act provides for the uniform registration, certification, and background check of sports agents seeking to represent student athletes who are or may be eligible to participate in intercollegiate sports. The act also imposes specified contract terms on these agreements to the benefit of student athletes, and provides educations institutions with a right to notice along with a civil cause of action for damages resulting from a breach of specified duties.

ORIGIN: Completed by the Uniform Law Commissioners in 2000.

APPROVED BY: American Bar Association

SUPPORTED BY: National Collegiate Athletic Association

STATE ADOPTIONS:
Alabama
Arizona
Arkansas
Delaware
District of Columbia
Florida
Idaho
Indiana
Minnesota
Mississippi
Nevada
Tennessee
Utah
U.S. Virgin Islands
Washington
West Virginia

2002 INTRODUCTIONS:

California
Georgia
Hawaii
Illinois
Iowa
Maryland
Michigan

Missouri
Nebraska
New Jersey
New York
Pennsylvania
South Carolina
Wisconsin

UNIFORM ATHLETE AGENTS ACT -- SUMMARY

With the proliferation of professional sport franchises in the United States, and the immense sums now paid to athletes for commercial endorsement contracts, it is no surprise that the commercial marketplace in which athlete agents operate has become very competitive. And while maximizing the income of one's clients is certainly the "American way" (as well as good business practice), the recruitment of a student-athlete while he or she is still enrolled in an educational institution may cause substantial eligibility or other problems for both the student and the school, especially where the athlete is not aware of the implications of signing the agency agreement or where agency is established without notice to the athletic director of the school. The problem becomes even more acute where an unscrupulous agent misleads a student. While several states have enacted legislation to address these issues, agent registration and disclosure requirements vary greatly from state to state, causing confusion among student athletes, athletic departments, educational institutions, and the agents themselves.

The Uniform Athlete Agents Act provides for the uniform registration, certification, and background check of sports agents seeking to represent student athletes who are or may be eligible to participate in intercollegiate sports, imposes specified contract terms on these agreements to the benefit of student athletes, and provides educational institutions with a right to notice along with a civil cause of action for damages resulting from a breach of specified duties.

The act requires agents to disclose their training, experience, and education, whether they or an associate have been convicted of a felony or crime of moral turpitude, have been administratively or judicially determined to have made false or deceptive representations, have had their agent's license denied, suspended, or revoked in any state, or have been the subject or cause of any sanction, suspension, or declaration of ineligibility. Agents are required to maintain executed contracts and other specified records for a period of five years, including information about represented individuals and recruitment expenditures, which would be open to inspection by the state.

While the act imposes significant disclosure, registration, and record-keeping requirements on athlete agents, those who are issued a valid certificate of registration or licensure in one state would be able to cross-file that application (or a renewal thereof) in

all other states that have adopted the act. This aspect of the act at once simplifies regulatory compliance for agents, while at the same time facilitates the ability of all jurisdictions to obtain dependable, uniform information on an agent's professional conduct in other states.

Because the potential loss of intercollegiate eligibility is a serious, and often unexpected, effect of entering an athlete-agent contract, the act provides student-athletes with a statutory right to cancel an agency contract within 14 days after the contract is signed without penalty. In addition, athlete-agent contracts subject to the act are required to disclose the amount and method of calculating the agent's compensation, the name of any unregistered person receiving compensation because the athlete signed the agreement, a description of reimbursable expenses and services to be provided, as well as warnings disclosing the cancellation and notice requirements imposed under the act.

The potential loss of a student-athlete's eligibility is also a serious concern for athletic programs at educational institutions - accordingly, the act requires both the agent and the student-athlete to give notice of the contract to the athletic director of the affected educational institution within 72 hours of signing the agreement, or before the athlete's next scheduled athletic event, whichever occurs first. Where applicable, the agent must also provide this notice to a school where he or she has reasonable grounds to believe the athlete intends to enroll. The act would also provide educational institutions with a statutory right of action against an athlete agent or former student athlete (several, but not joint, liability) for damages, including losses and expenses incurred as a result of the educational institution being penalized, disqualified, or suspended from participation by an athletics association or conference, or as a result of reasonable self-imposed disciplinary actions taken to mitigate sanctions, as well as associated party costs and reasonable attorney's fees.

Finally, the act prohibits athlete agents from providing materially false or misleading information or making a materially false promise or representation with the intent of inducing a student athlete to enter into an agency contract, or from furnishing anything of value to a student athlete or another person before that athlete enters into an agency contract. The act provides that an athlete agent may not intentionally initiate contact with a student athlete unless registered under this act, and may not refuse or willfully fail to retain or permit inspection of required records, fail to register where required, provide materially false or misleading information in an application for registration or renewal thereof, predate or postdate an agency contract, or fail to notify a student athlete (prior to signing) that signing an agency contract may make the student athlete ineligible to participate as a student athlete in that sport. The act would impose criminal penalties for violations of these prohibitions.

The Uniform Athlete Agents Act provides important protections for student-athletes and the educational institutions where they compete, creates a uniform body of

agent registration information for use by state agencies, and simplifies the regulatory environment faced by legitimate sports agents.

INTRODUCTION IN MICHIGAN LEGISLATURE

Legislation was introduced in early 2002 to adopt the Uniform Athlete Agents Act in Michigan (HB 4857). HB 4857 passed the House in November 2002 and was referred to the Senate on November 14, 2002.

The House Legislative analysis summarizes the arguments for and against the Uniform Act as follows:

> Among the beneficial features of the model act are:
>
> • a requirement that athlete agents must be registered with the state (with the assumption that the information regarding their experience, education, and background that an applicant files will be open for public inspection) and reciprocity arrangements that allow an agent registered or licensed in one state to cross-file applications with other states that have adopted the act;
>
> • mandatory notification by agents and student-athletes to the educational institution when an agency contract has been entered into (so that the institution can avoid using an ineligible player);
>
> • the ability of student-athletes to cancel a contract without penalty within 14 days after signing (due to the supposed disparity in the sophistication of the parties to the contract) and the automatic voiding of contracts that fail to contain certain specified features (with the student under no obligation to return any consideration received as an inducement to sign);
>
> • mandatory notification in the contracts themselves to the student-athlete that signing the contract could result in losing eligibility and that the student must notify his or her school of the existence of the contract;
>
> • limitations on agent conduct, including prohibitions on certain kinds of inducements, with misdemeanor penalties, as well as civil penalties and administrative fines, for violations;
>
> • the granting of subpoena power to the state so it can obtain materials needed to administer the model act;
>
> • the creation of a cause of action to educational institutions for damages caused by an athlete agent or a former student-athlete due to a violation of the act.
>
> *Against:*
>
> In the past, legislation of this kind has encountered several objections. The bill requires the registration of agents but imposes no competency

requirements. The public, however, and student-athletes searching for an agent might assume that a person who is a "registered" agent has been approved by the state as competent and qualified. Moreover, generally speaking, the state has resisted efforts in recent years to register any additional occupations, partly because to do so will invite a flood of such requests. There have also been concerns that this kind of legislation ignores the possibility that part of the problem lies with the rules of the governing athletic associations, the nature of big-time college sports, and the special status of the student-athlete.

UNIFORM INTERSTATE FAMILY SUPPORT ACT

PURPOSE: Limits child and family support orders to a single state, eliminating interstate jurisdictional disputes. Amendments were added in 2001 to clarify many of the provisions of the Act, increasing its usefulness.

ORIGIN: Completed by the Uniform Law Commissioners in 2001. The 1996 UIFSA has been adopted in every state and the District of Columbia.

APPROVED BY: American Bar Association

STATE ADOPTIONS:
California
Washington
West Virginia

2002 INTRODUCTIONS:

Delaware
Illinois
Mississippi
Nebraska
Virginia

AMENDMENTS TO THE UNIFORM INTERSTATE FAMILY SUPPORT ACT (2001) -- SUMMARY

In 1992, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Interstate Family Support Act (UIFSA), which replaced the Uniform Reciprocal Enforcement of Support Act (URESA). URESA, was originally

promulgated in 1950, and was adopted by every state. UIFSA has now replaced URESA in every American jurisdiction.

UIFSA provides universal and uniform rules for the enforcement of family support orders, by setting basic jurisdictional standards for state courts, by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding, by establishing rules for determining which state issues the controlling order in the event proceedings are initiated in multiple jurisdictions, and by providing rules for modifying or refusing to modify another state's child support order.

The adoption of UIFSA in all American jurisdictions in some respects tracked the development of welfare reform efforts in the mid-1990s. Certain provisions of UIFSA were amended in 1996 following a review and analysis requested by state child support enforcement community representative. A month after these adoptions were promulgated by NCCUSL, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, the last major expression of child support enforcement reform from the Congress. As a result, federal grants to a state for child support enforcement became partially dependent upon the enactment of UIFSA.

The 2001 Amendments to UIFSA again follow a review and analysis requested by representatives of the state child support enforcement community. While some of these changes are procedural, and others substantive, none make a fundamental change in UIFSA policies and procedures. UIFSA continues to serve the basic principle of one order from one state that will be enforced in other states. The amendments are meant to enhance that basic objective.

The 2001 Amendments

One of the most important accomplishments of UIFSA was the establishment of bedrock jurisdictional rules under which a tribunal in one state only would issue or modify one support order only. That order would be the order any other state would enforce and would not modify. Further, if more than one state tribunal issues an order pertaining to the same beneficiary, one of those would become the enforceable, controlling order. The 2001 amendments clarify jurisdictional rules limiting the ability of parties to seek modifications of orders in states other than the issuing state (in particular, that all parties and the child must have left the issuing state and the petitioner in such a situation must be a nonresident of the state where the modification is sought), but allow for situations where parties might voluntarily seek to have an order issued or modified in a state in which they do not reside. The amendments also spell out in greater specificity how a controlling order is to be determined and reconciled in the event multiple orders are issued, and clarify the procedures to be followed by state support enforcement agencies in these circumstances, including submission to a tribunal where appropriate.

The amendments give notice that UIFSA is not the exclusive method of establishing or enforcing a support order within a given state – for example, a nonresident may voluntarily submit to the jurisdiction of a state for purposes of a divorce proceeding or child support determination, and seek the issuance of an original support order at that tribunal. The amendments also clarify, however, that the jurisdictional basis for the issuance of support orders and child custody jurisdiction are separate, and a party submitting to a court's jurisdiction for purposes of a support determination does automatically submit to the jurisdiction of the responding state with regard to child custody or visitation.

The amendments also provide clearer guidance to state support agencies with regard to the redirection of support payments to an obligee's current state of residence, clarifies that the local law of a responding state applies with regard to enforcement procedures and remedies, and fixes the duration of a child support order to that required under the law of the state originally issuing the order (i.e., a second state cannot modify an order to extend to age 21 if the issuing state limits support to age 18).

The amendments incorporate certain technical updates in response to changes in the law in the intervening years since 1996 – specifically, the use of electronic communications in legal and other contexts (i.e. E-Sign and the Uniform Electronic Transactions Act) and the evolution of federal and state agency practice (including specifically the usage of certain forms and the sealing of records in connection with certain child custody action information), and make other nonsubstantive changes to grammar and organization in an effort to clarify certain provisions.

Finally, the amendments expand UIFSA to include coverage of support orders from foreign country jurisdictions pursuant to reciprocity and comity principles. While a determination by the U.S. State Department that a foreign nation is a reciprocating country is binding on all states, recognition of additional foreign support orders through comity is not forbidden by federal law. UIFSA clearly provides that a foreign country order may be enforced as a matter of comity. In the event a party can establish that a foreign jurisdiction will not or may not exercise jurisdiction to modify its own order, a state tribunal is also authorized to do so.

UNIFORM INTERSTATE FAMILY SUPPORT ACT – WHY STATES SHOULD ADOPT IT

Currently, one in four children in the U.S. -- more than 10 million children -- grows up in a single-parent household, and millions of these children fail to receive the financial support that they are owed. This support is crucial to sustaining family life, and often to averting outright poverty. Children whose parents live in different states suffer the most, since a conflict between jurisdictions can often stand as a serious impediment to the enforcement of a support order.

In recent years, Congress has made substantial changes to federal child support enforcement laws. Perhaps most significantly, it has mandated that the states adopt child support guidelines and establish enforcement devises such as tax intercepts and credit reporting.

To eliminate interstate jurisdictional disputes and enable the new federal legislation to be effective, the Uniform Law Commissioners (ULC) have drafted the Uniform Interstate Family Support Act (UIFSA), which provides for one-state control of a case and for a clear, efficient method of interstate case processing. This new act simplifies the muddle of conflicting child and spousal support laws that develop when parents live in different states. It represents a major overhaul of national child support rules and should be adopted in every state.

UIFSA UPDATES AND IMPROVES URESA

The Uniform Reciprocal Enforcement of Support Act (URESA), drafted by the ULC in 1950, amended in 1958 and 1968, and adopted in every state, has been one of the ULC's most successful acts. Yet URESA recognizes the coexistence of multiple support orders from different states, often making it difficult to enforce an order for collection of child and spousal support.

It is the overriding principle of UIFSA that, to the maximum extent possible, only one valid support order will be in existence at any one time. This act makes the child's "home state" dominant in establishing priority of competing courts.

UIFSA also provides for a "long arm" provision which allows one court to retain exclusive jurisdiction over both parties in the support dispute, even though one - or both - may be living outside the boundaries of the court's jurisdiction.

A number of other improvements are made to URESA to streamline interstate proceedings: support proceedings may be initiated by or referred to administrative agencies rather than to courts in states that use those agencies to establish support orders; vital information and documents may be transmitted through electronics and other modern means of communication for quicker facilitation; courts are required to cooperate in the discovery process for use in a court in another state; a registered support order is immediately enforceable, unless the respondent files a written objection within twenty days and sustains that objection.

UIFSA MAKES SUPPORT ORDER ENFORCEMENT EASIER

If a court finds that support is owed, it issues a support order requiring that support or reimbursement be paid. To enforce its support orders, a court may: order the person owing support to make payments; order that income be withheld; enforce orders by claiming civil or criminal contempt; set aside property for payment of support; or order the person owing support to seek appropriate employment.
Except under narrowly defined circumstances, the only court or tribunal that can modify a support order is the one having continuing, exclusive jurisdiction over the order. If two or more states claim jurisdiction to establish or modify an order, UIFSA has a priority scheme that favors the child's home state.

Also, UIFSA provides two direct enforcement procedures that do not require assistance from a court. First, the support order may be mailed directly to an obligor's employer in another state, which triggers wage withholding by that employer without the necessity of a hearing, unless the employee objects. Second, the act provides for direct administrative enforcement by the support enforcement agency of the obligor's state.

UNIFORMITY

The problems this act addresses have long cried out for uniformity, and it may well be the answer to long-standing interstate jurisdictional conflicts that have often been a refuge for those hoping to avoid paying child support.

If adopted everywhere, the bottom line effect of this act would be to eliminate multiple litigation across state lines and also to counter inefficiencies within the URESA bureaucracy, both of which form major barriers to child support enforcement.

The UIFSA holds the promise of exerting a positive effect on the lives of untold numbers of American children, one quarter of whom now live in single parent households. The ULC envisions that the new law's influence will be extremely broad, and some form of it should be adopted in every state.

UNIFORM FOREIGN MONEY CLAIMS ACT -- SUMMARY

The necessary engagement of Americans in international trade has increased the amount of business conducted by Americans in foreign currency. Also, more travel to foreign countries by Americans, and more travel to the United States by citizens of other countries, increases the number of tort claims that can be expressed in foreign currency, or in both foreign currency and dollars. When a business deal goes bad, the losses are appropriately taken in the currency that is the foundation of the deal. Injuries suffered may, also, be most appropriately compensated in a foreign currency, depending upon where the losses were suffered and where damages accrued. Yet the general rule in the United States requires judgments on all claims to be stated and paid in dollars. A number

of states fix the payment of judgments in dollars by statute.

Requiring that judgments be always in dollars does not accord with the international character of much litigation, and is contrary to the rules that pertain in most countries, which do recognize judgments in foreign currency--including dollars. So it is appropriate for the United States to join the rest of the world with respect to the payment of judgments. However, to do so, the law must also select appropriate rules for converting a judgment in a foreign currency to dollar value. The Uniform Foreign-Money Claims Act (UFMCA) reverses the rule that all money judgments must be valued in dollars, and provides the rules for fair conversions of foreign money judgments into dollar amounts.

UFMCA allows any claimant to assert a claim in foreign money. It also allows any opposing party to contest such a claim, and to assert and prove that a different money should be the basis for the claim. How does a court determine the money to be used? UFMCA establishes some basic alternative standards. If a specific money is regularly used between the parties as a matter of usage or course of dealing, it can be asserted as the currency to be used in assessing damages in an action. If a specific currency is used for valuing or settling transactions in a particular commodity or service by trade usage or common practice, it can be the currency used in the litigation. Lastly, if a loss is ultimately felt or incurred by a party in a specific currency, that money can be used to establish the price of a claim. By hearing evidence as to any of these basic standards, the court determines what money shall be used to value a claim.

The parties themselves can establish the money that is appropriate. UFMCA permits parties to agree to the money that will govern the transaction between them. They can also agree to settle a claim in any currency that they choose. If there is a contract specifying payment in a certain currency, that currency is the proper money for payment of any claim under that contract.
But conversion between dollars and a foreign currency remains a problem. American litigants will ordinarily have dollars with which to satisfy judgments against them. Foreign defendants may prefer to pay in dollars, as well. Since the dollar is actively traded in international money markets, it is not rare for dollars to be available to foreign entities.

If currencies remained at fixed values with respect to each other, there would be no problem. However, currencies fluctuate against each other in an international market. We hear that the dollar goes up or down against the pound, the euro and the yen, as a part of the normal business news every day. Anybody who travels out of the United States is aware of these fluctuations as he or she exchanges dollars for the foreign currency of choice. If judgments are to be converted from another currency to dollars, what is the fair time to value the exchange?

With respect to judgments, there are three possibilities, the day a person suffers a loss (breach day), the day the judgment is rendered by a court (judgment day), or the day the judgment is actually paid (payment day). If the breach day or the judgment day are chosen as the date of conversion, then currency fluctuations between the chosen date and the date of payment are at the risk of the claimant. After a conversion date that is either the breach day or the judgment day, if the dollar drops against the currency in which the judgment is stated, the claimant gets less value on payment day. Conversely, if the dollar rises against that currency, the claimant gets more value on payment day.

Rather than subject the claimant to that risk of currency fluctuation, UFMCA establishes payment day as the proper date for making the conversion. We assume that the claimant is being paid in the currency that is appropriate. He or she should get the value that is inherent in a judgment stated in that currency. Conversion to dollars on payment day conforms most closely to that principle. Payment day is, also, the day of conversion in the law of the major participating countries in international trade.

Whether to pay in dollars or in the foreign currency is, in fact, at the option of the judgment debtor under UFMCA. If dollars are chosen, the rate of exchange is the bank-offered spot rate on the conversion date, which is the basically the free market rate of exchange on the day preceding the day of payment.

Judgments in a law suit are not the only money awards that UFMCA will govern. Arbitration awards are, also, subject to this Act. Another kind of proceeding that may require conversion from a foreign currency to dollars is a "distribution proceeding." This is defined as "a judicial or nonjudicial proceeding for an accounting, an assignment for the benefit of creditors, a foreclosure, for the liquidation or rehabilitation of a corporation or other entity, for the distribution of an estate, trust, or other fund in or against which a foreign-money claim is asserted."

To convert foreign money to dollars in a "distribution proceeding," the selected date is the day the proceeding is initiated. The kinds of actions that are "distribution proceedings" involve distributing money from an established fund to those persons entitled to it. There are no losses that may fluctuate in value. Therefore, value established at the time the distribution is asked for is the fair value.

UFMCA serves the goals of permitting claims in foreign currency and of establishing a fair conversion to dollars. These are its principal purposes. However, there are some other issues that must be covered, and UFMCA covers them. The right to pre-judgment interest and the rate of interest are treated as substantive law regarding the right to recovery under the conflict of laws rules that pertain in a state. A court might choose the law of the foreign jurisdiction, therefore, in deciding the right to pre-judgment interest and the rate to be applied if there is a right to pre-judgment interest. However, the interest on a judgment is at the same rate as any other judgment under the law of the state rendering the judgment.

A judgment of a court in another jurisdiction that is expressed in terms of a foreign currency is enforceable, and may be converted into dollars under UFMCA at the judgment debtor's option, even though the jurisdiction in which the judgment is rendered does not provide for such a conversion. Such a judgment is to be enforced as any other foreign judgment is enforced.

UFMCA provides for temporary valuations of foreign money claims in dollars for the purposes of taking certain provisional steps in an action, such as seizing or restraining assets pursuant to a writ of attachment, assessing costs of litigation, or determining the amount of a surety bond. The time for making a temporary valuation is the banking day next preceding the filing of the application for the specific process of the court, and the rate is the bank-offered spot rate of exchange prevailing on that day.

Sometimes a foreign country will revalorize its currency, such as Brazil did in recent history. If a foreign money claim is stated in the old currency, then a rate of exchange must be stated for conversion into the new currency. The rate under UFMCA is the rate of conversion officially established by the issuing country.

These are the basic issues addressed in UFMCA. The United States is preparing itself for a greater and more competitive role in international trade. UFMCA is a measure that states can adopt as part of the general preparation for assuming that improved role. Uniformity is essential for that role to be fully assumed in the administration of civil justice in the states.

UNIFORM FOREIGN MONEY CLAIMS ACT – WHY STATES SHOULD ADOPT IT

The Uniform Law Commissioners promulgated the Uniform Foreign Money Claims Act (UFMCA) to allow courts in the United States to accept or render judgments valued in a foreign currency. There are many reasons why the Uniform Foreign Money Claims Act should be adopted in every state.

Increased Need Due to International Claims. Foreign money claims are greatly increasing as more Americans participate in the global economy. Additionally, increased international travel also increases the number of personal claims in foreign money.

United States Role in Foreign Trade. Most of the United States' major trading partners allow judgments in dollars. The UFMCA will bring the United States in line with the international practice by allowing judgments in foreign money.

A Settled Payment Date. UFMCA endorses the payment day rule, which is used by most other countries for converting foreign money judgments into dollars.

A Fair Payment Date. The payment day rule meets the reasonable expectations of the parties involved and places the aggrieved party in the position it would have been in financially but for the wrong that gave rise to the claim.

A Fair Conversion to Dollars. The UFMCA establishes a fair conversion to dollars by using the bank spot rate as of the day of payment.

Allocation of Risk of Exchange Rate Fluctuation. UFMCA recognizes the rights of parties to agree upon the money that governs their relationship. In the absence of an agreement, the Act adopts the rule of giving the aggrieved party the amount to which it is entitled in its own money or the money in which the loss occurred.

Non-Adjudicated Claims. UFMCA also covers arbitration awards.

Uniformity. A lack of uniformity in the states in resolving foreign money claims stimulates forum shopping and creates a lack of certainty in the law. The rapid adoption of UFMCA will help to encourage and sustain the United States' leading role in international trade in the coming decades.

UNIFORM CUSTODIAL TRUST ACT

PURPOSE: To enable lawyers to make the benefits of trusts available at low cost to people without extensive financial assets.

ORIGIN: Completed by the Uniform Law Commissioners in 1987.

ENDORSED BY: American Bar Association
American Association of Retired Persons

STATE ADOPTIONS:
Alaska
Arizona Arkansas
Colorado
District of Columbia
Hawaii
Idaho
Louisiana
Massachusetts
Minnesota
Missouri
Nebraska

New Mexico
North Carolina
Rhode Island
Virginia
Wisconsin

UNIFORM CUSTODIAL TRUST ACT -- SUMMARY

We are perfectly free to be irresponsible with the property that we accumulate. We can dissipate it, abandon it, or ignore it. Most of us choose to be more responsible, however. We tend to accumulate property for the economic security it provides ourselves and our families. It comes as a great shock, therefore, when we find that controlling and protecting it at key moments in our lives is much harder than we imagined. What happens if we become incapacitated? Guardianships and conservatorships are expensive last resorts that mean total loss of control. What happens when we die? Wills and the probate process offer some solace, but probate becomes more onerous and expensive than helpful. Extensive estate planning with its panoply of generation-skipping devices, such as trusts, is expensive and beyond the resources of most people. The search for a better way continues.

The Uniform Law Commissioners' Uniform Custodial Trust Act, promulgated in 1987, offers some needed help. Inter vivos and testamentary, discretionary trusts are too complicated to meet certain needs. But the trust form of ownership, simplified and carefully prescribed in a statute, can meet them, thus the Uniform Custodial Trust Act (UCTA).

A trust is, simply, a legal structure for organizing the ownership and management of property for its preservation on behalf of specified individuals. A trust involves three fundamental participants: a donor who puts property in a trust; a trustee who owns and manages the trust; and beneficiaries who receive the financial benefit of the trust and for whom the property is preserved. A trust arises in a trust agreement or instrument (a document) in which the donor names the trustee and beneficiaries. The donor also establishes the trustee's powers over the property and the beneficiaries' rights to principal and income in the trust instrument. The donor then transfers property to the trustee, who owns it for the benefit of the beneficiaries. The trustee is also a fiduciary, meaning that he or she is subject to special rules and standards of care when managing the trust's assets. All trusts have these characteristics, and a custodial trust is but one of a number of kinds of trusts.

The UCTA allows any person to create a custodial trust by executing a simple statement (it may be a separate document or merely a notation on an existing title document) that the property is being placed in trust under the Act. The trustee's

obligations arise upon acceptance of the property. That is all that is necessary to create the trust.

The UCTA permits a kind of springing trust too-a trust that arises upon the happening of a future event. Any person can create such a trust with respect to specific property by executing a simple statement, indicating that the trust will be established upon the happening of the event.

The UCTA also allows anybody obligated to an incapacitated person, without a conservator (a conservator is a court-appointed manager of an incapacitated person's property), to establish a custodial trust into which property satisfying the obligation is placed for the incapacitated person as beneficiary. If the value of the property so placed exceeds $20,000, however, a transfer into such a trust must be approved by a court.

What distinguishes a custodial trust from other kinds of trusts? To begin with, the UCTA governs all aspects of the trust relationship, including a trustee's powers and obligations. Therefore, elaborate trust documents are not needed. Second, a custodial trust exists at the will of its beneficiaries. Any beneficiary can terminate his or her share of the trust. Third, trust beneficiaries can direct the trustee's payment of income to themselves. Fourth, the beneficiaries can direct the trustee's investment and management of the trust property. Fifth, at a beneficiary's incapacity, the trust continues as a discretionary trust, with the trustee as a full fiduciary. Therefore, no conservator needs to be appointed for the purposes of managing the trust property. Sixth, a beneficiary may direct the trustee by a simple writing to distribute the trust property in any fashion the beneficiary desires at the beneficiary's death. The writing is not a will unless the beneficiary makes it one, and the distribution is a nonprobate transfer of the property.

These powers of beneficiaries distinguish a custodial trust from all other trusts. Trustees under the common law are not subject to the direction of beneficiaries. The powers of the beneficiaries in the UCTA suggest why such a trust is called "custodial" and suggest the values of a custodial trust, as well as its limitations.

A trust is custodial because the trustee's powers are limited by the beneficiaries - the trustee is a custodian for the beneficiaries' interests. The trustee is a custodian until such time as a beneficiary becomes incapacitated. The custodial trust is an ideal form of ownership for anyone who wants to make sure property is properly managed before incapacity and protected afterwards. A person with property merely conveys the property to a trustee, naming himself or herself as beneficiary. While there are no questions of capacity, the beneficiary retains significant powers over the property. At incapacity, his or her appointed trustee continues to manage the property and use it for the beneficiary. If incapacity is temporary, the beneficiary reasserts his or her powers when capacity returns. If at any time a beneficiary with capacity desires to terminate the custodial trust, he or she simply terminates it.

Who will use the trust? Older people who want to make sure they control who manages their property when they are incapacitated, are the most likely users of the UCTA. People who go on long trips and who want to assure proper management while they are gone or who want protection if they become incapacitated while traveling can use a custodial trust rather than a power of attorney if it suits their needs. These are examples of people and situations for which the UCTA was created.

At the same time, people who need discretionary trusts for estate planning and tax purposes will continue to turn to traditional trust law. The control provided to beneficiaries in the UCTA and the ability to terminate a custodial trust do not make it suitable for these purposes.

The UCTA fills very particular needs of ordinary people. It should be considered strongly by any state or jurisdiction conscious of the difficulties an ordinary person has in preparing for personal incapacity and death.

UNIFORM CUSTODIAL TRUST ACT – WHY STATES SHOULD ADOPT IT

The Uniform Custodial Trust Act (UCTA), promulgated by the National Conference of Commissioners on Uniform State Laws in 1987, offers everyone a chance to establish a kind of trust that guarantees control of property at a time when a person becomes incapacitated, and that may also be used to pass on property at death without probate. The act is designed to offer a new, very simplified custodial trust, making the benefits of trusts available to people without extensive financial assets.

The UCTA was inspired by the Uniform Transfers to Minors Act, and the highly useful concept of a custodian for property of a minor under the terms of that act. But why should minors be the only beneficiaries of a good idea?

There are many reasons why every state should consider and adopt the Uniform Custodial Trust Act.

INEXPENSIVE

A custodial trust is inexpensive to create. Fees for consultation and drafting will be minimum - and non-existent in many cases. In addition, the UCTA provides an alternative to a costly court-supervised conservator or guardian. It can be used to avoid the costs and delays of probate proceedings at death. Economies can accrue broadly with the use of custodial trusts.

SIMPLE

A custodial trust can be set up by simple language referencing the statute. No elaborate trust document is necessary. Rights and obligation are derived directly from the statute.

CONTROL

Any person who creates a custodial trust retains complete control over it until incapacity or death. The named trustee manages the property in the case of incapacity, but until then, control remains with the beneficiary - the creator of the trust. The beneficiary directs the management of the property, receives income and principal, and can cancel the trust at any time.

COMPREHENSIVE

Any kind of property, real or personal, tangible or intangible, can be put in a custodial trust. Anybody can be made a beneficiary. Any legally competent person or entity can be appointed as trustee.

The Uniform Custodial Trust Act is simple, inexpensive, comprehensive, and complete. The most frequent users of this trust will most likely be senior citizens who want to provide for the management of assets in the event of future incapacity. It is also available for a parent to establish a custodial trust for an adult child who may be incapacitated. Those leaving the country temporarily can also place their property with another for management without relinquishing permanent control of their property.

The Uniform Custodial Trust Act should be adopted in every state. Although it meshes with the Uniform Probate Code (UPC), it is appropriate in states which have not adopted the UPC.

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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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

Subject	Commission Report	Act No.
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 By-Laws	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
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
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

Subject	Commission Report	Act No.
Condemnation Procedures	1968, p. 8	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: Sheriff's Service of Process	1976, p. 74	148
Court of Appeals Jurisdiction	1980, p. 34	206

1982 Legislative Session

Subject	Commission Report	Act No.
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

1983 Legislative Session

Subject	Commission Report	Act No.
Elimination of References to Abolished Courts: Police Courts and County Board of Auditors	1979, p. 9	87
Federal Lien Registration	1979, p. 26	102

1984 Legislative Session

Subject	Commission Report	Act No.
Legislative Privilege: a. Immunity in Civil Actions	1983, p. 14	27

b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/Psychiatrist-Patient Privilege	1978, p. 28	362

1986 Legislative Session

Subject	Commission Report	Act No.
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

1987 Legislative Session

Subject	Commission Report	Act No.
Amendments to Article 8 of the Uniform Commercial Code	1984, p. 97	16
Disclosure in the Sale of Visual Art Objects Produced in Multiples	1981, p. 57	40, 53, 54

1988 Legislative Session

Subject	Commission Report	Act No.
Repeal of M.C.L. §764.9	1982, p. 9	113
Statutory Rule Against Perpetuities	1986, p. 10	417, 418
Transboundary Pollution Reciprocal Access to Courts	1984, p. 71	517

1990 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Procedures of Justice Courts and Municipal Courts	1985, p. 12; 1986, p. 125	217
b. Noxious Weeds	1986, p. 128; 1988, p. 154	218
c. Criminal Procedure	1975, p. 24	219
d. Presumption Concerning Married Women	1988, p. 157	220
e. Mackinac Island State Park	1986, p. 138; 1988, p. 154	221
f. Relief and Support of the Poor	1986, p. 139; 1988, p. 154	222
g. Legal Work Day	1988, p. 154	223
h. Damage to Property by Floating Lumber	1988, p. 155	224

1991 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Land Contracts	1988, p. 157	140
b. Insurance	1988, p. 156	141
c. Animals	1988, p. 155	142
d. Trains	1986, pp. 153, 155; 1987, p. 80; 1988, p. 152	143
e. Appeals	1985, p. 12	144
f. Crimes	1988, p. 153	145
g. Library Corporations	1988, p. 155	146
h. Oaths	1988, p. 156	147
i. Agricultural Products	1986, p. 134; 1988, p. 151	148
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m. Association Land	1986, p. 154; 1988, p. 155	152
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r. Recording Duties	1988, p. 154	157
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1992 Legislative Session

Subject	Commission Report	Act No.
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1993 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures of Home Rule Villages	1989, p. 17	32
Condemnation Procedures Regarding Railroads	1989, p. 25	354
Condemnation Procedures Regarding Railroad Depots	1989, p. 26	354

1995 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures Regarding Inland Lake Levels	1989, p. 24	59
Condemnation Procedures of School Districts	1989, p. 24	289

1996 Legislative Session

Subject	Commission Report	Act No.
Felony Murder and Arson	1994, p. 179	20, 21

1998 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures of General Law Villages	1989, p. 16	254
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BIOGRAPHIES OF COMMISSION MEMBERS AND STAFF

RICHARD D. McLELLAN

Richard D. McLellan, is Chairman 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.

Mr. McLellan is a lawyer with the law firm of Dykema Gossett PLLC and serves as the Member-in-charge of the firm's Lansing Office and as the leader of the firm's Government Policy & Practice Group. He is responsible for the firm's public policy, administrative law and lobbying practices in Lansing, Chicago and Washington, D.C.

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

Following the 1990 Michigan elections, 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 has also been 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 and a member of the Michigan Jobs 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 10 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 serves as member of the Board of Trustees of Michigan State University-Detroit College of Law.

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.

McLellan served as a member of the Board of Directors of the Mercantile & General Life Reassurance Company of America and is a Trustee of JNL Trust established by the Jackson National Life Insurance Company. He is also Chairman of the Michigan Competitive Telecommunications Providers Association and Chairman of the Information Technology Association of Michigan.

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 is Director of Government Relations for the Michigan Association of School Boards. He also serves 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 State Senator from 1975 to 1978. He was a member of the Board of Regents of Eastern Michigan University for 14 years and currently serves on the Committee of Visitors of the University of Michigan Law School. He also is a member of the Boards of Arbor Hospice and Home Care and the Center for the Education of Women in Ann Arbor.

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 National Association of College and University Attorneys, the Michigan and National Councils of School Attorneys, and the American Bar Association.

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 LL.B. 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, the Castle Park Association, and the Michigan Historical Commission and serves as the Chair of the Commission. He is a member of the board of the Michigan Historical Center Foundation and is a Fellow of both the Michigan State Bar Foundation and the American Bar Foundation.

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.

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 elected in November of 1998 to a term ending January 1, 2005. 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 as Chief Judge of the Court of Appeals effective January 1, 2002.

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. Prior to that, he was a clerk to a justice of the Michigan Supreme Court and in private civil practice for twenty years in the City of Detroit. He recently returned to private practice in Detroit.

He is a graduate of Sts. Peter and Paul High School, Saginaw, the University of Detroit, and the University of Michigan Law School. He is married and the father of five children.

Mr. Ward is an Adjunct Professor at the Detroit College of Law at Michigan State University, Wayne State University Law School, and University of Michigan-Dearborn; a member of the Boards of Directors of Wayne Center, Wayne County Catholic Social Services and Wayne County Neighborhood Legal Services; past President of the Incorporated Society of Irish American Lawyers; a former member and President of the Board of Control of Saginaw Valley State University; a former commissioner of the State Bar of Michigan; and a former commissioner and President of the Wayne County Home Rule Charter Commission.

BILL BULLARD, JR.

Mr. Bullard is a legislative member of the Michigan Law Revision Commission and has served on the Commission since July 1996.

Mr. Bullard is a Republican State Senator representing the 15th Senatorial District. He was first elected to the Michigan House of Representatives in 1982 and served in that body until his election to the Senate in July 1996. He is currently Chairman of the Senate Transportation and Tourism Committee, as well as the Senate Financial Services Committee. Mr. Bullard also serves as the Vice-Chairman of the Senate Hunting, Fishing and Forestry Committee. He is also the Vice-Chairman of the Senate Finance Committee. Mr. Bullard is also the only practicing attorney serving on the Senate Judiciary Committee.

Mr. Bullard is a graduate of the University of Michigan and the Detroit College of Law. He has three children.

Mr. Bullard is the recipient of the first annual Legislator of the Year award from the Michigan Townships Association. He has been recognized by the National Federation of Independent Business with the Guardian Award, the Oakland County School Board

Association with the Distinguished Service award, the Michigan Soft Drink Association with the Legislator of the Year award. In 1999, he was presented with the State Highway Safety Champion award from the Advocates of Highway and Auto Safety. Mr. Bullard was also recognized by the Michigan Safety Commission in 1999 when they presented him with the State Safety Award. Mr. Bullard was appointed to the Oakland County Business Roundtable, Transportation and Telecommunications Committee by Oakland County Executive L. Brooks Patterson. Mr. Bullard was also recognized for achieving the Michigan Sales Tax Exemption for Rare Coins and Precious Metals by the Industry Council for Tangible Assets. He was also named Legislator of the Year in 2000 by the Michigan Humane Society, as well as by the National Republican Legislators' Association.

Mr. Bullard is a member of the National Conference of Commissioners on Uniform State Laws (NCCUSL), National Conference of Insurance Legislators (NCIL), the Fraternal Order of Police of Southwest Oakland County, the Oakland County Bar Association and the State Bar of Michigan.

GARY PETERS

Mr. Peters is a legislative member of the Michigan Law Revision Commission and has served on the Commission since June 1995.

Mr. Peters is a Democrat State Senator representing the 14th Senatorial District. He was elected to the Michigan Senate in November 1994. He serves as the Minority Vice Chair of the Senate Education, Finance, Judiciary, and Natural Resources & Environmental Affairs Committees, and is a member of the Economic Development, International Trade & Regulatory Affairs Committee.

Prior to being in the Legislature, Mr. Peters was Vice President, Investments, for a major national financial services firm. He serves as a Securities Arbitrator for the New York Stock Exchange, National Association of Securities Dealers, and the American Arbitration Association.

Mr. Peters taught Strategic Management and Business Policy at Oakland University, and was an instructor in the Finance & Business Economics Department at Wayne State University. His educational credentials include a B.A. from Alma College (Magna Cum Laude, Phi Beta Kappa), an M.B.A. in Finance from the University of Detroit, and a J.D. from Wayne State University Law School.

His previous government experience includes a term on the Rochester Hills City Council where he served as Chair of the Solid Waste Management Committee, Vice Chair of the Budget & Finance Committee, and a member of the Zoning Board of Appeals and Paint Creek Trailways Commission.

Mr. Peters' community involvement includes serving on the Board of Directors for Common Cause of Michigan, a member of the Environmental Policy Advisory Committee for the Southeast Michigan Council of Governments (SEMCOG) and as Chair of the Air Issues Committee for the Michigan Sierra Club. He recently received the Star Award from the Michigan Deputy Sheriff's Association for his support and dedication to law enforcement issues, and was named Environmentalist of the Year by the Mackinac Chapter of the Sierra Club.

Mr. Peters is also a commissioned officer in the U.S. Naval Reserve. He is married and has three children.

JAMES L. KOETJE

Mr. Koetje is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 2001.

Mr. Koetje is a Republican State Representative, serving the 74th House District in Michigan. Mr. Koetje was first elected to the Michigan House of Representatives in 1998. He is Chair of the Gaming and Casino Oversight Committee, vice-chair of Land Use and the Environment, and serves on the Civil Law and the Judiciary Committee as well as the Commerce Committee.

Mr. Koetje has an extensive business and legal background, being an attorney in private practice for more than twenty years. He holds a Bachelor of Science degree from Calvin College and a law degree from Valparaiso University School of Law.

Mr. Koetje is a former member of the Grandville City Council and Grandville Zoning Board of Appeals. He is also a former member of the Classis Committee of the Christian Reformed Church; is a member and past president of the American Business Clubs, and former member of WCET-TV Board of Directors. Mr. Koetje is also a former member of the board of the Grandville Friendship Homes, an organization dedicated to men and women's adult foster care. He serves as president of the Grandville Christian School Foundation and is a member of the Greater Grandville Chamber of Commerce.

Mr. Koetje is married and has four children.

STEPHEN ADAMINI

Mr. Adamini is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 2001.

Mr. Adamini represents the 109th District. He currently is serving his first term in the House.

Mr. Adamini has practiced law for over 32 years. He is senior partner at Kendricks, Bordeau, Adamini, Chilman & Greenlee, P.C., a Marquette law firm. He is a graduate of Negaunee High School, and received his Bachelor of Arts degree in political science from the University of Michigan in 1967 and his Juris Doctorate from the University of Michigan Law School in 1970.

Mr. Adamini serves as the Democratic vice-chair of the House Civil Law & Judiciary Committee, and he also sits on the House Health Policy Committee.

Mr. Adamini has a longtime civic commitment to the Central Upper Peninsula community. From 1971 to 1976, he served on the Michigan Boundary Commission. From 1973 to 1979, he served on the Alger-Marquette Community Mental Health Board, including one term as chair and two terms as treasurer. Mr. Adamini chaired the Marquette County Democratic Party from 1986 to 1992. He served on the Michigan Transportation Commission, appointed by former Governor Jim Blanchard, from 1987 to 1991. In 1991, he served on the Marquette County Re-Apportionment Commission. From 1994 to 1999, he served on the Marquette County Airport Board, including two terms as chairperson. From 1997 to 2000, he served on the Executive Committee of the Gwinn Area Chamber of Commerce.

Mr. Adamini and his wife Linda, a retired elementary school teacher, reside in Marquette. They have two adult children, Corrine Adamini Ricker and Stephen Jr. They also have three grandchildren, Alexandra, Marki, and Ryan.

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, Library of Michigan (until October 1, 2001), Legislative Council Facilities Agency, Joint Committee on Administrative Rules staff, Legislative Corrections Ombudsman, Michigan Law Revision Commission, Commission on Uniform State Laws, and the Sentencing Commission. He also served as a member of the Library of Michigan Board of Trustees and Foundation Board until October 1, 2001.

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 1993 to October 1993. He had previously served six terms as a state legislator beginning in 1981, serving in a leadership position and as vice-chairman 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 in 1973 and a J.D. from Case Western Reserve University in 1976.

Mr. Strand, his wife Cathy, and sons Michael and Matthew live in East Lansing, Michigan.

KEVIN C. KENNEDY

Mr. Kennedy is the Executive Secretary to the Michigan Law Revision Commission, a position he has filled since December 1995.

Mr. Kennedy joined the faculty of Michigan State University - Detroit College of Law in 1987 and has taught courses in civil procedure, conflict of laws, international trade, and international litigation.

He is a graduate of the University of Michigan, Wayne State University, and Harvard University. He was a law clerk at the U.S. Court of International Trade, was a private practitioner in Hawaii, and served as a trial attorney for the U.S. Department of Justice. He is married.

Mr. Kennedy is the author of nearly forty law review articles concerning international law, international trade, and civil procedure. He is the co-author of World Trade Law, a treatise on international trade law.

GARY GULLIVER

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He is married and has four children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.