final minutes

Michigan Law Revision Commission Meeting
Thursday, June 21, 2012 ▪ 11:30 a.m.
Legislative Council Conference Room ▪ 3 Boji Tower
124 W. Allegan ▪ Lansing, Michigan

Members Present:
Richard McLellan, Chair
Tony Derezinski, Vice-Chair
Senator Vincent Gregory
Representative Mark Meadows
Senator Tonya Schuitmaker
Judge William Whitbeck
John Strand
George Ward

Members Absent and Excused:
Representative Kurt Heise

Others Present:
Katherine Allen
Sean Bennett
Susan Cavanagh, Office of the Legislative Council Administrator
Jen Satterlee
Bruce Timmons
Jane Wilensky, MLRC Executive Secretary

I. Convening of Meeting
Chairperson McLellan called the meeting to order at 11:50 a.m.

II. Roll Call
The clerk took the roll as the members of the Commission and the audience introduced themselves. A quorum was present and Representative Heise was excused.

III. Approval of February 16, 2012 Meeting Minutes
The Chair asked for a motion to approve the minutes of the last meeting. No corrections or amendments were offered. **Senator Schuitmaker moved, supported by Mr. Derezinski, to adopt the minutes of the February 16, 2012 Michigan Law Revision Commission meeting. The minutes were unanimously approved.**

IV. Update on Pending Projects
The Chair called on Ms. Wilensky for a report on the Commission's pending projects.

a. Update of 2003 Report about Governor's Power to Remove Public Officials
Ms. Wilensky noted that this is one of the projects worked on by one of the students hired under the Commission's fellowship program. The update (attached to these minutes) of the 2003 MLRC Report on the Governor's Power to Remove Public Officials focused on changes to state law following Public Act 4 of 2011—the Emergency Manager law. The update concludes that under this law there is now a provision that provides for the removal of officers of a school district or a municipality that is in financial difficulty and has gone into receivership under the statute. The Chair noted that the provision does not include misconduct which means there is still an absence of removal power for misconduct. He then highlighted some of the issues involved and a discussion followed. The Chair is prepared at this point for the Commission to very specifically say that it is good public policy for the Constitutional provision for the removal of public officials be fully implemented and include positions that did not exist, like mayors and county executives, when the Constitutional section was enacted. He hopes some of the legislative members of the Commission will then get the bills drafted. After more discussion, the Chair will try to get more information including any administrative procedures in place and whether NCSL or CSG have any reports on how other states handle removal of public officials. The Commissioners had no objections continuing to work on a more thorough report.

b. Update of 2001 Report about Emergency Preparedness
The Chair commented that he felt it is better to address this issue before there is an actual crisis and called on Ms. Wilensky to provide an overview of the draft report (attached to these minutes). Ms. Wilensky reported the update

includes two recommendations—1) address the fact that the statutes do not have a consistent definition of the terms "emergency" and "disaster" and 2) the Michigan Legislature should consider adoption of the Uniform Emergency Volunteer Health Practitioners Act. She noted that the original MLRC report conducted in 2001 was a review and survey of the current laws only. A discussion followed. The Chair suggested work continue on this issue so that the Commission can make a clear recommendation to the Legislature.

c. International Corporate Lawyer Licensure

The Chair provided background on this issue and stated he would like the Commission to move forward and perhaps have a bill drafted that reflects the principals found in a report prepared on the subject (attached to these minutes). He asked the members to review the report and be prepared to act on some very specific legislative proposals at the next meeting.

d. Michigan Law Revision Commission Fellowship Program

Ms. Wilensky shared the resumes of the two students from the University of Michigan Law School hired to assist the Commission. She noted that Mr. Stiff provided the updates on the two reports presented today and Ms. Toman is working on the review of court decisions from last year. The Chair commented that he is pleased the Commission is filling these fellowships.

V. New Projects

Updating Open Meetings Act

The Chair explained the need to update the Open Meetings Act and directed the members' attention to an article prepared by Jack Dempsey (attached to these minutes). He has asked Mr. Dempsey's assistance in updating the act and helping the Commission bring forward some recommendations. Ms. Wilensky noted that she has a posting for a student to work on this project as well. The Chair will try to have Mr. Dempsey come to a Commission meeting to provide an update on this project.

VI. Public Comment

The Chair asked if there were any public comments. Mr. Sean Bennett offered a statement regarding immunity for court-appointed psychologists (attached to these minutes) and encouraged the Commission to reverse a Commission's position made in a report on the subject issued 10 years ago. The Chair explained that the Commission does not have the resources to review this issue. **Mr. Derezinski moved, supported by Mr. Strand, to reject Mr. Bennett's request to review the issue of immunity for court-appointed psychologists. There was no further discussion. The motion was unanimously approved.**

VII. Adjournment

The Chair noted that the next meeting is tentatively scheduled for October 18, 2012. **Having no further business, the Chair adjourned the meeting at 1:26 p.m.**

Approved at October 18, 2012 MLRC meeting.

UPDATE TO 2003 REPORT ON THE GOVERNOR'S POWER TO REMOVE PUBLIC OFFICIALS FROM OFFICE AND RECOMMENDATION TO THE LEGISLATURE

In its Thirty-Eighth Annual Report, the Michigan Law Revision Commission surveyed the Governor's constitutional and statutory authority to remove state and local public officials from office. A recent, significant statutory enactment affecting the Governor's removal powers once again draws the Commission's focus to this area. After surveying the Local Government and School District Fiscal Accountability Act and its removal provision, the Commission recommends reforms to existing law.

Background

On March 16, 2011, Governor Snyder signed into law the Local Government and School District Fiscal Accountability Act. The statute provides significant new authorities to the Governor and "the state financial authority"–the State Treasurer for municipal corporations, and the Superintendent of Public Instruction for school districts–to "take action and to assist a local government in a condition of financial stress or financial emergency so as to remedy the stress or emergency by requiring prudent fiscal management and efficient provision of services, permitting the restructuring of contractual obligations, and prescribing the powers and duties of state and local government officials and emergency manager." MCL 141.1503.

To achieve this end, the statute establishes criteria and mechanisms for determining when a "local government"–a municipal corporation or school district–suffers from "severe financial stress. MCL141.1512–.1514. The Governor then uses this designation, along with other criteria, to determine whether the local government faces a financial emergency. MCL141.1515. Upon such a finding, the Governor declares the local government to be in receivership, and appoints an emergency manager "to act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." MCL 141.1515(4).

The statute grants the emergency manager broad powers to develop and then implement a financial and operating plan for a local government. MCL 141.1518. The emergency manager may issue binding orders to local government actors, MCL 141.1517(1), with additional and extensive enumerated powers. *See, e.g.*, MCL 141.1519. The statute also extends school district-specific authorities to an emergency manager appointed to oversee the operations of a school district. *See* MCL141.1520. Subject to the statute's removal provisions, *see* MCL 141.1515(8)(a), an emergency manager's appointment lasts until such time as the emergency manager determines, and designated state officials agree, that a condition of financial emergency no longer exists in the local government to which the emergency manager has been appointed. MCL141.1515(8)(b); MCL 141.1524.

Removal of Local Elected Officials

The statute imposes on local elected and appointed officials a duty to "promptly and fully provide the assistance and information necessary and properly requested by the state financial authority, a review team, or the emergency manager in the effectuation of their duties and powers and of the purposes of this

act." MCL 141.526(1). Such state officials may administer oaths, issue subpoenas, and initiate mandamus actions to compel local officials to provide testimony or documents necessary to carry out the statute. In addition, if a local official fails to comply with an emergency manager's binding orders, see MCL 141.1517(1), such that the emergency manager's plan implementation is "disrupt[ed]," the emergency manager may bar that official from access to local government facilities and resources. MCL141.1517(2). However, even if the emergency manager invokes this authority, the local government official continues to occupy his or her position, albeit without the ability to exercise the functions of that office or position independent of emergency manager direction.

The statute's final disciplinary measure fills this gap: The removal from office of local elected and appointed officials. Either a review team or the emergency manager may report to the state financial authority and the attorney general that a local official has failed to abide by the statute's provisions, which the statute considers "gross neglect of duty." Then, "[f]ollowing a review and a hearing with a local government elected official," the state financial authority may recommend to the Governor that the Governor remove that official from office. MCL 141.1526(2). The statute appears to entitle only an elected official, and not appointed officials, to a hearing before the state financial authority decides whether to recommend that official's removal.

The statute does not define the category of "local government officials" subject to removal by the Governor, nor is that term used elsewhere in the statute. This definitional silence is significant. The Governor's constitutional authority to remove local elected officials is not self-executing, but requires instead legislative authorization. Article VII, Section 33 of the 1963 Constitution provides that "[a]ny elected officer of a political subdivision may be removed from office in the manner and for the causes provided by law." By contrast, Article 5, Section 10 grants self-executing removal authority for state officers:

> The Governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature.

Prior to passage of the Local Government and School District Fiscal Accountability Act, the Governor lacked authority to remove school board members. See Mich. Op. Att'y Gen. No. 5395 (1978) (concluding that the Governor lacks independent authority to remove school board members). The statute appears to fill this gap for school districts that have been placed into receivership.

Significantly, the statute assigns to the "state financial authority" the ability to recommend the removal of a local official who fails to comply with the statute. As indicated above, the statute uses "state financial authority" to refer to either the State Treasurer or the Superintendent of Public Instruction, depending on the nature of the unit of local government at issue. In addition, the relevant state financial authority must provide a hearing to a "local government elected official" before relaying to the Governor a removal recommendation. Though also not defined by the statute, when read in context "local government elected official" appears to encompass any elected official of either type of "local government" covered by the statute. Thus, the statute subjects the local elected and appointed officials of both municipal corporations and school districts that have been placed into receivership to removal for gross neglect of duty.

Reform Recommendation

The Local Government and School District Accountability Act thus melds portions of the 1963 Constitution's two removal provisions to grant the Governor comprehensive removal power with respect to "local government officials." From Article V, Section 10, the statute adopts "gross neglect of duty" as grounds for removal of local government officials. And the statute grants legislative authorization for the removal of the elected officials of certain political subdivisions, which the Governor may not otherwise wield because no statute has been enacted that is designed to implement Article VII, Section 33's removal provisions for a given category of local elected officials.

This comprehensive removal power does not exist for elected officials of local governments that have not been placed into receivership. The Governor would only be able to remove such an official if statutory removal authorization already exists. See, e.g., MCL168.238 (removal of county auditor); MCL 168.327 (removal of city officers). Because the legislature has opted to extend to the Governor discrete grants of statutory authority to remove the elected officers of political subdivisions, there exists categories of elected officials who the Governor cannot remove from office, no matter how poorly that elected official performs the duties of the office he or she holds.

The Commission recommends that the Legislature adopt an approach similar to that employed in the Local Government and School District Fiscal Accountability Act for defining the Governor's power to remove the elected officials of political subdivisions. Specifically, the legislature should repeal existing statutes that, pursuant to Article VII, Section 33, provide the Governor with removal power with respect to discrete categories of local elected officials. Then, the legislature should adopt a general statute that enables the Governor to remove all local elected officials who meet the criteria set forth in Article 5, Section 10, specifically, gross neglect of duty, corruption, or misfeasance or malfeasance.

Alternatively, the legislature could retain existing statutory removal provisions respecting the elected officials of political subdivisions, while providing additional authorities to remove other categories of elected officials, like school board members, for which no authority currently exists.

UPDATE TO 2001 REPORT ON EMERGENCY PREPAREDNESS AND RESPONSE LEGISLATION IN THE STATE OF MICHIGAN

In its Thirty-Sixth Annual Report issued soon after the attacks of September 11, 2001, the Law Revision Commission ("the Commission") surveyed the then-existing state of emergency preparedness and response legislation. More than a decade has passed since that examination, during which time federal and state governments have undertaken significant new initiatives to address age-old and novel threats posed by manmade and natural disasters. Pursuant to the Commission's statutory duty to "[e]xamine the . . . statutes of this state for the purpose of discovering defects and anachronisms in the law and recommending needed reforms," MCL 4.1403(1)(a), this Report returns to the topic of emergency preparedness to assess the altered landscape and suggest needed reforms.

In analyzing emergency preparedness, this Report proceeds in three parts. First, this Report catalogs existing state law authorities respecting manmade and natural disasters. Second, this Report analyzes emergency preparedness authorities and initiatives of neighboring states with risk profiles generally similar to that of Michigan. Third, this Report discusses emergency preparedness reform proposals.

II. Existing Emergency Preparedness: Constitutional and Statutory Authorities

Constitutional Provisions

Article IV, Section 39 authorizes the Michigan Legislature to provide by statute for "temporary and prompt" succession to elected and appointed offices when an emergency renders the incumbent unable to exercise his or her duties, and to adopt any law necessary and proper to ensure continuity of government functions. Article V, Section 12 designates the Governor as commander-in-chief of the state's armed forces, which may be employed to "execute the laws, suppress insurrection, and repel invasion."

Statutory Provisions

Emergency Powers of Governor Act

MCL 10.31 authorizes the Governor to proclaim a state of emergency within a designated area. The Governor may issue such a declaration on his or her own accord, or upon request from a mayor, county sheriff, or the commissioner of the Michigan state police during "times of great public crisis . . . or reasonable apprehension of immediate danger of a public emergency of that kind." Once an emergency declaration issues the Governor may promulgate regulations he or she deems "necessary to protect life and property or to bring the emergency situation within the affected area under control." The Governor's authorities under the Act should be broadly construed to ensure "adequate control over persons and conditions" while an emergency declaration is in force. MCL 10.32. Orders issued under this authority supplant local action. "[I]n the event the Governor exercises any of the powers granted to him by [the statute], local government has no power to act." *Walsh v. City of River Rouge*, 385 Mich. 623, 640 (1971) (citation omitted). The Governor's subsequent declaration that an emergency no longer exists terminates any orders issued pursuant to the statute during the emergency. MCL 10.31(2).

Emergency Management Act

The Governor is assigned similar authorities by the Emergency Management Act. MCL 30.401 *et. seq*. Under that statute, the Governor may declare a state of disaster or emergency. MCL 30.403(3).

Unlike a declaration of public emergency issued under MCL10.31, the Governor must either terminate the state of disaster or emergency 28 days after its initial proclamation's issuance or petition the legislature for an extension. *Id.* Both chambers of the legislature must approve by resolution an extension specifying the additional duration of the disaster or emergency declaration. *Id.*

The statute defines a "disaster" broadly, encompassing actual and potential "widespread or severe" damage from man-made or natural causes, including oil spills, infestations, and hostile military actions. MCL 30.402(e). An "emergency," by contrast, may be declared when the Governor determines that state assistance is necessary to "protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state." MCL 30.402(h).

Once the Governor declares a state of disaster or emergency, he or she may issue executive orders, declarations, and proclamations, which have the force of law. MCL 30.403(2). The statute permits the Governor to seize private property for use in response efforts, limit access to areas threatened or affected by a disaster or emergency, and suspend regulatory statutes and other provisions, strict compliance with which would prevent or hinder response efforts. *See, e.g.*, MCL 30.405.

In addition to the broad powers the Emergency Management Act assigns to the Governor, the statute also designates the director of the state department of police as State Director of Emergency Management. MCL 30.402(d). During periods of disaster or emergency, the Director implements orders and directives issued by the Governor. The Director serves as a coordination point between federal, state, county, and municipal disaster prevention, mitigation, relief, and recovery actors, resources, and funding. The Director may also investigate requests for assistance from county and municipal bodies, and may accept the assistance of volunteers. The statute grants the Director rulemaking authority he or she may use to establish requirements for the appointment, training, and professional development of emergency management coordinators, emergency management training programs, and local and interjurisdictional emergency management programs, and establish state emergency operations centers. MCL 30.407

The statute also requires each state government agency for which the emergency response plan contemplates a role in disaster response efforts to name "emergency management coordinators." Each agency must "cooperate to the fullest possible extent" with the Emergency Management Division's director. For purposes of the statute, the judiciary is considered a "department," with the chief justice of the Michigan supreme court as "director." MCL 30.408. County and municipal governments and public colleges and universities may also designate emergency coordinators. MCL 30.409

County and municipal governments must also engage in appropriate emergency planning and coordination, *id.*, and may declare a "local state of emergency" of more limited duration and subject to stricter limitations on triggering conditions than the state-wide declaration power the statute vests in the governor. MCL 30.410. The statute also authorizes a state "disaster contingency fund," with a funding floor and ceiling of $ 30,000 and $ 750,000, respectively, to support county and municipal relief efforts in the absence of federal assistance and sufficient county or municipal funding. MCL 30.418.

Finally, a 2002 amendment to the statute permits the governor to declare a "heightened state of alert" upon a good cause belief that terrorists are within the state, or that acts of terrorism may be committed within the state or against a vital resource. As in a declaration of emergency or disaster, a heightened state of alert permits the governor to, among other things, issue directives with the force of law in order to protect state interests, apprehend terrorists, and prevent or respond to terrorist attacks. Heightened states of alert only may be maintained sixty days after initial declaration by approval of both houses of the legislature. MCL 30.421.

Michigan Military Act

The governor may supplement emergency response resources with authorities contained in the Michigan Military Act, which permits the governor to call into service members of the organized or unorganized militias to, among other things, assist civil authorities in time of "public danger, disaster, crisis, catastrophe or other public emergency." MCL 32.551; 32.555. Acts of terrorism are not specifically enumerated among the scenarios in which the governor may activate the organized or unorganized militias, but both the potential breadth of other categories--"public danger," for instance--and amendments adopted in 2002 to other portions of the act suggest the governor could properly invoke his or her militia authority to suppress or respond to terrorism. Specifically, in discussing a state militia commanding officer's ability to apprehend certain categories of individuals, the statute references organized militia "called into . . . active state service . . . to . . . respond to acts or threats of terrorism." MCL 32.579(2). In addition, members of the organized militia "ordered by the governor to respond to acts or threats of terrorism," among other categories, enjoy the immunity of peace officers. MCL 32.579(3)(c).

Members of the organized and unorganized militia may be joined in providing emergency assistance by members of the Michigan volunteer defense force. When activating units to comprise the Michigan volunteer defense force, the Governor should consider the number of such volunteers deemed "necessary for adequate emergency assistance to the state." MCL 32.651(1). The department of military and veterans affairs determines the force's missions in cooperation with the state department of police and with the state emergency preparedness plan in mind. The force "shall be ready and able to protect the state in case of insurrection, invasion, disaster or other emergency, actual or imminent" when the national guard has been called into the military service of the United States. MCL 32.655. Except under certain circumstances--the protection of public property and training exercises--the force "shall not be equipped with any type of weapon." MCL 32.651(6).

Interstate Civil Defense and Disaster Compact

Structuring interstate emergency response are two interstate compact statutes. The first, enacted in 1953, ratifies interstate disaster compacts with any other state that joins with Michigan in an agreement "substantially" the same as the fifteen-article compact embodied in the statute. Under this model compact, contracting states agree to provide mutual aid in the event of an emergency or disaster, examples of which are enumerated. This degree of mutual aid contemplates sharing resources available from any source and the conclusion of plans of mutual aid between emergency management agencies in the contracting states. Contracting states also pledge to share resource inventories and, to the extent possible, observe uniform standards and practices with respect to emergency management. The proposed interstate compact additionally provides reciprocal recognition of any licensure or permits held by a person in one state who hopes to render aid in the other contracting state. Party states also receive a measure of immunity from criminal liability for relief efforts the state or its officials conduct in another party state in certain circumstances. The proposed compact also envisions party states cooperating in the development of evacuation plans, with party states that receive displaced residents entitled to reimbursement for expenses incurred while accommodating displaced residents of another party state. MCL 30.261.

Interstate Emergency Management Assistance Compact

A second statute, adopted in 2001, 2001 PA 247, MCL 3.991 *et seq.*, extends authorization for interstate emergency management assistance compacts addressing equipment and personnel. As in

compacts concluded under the 1953 statute, the contracting parties must enter into plans and programs for interstate cooperation in emergency response-related activities. But the 2001 statute provides more particularized factors that should be considered in crafting an equipment- or personnel-related compact. In developing plans and programs for interstate cooperation, contracting states should together examine each state's state hazard analysis to identify potential emergencies that both states are likely to suffer. The contracting states should also consider their individual state emergency management plans when developing the interstate plan, provide mechanisms for warning communities adjacent to or crossing state borders, and focus on assuring the uninterrupted delivery of needed services and supplies during emergencies. Any assistance mechanisms developed under an equipment- or personnel-related compact may only be provided upon the request of the state's authorized representative to his or her counterpart in another contracting state. While each state joining in such a compact pledges to "take such action as is necessary to provide and make available the resources" covered by the compact, each state may withhold whatever resources it deems necessary to meet its own disaster response needs. Emergency responders sent into another state to render aid pursuant to a compact adopted under the statute are treated as if they were agents of the recipient government for tort liability and immunity purposes. Provisions similar to those in the 1953 statute are included for reciprocal licensure and certification recognition. The state receiving emergency assistance provides for reimbursement of certain expenses incurred by the assisting state. MCL 3.991-1001. Though described in differing terms, both statutes appear to substantially overlap in the emergency response-related subjects each addresses. No significant authorities are extended to party states under one interstate compact act that are not similarly available or permitted to party states under the other act.

Emergency Interim Executive Succession Act

Continuity in government functions during an emergency is matched with continuity in governmental offices. A 1959 statute establishes mechanisms for succession to offices vacated during a disaster, "an extraordinary misfortune caused by an enemy attack upon the United States or by civil disorder and resulting in widespread destruction of life and property," or enemy attack, phrased in broad terms to cover any attack by "a power hostile to the United States." MCL 31.2(b), (c). To ensure continuity in office, all state executive offices must designate five "emergency interim successors," along with an order of succession within each list of five qualified candidates. Each state executive officer--the "elected heads of the principal departments"--are to keep each of his or her five designated potential successors "generally informed" regarding the responsibilities of the office to which they may succeed in the event of an emergency, MCL 31.5, with reciprocal duties imposed on each emergency interim successor to stay current on the responsibilities and practices of the office for which he or she has been designated. MCL 31.13. The governor, secretary state, or the emergency interim successor to either office, determines when another official is "unavailable" for succession purposes. MCL 31.10.

In addition to these primary emergency response-related statutes, provisions bearing on emergency response are scattered throughout the Michigan Compiled Laws. For example, under the Natural Resources and Environmental Protection Act, owners of "high and significant hazard potential dams" must develop emergency action plans consistent with the state emergency preparedness plan and county or local emergency action plans. MCL **324.31523**. In addition, under the Animal Industry Act, the director of the Michigan department of agriculture is tasked with alerting the governor of diseases or animal conditions that pose an "extraordinary emergency to the livestock industry, public health, or human food chain" along with a recommendation of procedures necessary to eliminate the threat. MCL 287.710. The governor may then act on this notification by declaring a state of emergency or taking other appropriate actions. Likewise, with regard to adulterated products, the governor is granted the authority to declare a "public health state of emergency" after determining that a consumer product's adulteration poses a threat to pubic safety and health. The governor may then order that the adulterated product not be displayed or sold, and that retailers segregate any affected products pending later

disposition by appropriate state authorities. MCL10.122. Under the Public Health Code, the department of health is tasked with generating lists of "reportable diseases, infections, and disabilities." In addition, the department may promulgate rules for investigating reported cases or epidemics, and disease and infection control procedures. MCL 333.5111. More specifically, the department is tasked with developing annual pandemic influenza plans, including an assessment of the state's preparedness for a potential outbreak. MCL 333.5112.

III. Existing Emergency Preparedness Constitutional and Statutory Authorities in Other States

To place existing Michigan constitutional and statutory authorities in a broader context, the Commission examined similar authorities in other states. For this comparison the Commission selected Illinois, Indiana, and Ohio. Of course, no two states examined in this report face the same risk profile. However, the selected states generally are subject to similar weather patterns and risks, among other characteristics relevant to emergency preparedness.

Illinois

The provisions of the Illinois Constitution of 1870 relevant to emergency response parallel those of the Michigan Constitution. Article XII, Section 4 designates the Governor as commander-in-chief of the state's organized militia, which, like in Michigan, he may call out to "enforce the laws, suppress insurrection or repel invasion." The Illinois Constitution contains no provision similar to Article IV, Section 39 of the Michigan Constitution, which delegates succession matters to the legislature. The Illinois Constitution's sole reference to matters of succession in office appears in Article V, Section 7, which provides that if the office of Attorney General, Secretary of State, Comptroller or Treasurer becomes vacant "the Governor shall fill the office by appointment."

The Illinois Emergency Management Act provides for that state's primary emergency response framework. 20 ILL. COMP. STAT. § 3305/1 *et. seq.* Unlike in Michigan, which differentiates between emergency declarations and disasters, the Illinois statute only refers to disasters, defined as "an occurrence or threat of widespread or severe damage, injury or loss of life or property resulting from any natural or technological cause, including but not limited to fire, flood, earthquake, wind, storm, hazardous materials spill or other water contamination requiring emergency action to avert danger or damage, epidemic, . . . explosion, riot, hostile military or paramilitary action, public health emergencies, or acts of domestic terrorism." 20 ILL. COMP. STAT. § 3305/4. The statute then further defines "public health emergencies" as any occurrence or imminent threat of illness believed to be caused by bioterrorism, an infectious agent or biological toxin, a natural disaster, a chemical or nuclear attack or accidental release, all of which must pose a high probability of a large number of deaths or serious disabilities in affected populations, or a significant risk of substantial future harm to large number of people among the affected population. *Id.*

Like in Michigan, the Act assigns the governor authority to issue a proclamation declaring the existence of a disaster for a period of 30 days. 20 ILL. COMP. STAT. § 3305/7. However, unlike the Michigan act, no express provision is made to continue a disaster proclamation past the statutory deadline. The governor could presumably issue a new disaster proclamation after a prior declaration lapses, but the Illinois legislature has no role in the issuance of extension of a disaster proclamation. Once issued, the disaster proclamation triggers many of the same authorities that the governor of Michigan wields under a disaster or emergency proclamation. Unique authorities are specifically extended to the Illinois governor though, including the ability to exact price controls and employ rationing. 20 ILL. COMP. STAT. § 3305/6. The Act also contains authority to seize private property with just compensation, but provides extensive procedures for how such a taking shall be made and

compensated. 20 ILL. COMP. STAT. § 3305/7.

Unlike in Michigan, the Act provides for the establishment of an independent emergency management agency, rather than one housed within, for example, the Illinois State Police. 20 ILL. COMP. STAT. § 3305/5. A senate-confirmed director heads the Illinois Management Agency for a two-year-term appointment. *Id.* The agency he or she heads "[c]oordinate[s] the overall emergency management program of the State," and reviews and approves emergency operations plans and exercises developed by political subdivisions. *Id.*

By comparison to its Michigan counterpart, the Illinois Emergency Management Act provides more specificity in describing the agency's authorities. For example, the Illinois director is tasked with developing a comprehensive emergency preparedness and response plan with respect to nuclear accidents and general nuclear safety under the Department of Nuclear Safety Law of 2004 and the Illinois Nuclear Safety Preparedness Act. 20 ILL. COMP. STAT. § 3305/5(f)(2.5). The director also may make grants to institutions of higher education in the state for safety and security research. 20 ILL. COMP. STAT. § 3305/5(g). The Act authorizes the establishment of Mobile Support Teams to "aid and to reinforce the Illinois Emergency Management Agency, and emergency services and disaster agencies in areas stricken by disaster." 20 ILL. COMP. STAT. § 3305/8. To provide sufficient resources to cope with emergencies, the Act provides for a hierarchy of funding sources with a view toward ensuring that "funds to meet disasters shall always be available," including by empowering the governor to deposit transfers and loan proceeds into a Disaster Relief Fund if regular appropriations and the Disaster Relief Fund without such transfers prove inadequate and the legislature is not in session. 20 ILL. COMP. STAT. § 3305/9. An Executive Interim Successors for State Officers Act provide for continuity in office in much the same manner as the Michigan statute addressing the same subject matter. 5 ILL. COMP. STAT. § 275/5. And the state has adopted the Uniform Emergency Volunteer Health Practitioners Act, of which more later. *See* 225 Ill. Stat. Comp. § 140/6.

Broadening and deepening state emergency planning is possible under other portions of the Act. For instance, the Act "encourage[s]" the development of an emergency management advisory committee of private and public personnel, including representatives of relevant state and political subdivisions. 20 ILL. COMP. STAT. § 3305/5(e). In addition, each county, each municipality with a population greater than 500,000, and other municipal corporations designated by the governor must maintain an "emergency services and disaster agency" tasked with developing an emergency operations plan and assigning emergency responsibilities to local departments. 20 ILL. COMP. STAT. § 3305/10. Illinois also maintains a corollary to the Michigan Interstate Disaster Compact, *see* 45 ILL. COMP. STAT. § 151.1 *et. seq.*, and additionally authorizes the governor to negotiate on the state's behalf "mutual aid agreements" covering an enumerated but expansive list of topics. 20 ILL. COMP. STAT. § 3305/6 (5)

Indiana

Like the Illinois Constitution, the Indiana Constitution of 1978 contains no provision for the succession to executive office aside from the detailed procedures for determining when a vacancy exists in certain constitutional offices and the filling of such a vacancy, *see* IN. CONST. ART. V, Sec. 10, with other appointments left to statute. *See* IND. CONST. ART. XV, Sec. 1. The Indiana governor's commander-in-chief power is described in almost identical terms as that of his Michigan and Illinois counterparts—capable of being employed to "execute the laws, or to suppress insurrection, or to repel invasion." IND. CONST. ART. 5, Sec. 12.

Indiana's statutory emergency management scheme is somewhat more complicated than Michigan or Illinois' emergency management framework. In 2005, Indiana established a Department of Homeland Security while eliminating the prior "state emergency management agency." IND. CODE §

10-19-2-1. The Department is assigned primary responsibility for state emergency management, tasks defined in two portions of the Indiana Code: the Act establishing the Department itself, and the prior emergency management statute partially repealed in 2005, the Emergency Management and Disaster law. The prior law's declaration of purpose, as amended, identifies the Department as the state actor tasked with "provid[ing] for emergency management" broadly defined elsewhere in the same Act. IND. CODE § 10-14-3-7.

Indiana statute provides for emergency response-related authorities and processes similar to that in Illinois and Michigan for responding to disasters. A "disaster" is defined as any of thirty enumerated categories, including an "act of terrorism" and "any other public calamity requiring emergency action." IND. CODE § 10-4-1-3. The governor may declare a "disaster emergency" by proclamation or executive order, but that declaration may only last for thirty days, and, significantly, the legislature may "by concurrent resolution . . . terminate a state of disaster emergency at any time." IND. CODE § 10-14-3-12. Like in other states, the declaration activates relevant "state, local, and interjurisdictional" emergency plans and gubernatorial powers that largely mirror the illustrative lists adopted by the Illinois and Michigan legislatures. *Id.* In addition, like in Michigan, political subdivisions may declare local disaster emergencies of more limited duration and that trigger more limited emergency powers than a state disaster emergency. IND. CODE § 10-14-3-29.

Unlike either Illinois or Michigan, the department, in addition to its general responsibility to plan for "homeland security emergencies," must also specifically plan for the protection of key assets and public infrastructure from disasters and terrorists attacks. IND. CODE § 10-19-3-3. In addition, a Counterterrorism Security Council, comprised of designated constitutional and appointed officials and members of the legislative branch, develops a strategy "in concert with" the Indiana Department of Homeland Security to: enhance state terrorism prevention and response; develop a counterterrorism plan and needs assessment; develop counterterrorism curricula for state law enforcement; and share intelligence information with the federal, state, and local law enforcement agencies. IND. CODE § 10-19-8-4. It is not clear from the Indiana Code whether this joint Council-Department terrorism strategic plan includes, or is different from, the critical infrastructure protection plan for which the Department is responsible. The Department also oversees a permitting program for the transport of high- and low-level radioactive waste within the state, and develops an emergency response framework for potential accidents that may occur during transit. *See* IND. CODE § 10-14-8-1 *et. seq.*

In 2011, Indiana established authorization for interstate mutual aid agreements. This novel statute addresses an "emergency," or a condition that poses an immediate risk to health, life, property, or the environment without reaching proportions of a state or local disaster or emergency, yet still beyond the local governing body's ability to alone cope with the threatening condition. IND. CODE § 10-14-6.5-1. In such circumstances, the appropriate local authority may seek assistance under "mutual aid agreements" previously entered into with a governmental jurisdiction or private entity outside of Indiana. IND. CODE § 10-14-6.5-4. A mutual aid agreement may address communication coordination, training, response, and standby for emergency response. Any emergency responder who assists an Indiana municipal corporation after a mutual aid agreement is invoked receives immunity protections and licensure recognition. IND. CODE § 10-14-6.5-5, -6.

Elsewhere in the Indiana executive branch, the Superintendent of State Police is tasked with operating the Indiana intelligence fusion center, which collects, analyzes, and shares criminal information with other governmental and private organizations for purposes of "detecting, preventing, investigating, and responding to criminal and terrorist activity." IND. CODE § 10-11-9-2.

Like Illinois, Indiana has enacted the Uniform Emergency Volunteer Health Practitioners Act. IND. CODE § 10-14-3.5-19. And to facilitate interstate emergency planning and response, Indiana has enacted statutory Interstate Emergency Management and Disaster Compact and a similar Emergency

Management Assistance Compact, both of which substantially mirror the relevant Illinois and Michigan statutes. IND. CODE § 10-14-6-1; IND. CODE § 10-14-5-1.

Ohio

Article III, Section 10 of the Ohio Constitution designates the governor as commander-in-chief of the state's militia forces, which under Article IX, Section 4 may be called "to execute the laws of the state, to suppress insurrection, to repel invasion, and to act in the event of a disaster within the state." For its part, the Ohio General Assembly may "pass laws to provide for prompt and temporary succession to the powers and duties of public offices . . . the incumbents of which may become unavailable for carrying on the powers and duties of such offices and to pass such other laws as may be necessary and proper for insuring the continuity of governmental operations in periods of emergency resulting from disasters caused by enemy attack."

Ohio's primary emergency management statute, like that in Illinois, defines a "disaster" in simple terms: "any imminent threat or actual occurrence of widespread or severe damage to or loss of property, personal hardship or injury, or loss of life that results from any natural phenomenon or act of a human." OHIO REV. CODE § 5502.21(E). Tasked with coordinating the state's response to such a disaster is the emergency management agency, located within the Ohio Department of Public Safety. OHIO REV. CODE § 5502.22. At the local level, all political subdivisions must provide some form of emergency management program that conforms to certain statutory requirements, including an all-hazards planning approach, but subdivisions are given flexibility in deciding what body develops and administers that plan. Political subdivisions within a county may join with the county board of commissioners and at least a majority of the chief executives of other political subdivisions can form county-wide emergency management agencies. OHIO REV. CODE § 5502.26. More broadly, "regional authorities for emergency management" may be formed between the boards of county commissioners of at least two different counties, subject to approval. OHIO REV. CODE § 5502.27. Or a political subdivision can perform its own emergency program design by declining to join a county-wide or regional emergency management agency, provided whatever program is developed "fits" with any broader authority—county or regional—that may plan for the region in which the solo political subdivision is located. OHIO REV. CODE § 5502.271.

Additional encouragement for intrastate cooperation is provided by authorization to engage in "mutual aid arrangements" for reciprocal emergency management assistance in response to hazards that exceed a political subdivision's resources. OHIO REV. CODE § 5502.29. Such agreements can be entered into with public or private entities, but unlike the similar Indiana statute the parties to the arrangement must be located in the state.

In 2002, however, the General Assembly supplemented this authorization with an "intrastate mutual aid compact." Unless a political subdivision opts out of this statute's application through local legislation, each is considered a "participating political subdivision." The compact establishes an "intrastate mutual aid program," which provides for mutual assistance among the compact parties whenever any one of the participating political subdivisions issues a formal declaration of emergency. Subject to a few conditions, a participating political subdivision's role is described as an "obligation to provide assistance in response to and recovery from a disaster or disaster-related exercises." OHIO REV. CODE § 5502.41.

A 1995 amendment to the act provides for a unique gubernatorial power. The governor may by written proclamation designate an alternate location for the "seat of government" in the event that an emergency renders continued operations in Columbus "imprudent, inexpedient, or impossible." This

new location for governmental functioning persists through the emergency, until the governor designates a new temporary emergency location, or the General Assembly by law establishes a new location. Similar authority is granted the governing body of political subdivisions." OHIO REV. CODE § 5502.24.

Ohio also maintains an interim emergency succession statute with different application than the similar statutes of the other states profiled in this report. Unlike those states, Ohio's emergency interim government statute applies only when an attack on the United States has occurred, defined as an "attack or series of attacks by an enemy of the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the state in any manner by sabotage or by the use of bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or processes." OHIO REV. CODE § 161.01(D). A natural disaster that renders an incumbent and his or her deputy "unavailable," or not able to fulfill the duties of the office, thus appears to not trigger the succession scheme defined by the statute. *See* OHIO REV. CODE § 161.02. But aside from this difference in breadth, the Ohio succession statute is substantially similar to succession frameworks in other states: incumbents designate interim successors, who will succeed to the incumbent's office in the event of an attack-caused vacancy until the incumbent regains the ability to exercise the duties of his or her office, or the governor appoints a new office holder. OHIO REV. CODE § 161.04, .05. Interestingly, provision is also made for the postponement of state or local elections when the governor of the individual exercising that office's powers judges that "the public interest requires" up to a six-month delay. OHIO REV. CODE § 161.09.

To supplement these public emergency resources, an Ohio commission on services and volunteers is tasked with working with agencies and political subdivisions in developing a "statewide system for recruiting, registering, training, and deploying the types of volunteers the commission considers advisable and reasonably necessary to respond to an emergency declared by the state or political subdivision," with a grant of limited tort immunity for volunteers deployed pursuant to that framework. OHIO REV. CODE § 121.404.

Like in other states, other portions of the Ohio Revised Code assign discrete emergency preparedness-related functions to various state agencies. For instance, a 2003 statute requires the Ohio public health council to promulgate rules under which health-related entities are required to report "events that may be caused by bioterrorism, epidemic or pandemic disease, or established or novel infectious agents or biological or chemical toxins posing a risk of human fatality or disability" chiefly through unexpected increases in the amount of inquiries such agencies receive for information or treatment related to such potential health risks. OHIO REV. CODE § 3701.201. In 2004, the same entity was granted authority promulgate rules to require trauma centers to report on their capacity to respond to disasters, mass casualties, and bioterrorism. The director of health may then "conduct an evaluation" of these reported response capabilities. OHIO REV. CODE § 3701.072.

IV. SUGGESTIONS FOR REFORM

As this general comparative discussion illustrates, Michigan's emergency preparedness and response framework largely mirrors that adopted by neighboring states that confront similar risk profiles. Two possible reforms do emerge from what otherwise represents a largely uniform regional approach to structuring emergency response-related statutory frameworks: clarification of the statutory definitions that trigger the state's emergency response framework, and adoption of the Uniform Emergency Volunteer Health Practitioners Act.

Clarification of Statutory Definitions

Under current law, a variety of event categories exist with no apparent reason for differences in definition. For instance, the Emergency Management Act defines an "emergency" as:

> [A]ny occasion or instance in which the governor determines state assistance is needed to supplement local efforts and capabilities to save lives, protect property and the public health and safety, or to lessen or avert the threat of a catastrophe in any part of the state.

MCL 30.402(h). Meanwhile, another statute that permits closure of financial institutions during the occurrence of an "emergency," defines "emergency" as:

> [A] condition or occurrence that has or may, directly or indirectly, interfere physically with the conduct of normal business operations of 1 or more offices of a financial institution, or which poses an imminent or existing threat to the safety and security of a person or property, or both. An emergency may arise as a result of a fire, flood, earthquake, hurricane, tornado, wind, rain, snowstorm, labor dispute or strike, power failure, transportation failure, fuel shortage, interruption of a communication facility, shortage of housing or food, robbery or attempted robbery, actual or threatened enemy or terrorist attack, epidemic or other catastrophe, riot, civil commotion, or any other act of lawlessness or violence.

MCL 487.941(b). Interestingly, this contrasting definition of an "emergency" more closely mirrors the Emergency Management Act's definition for a "disaster." *See* MCL 30.402(e). Moreover, the Michigan Military Act contains an "emergency" among those events that would permit the Governor to activate the organized militia, while also separately referencing "riot[s]," which, as noted above, are considered elsewhere in the Compiled Laws to be a subset of an "emergency."

Of course, these varying definitions of events and conditions for which emergency-response related authorities may be invoked is a consequence of illustrative definitions--as opposed to careful enumerations--of abstract concepts like "disasters" and "emergencies" that defy precise definition. Still, the existence of varying statutory definitions holds out potential that different agencies entrusted with emergency response-related authorities tied to differing definitions of a qualifying "emergency" could lead to less-than-uniform responses to conditions which, after possible legislative reexamination, may not warrant the distinctions that exist under current law. To avoid such a result, the legislature may consider adopting an "anchor" definition, using, for instance, the Emergency Management Act's definition of "emergency" and "disaster" as a point of cross-reference when those terms are used for a similar purpose in other statutes.

Uniform Emergency Volunteer Health Practitioners Act

In 2007, the Uniform Law Commission promulgated a Uniform Emergency Volunteer Health Practitioners Act ("Uniform Act") by which adopting states would treat out-of-state volunteer health practitioners who register with registration systems that meet certain statutory criteria "as if the practitioner were licensed in [the adopting] state" during the duration of an emergency. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 6(a). The Uniform Act seeks to avoid requiring volunteer health professionals from having to tender their professional credentials to a host government agency after an emergency has been declared. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT pref. note, at 4-5. At the same time, the Uniform Act recognizes the authority of host governments to limit the recognition they extend to out-of-state registration systems, and to control

the activities of out-of-state volunteer health professions when such professionals operate within the state. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 4.

Twelve states have since adopted the Uniform Act, including Arkansas, Colorado, Illinois, Indiana, Kentucky, Louisiana, Nevada, New Mexico, North Dakota, Oklahoma, Tennessee, and Utah. While interstate compacts adopted pursuant to the Michigan Interstate Disaster and Emergency Management Assistant Compact statutes provide for some measure of reciprocal recognition of emergency responder licensure, no standalone recognition for non-compact-state volunteers exists. Moreover, compact licensure recognition provisions only appear to be triggered when a compact party state has received a request for mutual aid. It may be that though a disaster declaration has been issued, no compact assistance request has been entered. By contrast, a state with the Uniform Act presumably would, as in the model statute, tie application of the Uniform Act's reciprocal recognition provisions to the issuance of a disaster declaration. Thus, with adoption of the Uniform Act, health professionals from a broader geographic range--compact and non-compact states alike--and at an earlier time than otherwise might be the case, may provide emergency response while still being subject to the host state's control of their response activities.

MICHIGAN LAW REVISION COMMISSION
PROPOSED LEGISLATION TO ENHANCE LICENSURE OF INTERNATIONAL CORPORATE LAWYERS IN MICHIGAN

NOVEMBER 2011

[DRAFT OF 10/21/11 2:25 PM]

Contents

Summary

Michigan's laws and court rules on the licensure of attorneys do not reflect the needs of international corporations headquartered in Michigan. There is a need to enhance Michigan as a headquarters location for fortune 1,000 and international corporations by adopting 21st century rules for bar admission for lawyers working in-house in corporations, including international lawyers licensed in countries other than the United States.

The Michigan Law Revision Commission ("Commission") recommends to the Michigan Legislature the adoption of amendments to Michigan law to encourage expansion of global law departments of major Michigan-based global corporations by:

- Eliminating the 3 of 5 years rule for institutional lawyers who have been practicing in-house in Michigan.
- Encourage, rather than discourage (as under present law), in-house lawyers to commit their professional careers to Michigan even if they leave in-house practice and enter private practice.
- Create a membership category for foreign lawyers working in institutional settings if they are part of an integrated corporate legal team.

The Present Challenge for Michigan-based Global Corporations

Michigan has a declining, but still important, number of global corporations with headquarters in Michigan. Each of these corporations maintains an Office of General Counsel that provides corporate legal services on a global basis.

But Michigan's licensing law for attorneys creates significant personnel and compliance issues for corporations with significant in-house legal staffs.

Global corporations transfer executives, including in-house counsel, continually to meet the business and personnel needs of their companies. Many of the senior lawyers subject to transfer have years of high-level legal experience. Some of them may have been educated in foreign countries and are licensed to practice law in this countries. Unfortunately, Michigan laws and rules regulating the practice of law create disincentives to companies in bringing lawyers to Michigan to serve the global needs of their employers. For example:

- Lawyers acting as in-house counsel but licensed in non-U.S. jurisdictions have no recognized professional status in Michigan.
- In-house counsels licensed in other states go through unnecessary burdens to get limited recognition of their professional status.
- An in-house counsel who successfully practices law in Michigan may be required to leave the state if he or she chooses to pursue his or her legal career in private practice.
- A Michigan lawyer having knowledge that another lawyer licensed in a foreign jurisdiction and serving as in-house counsel of a global corporation may be required to inform the Attorney Grievance Commission on the grounds that the lawyer has knowledge that the foreign in-house counsel has committed a significant violation of the Rules of Professional Conduct. In such situations, the very limited special certificates for certain foreign lawyers are not available. [Compare /opinions/ethics/numbered_opinions/CI-602.html CI-602I]

Background Research and Consultation

In preparing this Proposal, the Commission has consulted with corporate general counsels, the leadership of the State Bar of Michigan, the Chief Justice of Michigan, The Executive Office of the Governor, the Chairs of the Michigan House and Senate Judiciary Committees, the Deans of Michigan Law Schools and the Michigan Economic Development Corporation ("MEDC").

SBM Janet Welch and then-Justice (now Department of Human Resources Director) Maura Corrigan met with the Commission Chair to explore the issue of encouraging more international law and lawyers in Michigan.

The Commission has substantially benefited in its consideration of this matter by a Report to the Commission entitled "Modernizing Michigan's Law Regulating Licensure of Foreign and Domestic Attorneys" submitted by Troy Cumings, of the Warner Norcross & Judd LLP firm.

SBM Judicial Crossroads Task Force

In 2009, the State Bar of Michigan created a "Judicial Crossroads Task Force." The Task Force looked broadly at reforming Michigan's judicial system and created a Business Impact Committee as one of its four committees.

In 2009, representatives of the Law Revision Commission made a presentation to the Business Impact Committee on the issue of international lawyer licensing. The Business Impact Committee's Interim Report included the following:

> The task of the Business Impact Committee is to … determine whether there are **procedural or structural changes that** would improve the system… that, if implemented, would serve to improve the judiciary while **strengthening those businesses and, in turn, our state's economy**.

In its final Report, the Task Force addressed the international lawyer issue, including the following:

> Michigan's court system is not positioned to help the state compete in a global economy, attracting the confidence of international business and the trust of newcomers to the state.
>
> ***
>
> Most states, including Michigan, have not comprehensively addressed the full potential for promoting national and international business development within their jurisdictions through modernization and streamlining of their attorney licensing rules. **The red tape for licensure needs to be reduced to allow easier entry for out-of-state and out-of-country attorneys with significant experience who are seeking to practice law in Michigan on behalf of their business employers.** (Emphasis supplied.)

The Report included the Findings of the Business Impact Committee, including:

> Rules for Licensing Attorneys From Other States and Countries
>
> 1. Allow attorneys licensed to practice law in Michigan under a special certificate to change employers without significant additional paperwork. Implementation must also facilitate the issuance of special certificates to non-Michigan attorneys who transfer to Michigan to hold in-house positions, while preserving the character and fitness verification necessary. Alternatively, and more dramatically, broadly open admission to the Bar to any lawyer working in Michigan for a corporation, provided

> the lawyer is already properly licensed in any other state of the United States and so long as the lawyer's practice is limited to work as an attorney on behalf of his or her employer. There could also be consideration of a requirement that the attorney and the attorney's employer maintain an appropriate level of liability insurance.
>
> 2. Streamline the "special legal consultant" process and create a *pro hac vice* rule for lawyers licensed in countries other than the United States who are working for firms.

The Commission's legislative proposal for international lawyers is substantially consistent with the general proposal made by the SBM Task Force and the findings of the Business Impact Committee.

MCL §600.901.

The Commission's decision to propose changes in the law to enhance Michigan as a headquarters location for Fortune 1,000 and international corporations is within the scope of the Commission's jurisdiction to, *inter alia*:

> (d) **Recommend changes in the law** [the commission] considers necessary in order to modify or eliminate antiquated and inequitable rules of law, and **bring the law of this state into harmony with modern conditions**.

MCL §4.1403(1)

"Practice of Law"

Michigan law does not have an explicit definition of the "practice of law." Most of the legal development comes out of cases focusing on the unauthorized practice of law ("UPL"). But there is no question that an in-house legal counsel to a corporation is practicing law.

Licensing of Attorneys Is a Legislative Matter and A Proper Subject for the Commission

While the State Bar and the Michigan Supreme Court have the primary regulatory role with respect to the licensure of attorneys, the scope of that licensure is initially a matter of statute enacted by the Legislature. The law creating a licensing system for lawyers reads:

> The state bar of Michigan is a public body corporate, the membership of which consists of all persons who are now and hereafter licensed to practice law in this state. The members of the state bar of Michigan are officers of the courts of this state, and have the exclusive right to designate themselves as "attorneys and counselors," or "attorneys at law," or "lawyers."

> No person is authorized to practice law in this state unless he complies with the requirements of the supreme court with regard thereto.

Principles That Apply to the Practice of Law

In developing its proposal, the Commission recognizes that the following basic principles apply to the licensing and regulation of the practice of law in Michigan:

- The practice of law is a licensed profession.
- The admission to practice law in the United States is primarily a state matter, but federal recognition of admission to federal courts take precedence over the state.
- In Michigan, the framework for licensure of attorneys is established by the legislature in statute.
- In Michigan, the admission of attorneys is administered by judicial branch agencies as part of Michigan's one court of justice.
- The Legislature has made exceptions to the requirement to be licensed to practice law before certain administrative agencies, e.g., Tax Tribunal, Workers Compensation.

Policy Theory Underlying the Licensure for the Practice of Law

Historically, government imposed licensure of work has been based on the theory that government licensure is necessary to protect the public. Licensure provides the basis for imposing standards and barriers, including:

- Education requirements, including continuing education and training.
- Testing and examination of candidates for licensure.
- Residency requirements.
- Government-established ethics requirements and professional rules.
- Government price fixing.
- Enforcement against persons not licensed.

While consumer protection is one rationale, the protection of the economic interests of licensed groups through barriers to limit supply and raise the market value of the licensed service frequently becomes the primary goal as the licensed group takes over the process.

In the licensing of lawyers, residency requirements historically served as a barrier to entry. But, over time, with the changes in the economy and the practice of law, these barriers made little sense and were largely removed. In addition, there has been an evolution from state only to state and national regulation of lawyers, including:

- Law schools are largely regulated and accredited by a national private organization (American Bar Association Committee On Law Schools), not the states.
- The Bar Exam is now primarily focused on a multi-state questionnaire with each state setting its own passing level.
- Federal regulation of lawyers is expanding under federal law, e.g., Sarbanes Oxley.
- NAFTA and other international agreements are beginning to focus on harmonizing professional regulation on an international basis.

Geographic Restrictions Are Outdated

Michigan's lawyer licensing and the business of law has reflected that anachronism of most geographic restrictions:

- The Michigan Legislature repealed the residency restriction to be admitted to the State Bar. Previously, Michigan had a strange requirement that a candidate to be a lawyer had to be a resident of "a state," not Michigan, but any state. This requirement was used to prevent the licensure of Canadians who received joint law degrees from Michigan-based law firms.

- A small portion of the Michigan bar participates in multi-jurisdictional law firms and a few have established foreign offices.

- Michigan-based national and global companies have facilities and operations throughout the nation and in foreign countries.

- Global companies headquartered in Michigan have a need for lawyers with skills and experience throughout the world.

- Some Michigan-based companies have outsourced significant commodity legal work to foreign lawyers working outside the state.

General Agreement On Trade In Services (GATS)

The General Agreement on Trade in Services (GATS) is a treaty of the World Trade Organization (WTO) that entered into force in January 1995 as a result of the Uruguay Round negotiations. The treaty was created to extend the multilateral trading system to service sector, in the same way the General Agreement on Tariffs and Trade (GATT) provides such a system for merchandise trade.

Historically, public services such as health care, postal services, education, professional services, etc. were not included in international trade agreements. Such services were traditionally classed as domestic activities, difficult to trade across borders. Some services, for example educational services, have been "exported" for as long as universities have been open to international students. Other services are rapidly globalizing, including accounting, consulting and law. Even medical care is now subject to globalization through "medical tourism."

Recent technical and regulatory changes in Europe and other jurisdictions, has opened additional services to private commercial participation and reduced barriers to entry. The development of information technologies and the Internet have expanded the range of internationally tradeable service products to include a range of commercial activities such as distance learning, engineering, architecture, advertising and freight forwarding.

Under U.S. law, many services are regulated at the state rather than national level. While the overall goal of the GATS is to remove barriers to trade, the U.S. national government has not attempted to impose liberalization on any sector.

With respect to legal services, the Commission's proposal represents a very modest step in recognizing the global nature of legal services and the benefit of voluntarily implementing the principles of GATS in Michigan.

Unique Issues Facing Global Companies Headquartered In Michigan

- Headquarters staffs of global corporations manage business throughout the world.
- The supply chains of most manufacturers involve suppliers from many countries and require the ability to understand multiple legal systems.
- Good management practice requires frequent transfers of personnel from the field to headquarters, including lawyers.[For an example, read the now-outdated book "Why GM Matters."]
- Global transactions require lawyers with transnational experience. Federal securities, corporate transactions and complex litigation all require a mix of lawyer skills and experience.
- Global legal staffs include lawyers licensed in foreign jurisdictions that work in teams with U.S.-licensed lawyers.

State Interests In Including Corporate Legal Staffs Under State Licensure

- Insofar as licensure is in the public interest, Michigan should maximize the number of corporate lawyers under its regulatory scheme.
- It is in Michigan's economic interest to have global companies maintain headquarters in Michigan including their global legal staffs.
- The State should encourage, not discourage, corporate lawyers to remain in this state to practice law if they leave in-house corporate practice.

Commission's Proposed Changes In Michigan Law to Encourage Corporate Legal Staffs

- Eliminate 3 of 5 years rule for institutional lawyers who have been practicing in-house in Michigan.

- Encourage, rather than discourage (as under present law), in-house lawyers to commit their professional careers to Michigan even if they leave in-house practice and enter private practice.

- Create a membership category (optional) for foreign lawyers working in institutional settings if they are part of an integrated corporate legal team.

    - Recognize as member of the bar.
    - Practice within institutional setting only; private practice not permitted (except under Special Certificate of Qualification, see below)
    - Collect dues.
    - Subject to bar ethics.
    - Disclosure requirements on letterhead, business cards, opinions, etc.
    - Permit participation in State Bar committees.

Summary of Present Michigan Lawyer Requirements and Categories

Regular Member of the Bar

- Be 18 years old or older.

- Possess "good moral character."

- Have completed, before entering law school, at least 60 semester hours or 90 quarter hours toward an undergraduate degree from an accredited school or while attending an accredited junior or community college.

- Have obtained a JD from a reputable and qualified law school incorporated within the U.S. or its territories and the school must require a certain number of years of study to graduate. [The State Board of Bar Examiners has delegated this determination to the American Bar Association Committee On Law Schools. The ABA is a voluntary private organization that includes approximately __% of licensed attorneys in its membership.]

- Pass the bar exam with a score as determined by the Board of Bar Examiners.

Admission Without Examination; In-House Counsel

- To be admitted without taking the bar exam, in-house counsel must meet the following qualifications:

    - Intend in good faith to maintain an office in this state for the practice of law.

    - Intend to practice law in Michigan, or to be a full-time instructor in a reputable and qualified Michigan law school.

    - Submit the National Conference of Bar Examiners' Request for Preparation of a Character Report along with other material required by the Board.

- Have, after being licensed and for 3 of the 5 years preceding the application, actively practiced law as a principal business or occupation in a jurisdiction where admitted….

- The Supreme Court may, for good cause, increase the 5-year period. But such action requires a successful lawyer, actively practicing the most sophisticated law in Michigan to petition to Supreme Court for permission to remain in Michigan and continue his or her practice in a private practice setting.

Special Legal Consultant

- A lawyer who is not licensed to practice law in the United States, its territories, or the District of Columbia, may be eligible for admission to the State Bar of Michigan as a "special legal consultant."

- A person licensed to practice as a special legal consultant must maintain active membership in the State Bar of Michigan and must discharge the responsibilities of state bar membership and is authorized to render professional legal advice: (1) on the law of the foreign country where the legal consultant is admitted to practice.

- A person not licensed to practice law in the United States who serves as in-house counsel to a global corporation in Michigan is not eligible to be a special legal consultant because the lawyer does not limit his work to the law of the foreign country where the legal consultant is admitted to practice. In fact, such foreign lawyers may be involved in complex legal issues involving multiple jurisdictions.

State International Policy

The Commission's Proposal is consistent with a body of statutes that recognizes the importance of international matters to Michigan, including:

- In MCL §447.103 the legislature identified the International Commerce Division as "the focal point of the state for international activity" and tasked it to, in part:

> (q) Coordinate state activities when appropriate…when the international interests of the state can thus be advanced.

- MCL §447.153 authorizes the state government:

> (a) To assist, promote, encourage, develop, and advance economic prosperity and employment throughout this state by fostering the expansion of exports of goods and services to foreign purchasers.

- MCL §125.1204 establishes an economic expansion program to include the following activities:

> (d) Recommendations to the governor and the legislature, for the study and improvement of conditions, and for the elimination of restrictions, trade barriers and burdens imposed by law or otherwise, which may adversely affect or retard the legitimate development and expansion of industry, commerce or agriculture.

- MCL §125.1893 recently created the Michigan supply chain management development commission to, *inter alia:*

> (2) …create a road map for attracting, supporting, marketing, and growing the international trade, supply chain, and logistics industries by advising on the development and coordination of state transportation and economic development policies. Based upon an inventory of industry needs and state strengths and an economic multiplier impact analysis, the commission shall study and design programs to provide incentives and otherwise support these growth industries through workforce development, tax incentives, recruitment, marketing, and other activities.

- MCL §247.902 creates a transportation economic development fund:

> [F]or the purposes of enhancing this state's ability to compete in an international economy, serving as a catalyst for the economic growth of this state, and to improve the quality of life in the rural and urban areas of this state.

Appendix B: Chris Slavin Draft

Changes In Bar Admission Statute for Corporate Counsel

MCL CHANGES

Chris Slavin Draft

600.946 Foreign attorneys; admission to bar, qualifications, extension of term.

Sec. 946. Any person who is duly licensed to practice law in the court of last resort of any other state or territory or the District of Columbia, of the United States of America, and who applies for admission to the bar of this state without examination, **EXCEPT FOR A PERSON WHO HAS PRACTICED IN AN INSTITUTIONAL SETTING IN MICHIGAN FOR A MINIMUM OF FIVE YEARS AS GOVERNED BY SEC. 46a OF THIS CHAPTER,** is required to prove to the satisfaction of the board of law examiners that:

(1) He is in good standing at the bar of such other state, territory, or district, and has the qualifications as to moral character, citizenship, age, general education, fitness and ability required for admission to the bar of this state; and

(2) He intends in good faith either to maintain an office in this state for the practice of law, and to practice actively in this state, or to engage in the teaching of law as a full-time instructor in a reputable and qualified law school duly incorporated under the laws of this state; and

(3) His principal business or occupation for at least 3 of the 5 years immediately preceding his application has been either the active practice of law in such other state, territory, or district or the teaching of law as a full-time instructor in a reputable and qualified law school duly incorporated under the laws of this or some other state or territory, or the District of Columbia, of the United States of America, or that period of active service, full-time as distinguished from active duty for training and reserve duty, in the armed forces of the United States, during which the applicant was assigned to and discharged the duties of a judge advocate, legal specialist or legal officer by any other designation, shall be considered as the practice of law for the purposes of this section, which assignment and the inclusive dates thereof shall be certified to by the judge advocate general or comparable officer of the armed forces concerned or by the principal assistant to whom this certification may be delegated; or any combination of periods of practice thereof. The supreme court may, in its discretion, on special motion and for good cause shown, increase said 5-year period. Any period of active service in the armed forces of the United States not meeting the requirements of duty in the armed forces as herein stated may be excluded from the 5-year period above prescribed and the period extended accordingly.

600.946a Foreign attorneys in institutional setting; admission to bar, qualifications.

Sec. 946a. (1) ANY PERSON WHO IS DULY LICENSED TO PRACTICE LAW IN THE COURT OF LAST RESORT OF ANY OTHER STATE OR TERRITORY OR THE DISTRICT OF COLUMBIA, OF THE UNITED STATES OF AMERICA, WHO HAS PRACTICED IN A SINGLE INSTITUTIONAL SETTING AS COUNSEL TO A CORPORATION LOCATED IN THIS STATE FOR A MINIMUM OF FIVE YEARS, AND WHO APPLIES FOR ADMISSION TO THE BAR OF THIS STATE WITHOUT EXAMINATION, IS REQUIRED TO PROVE TO THE SATISFACTION OF THE BOARD OF LAW EXAMINERS THAT

(a) HE OR SHE IS IN GOOD STANDING AT THE BAR OF SUCH OTHER STATE, TERRITORY, OR DISTRICT, AND HAS THE QUALIFICATION AS TO MORAL CHARACTER, CITIZENSHIP, AGE, GENERAL EDUCATION, FITNESS AND ABILITY REQUIRED FOR ADMISSION TO THE BAR OF THIS STATE, AND

(b) HE OR SHE INTENDS IN GOOD FAITH EITHER TO MAINTAIN AN OFFICE IN THIS STATE FOR THE PRACTICE OF LAW, AND TO PRACTICE ACTIVELY IN THE STATE, OR TO CONTINUE PRACTICING IN AN INSTITUTIONAL SETTING LOCATED IN THE STATE.

600.647 Foreign attorneys in institutional setting; foreign institutional legal consultant certificate recognized by state bar; qualifications.

Sec. 947. (1) ANY PERSON WHO IS A RESIDENT OF A FOREIGN COUNTRY AND IS DULY LICENSED TO PRACTICE LAW IN A FOREIGN COUNTRY, AND WHO APPLIES TO THE BAR OF THIS STATE FOR A FOREIGN INSTITUTIONAL LEGAL CONSULTANT CERTIFICATE TO PRACTICE IN THIS STATE IN AN INSTITUTIONAL SETTING, IS REQUIRED TO PROVE TO THE SATISFACTION OF THE BOARD OF LAW EXAMINERS THAT:

(a) HE OR SHE IS HAS ACTUALLY PRACTICED IN A FOREIGN COUNTRY, AND IS IN GOOD STANDING AS AN ATTORNEY OR COUNSELOR AT LAW OR THE EQUIVALENT IN SUCH FOREIGN COUNTRY FOR AT LEAST THREE OF THE FIVE YEARS IMMEDIATELY PRECEDING THE APPLICATION; AND

(b) HE OR SHE POSSESS THE GOOD MORAL CHARACTER AND GENERAL FITNESS REQUISITE FOR A MEMBER OF THE BAR OF THIS STATE; AND

(c) HE OR SHE IS OVER 18 YEARS OF AGE; AND

(d) THE PERSON'S PRACTICE MUST BE LIMITED TO LEGAL ISSUES REGARDING THE COUNTY THE PERSON IS LICENSED IN WITHIN THE INSTITUTIONAL SETTING.

CHANGES IN RULES FOR THE BOARD OF LAW EXAMINERS

RULE 5: ADMISSION WITHOUT EXAMINATION

Rule 5 Admission Without Examination

(A) An applicant for admission without examination must

(1) qualify under Rules 1 and 2(B);

(2) be licensed to practice law in the United States, its territories, or the District of Columbia;

(3) be a member in good standing of the Bar where admitted;

(4) intend in good faith to maintain an office in this state for the practice of law;

(5) intend to practice law in Michigan, or to be a full-time instructor in a reputable and qualified Michigan law school; and

(6) have, after being licensed and for 3 of the 5 years preceding the application,

(a) actively practiced law as a principal business or occupation in a jurisdiction where admitted (the practice of law under a special certificate pursuant to Rule 5(D) or as a special legal consultant pursuant to Rule 5(E) does not qualify as the practice of law required by this rule);

(b) been employed as a full-time instructor in a reputable and qualified law school in the United States, its districts, or its territories; or

(c) been on active duty (other than for training or reserve duty) in the United States armed forces as a judge advocate, legal specialist, or legal officer. The judge advocate general (or a comparable officer) or delegate must certify the assignment and the inclusive dates.

The Supreme Court may, for good cause, increase the 5-year period. Active duty in the United States armed forces not satisfying Rule 5(A)(6)(c) may be excluded when computing the 5-year period.

(B) An applicant must submit the National Conference of Bar Examiners' Request for Preparation of a Character Report along with other material required by the Board and payment of the fees.

(C) An applicant not satisfying Rule 5(A) will be notified and given an opportunity to appear before the Board. The applicant may use the Board's subpoena power.

(D) An attorney

(1) ineligible for admission without examination because of the inability to satisfy Rule 5(A)(6); and

(2) practicing law in an institutional setting, e.g., counsel to a corporation or instructor in a law school, may apply to the Board for a special certificate of qualification to practice law. The applicant must satisfy Rule 5(A)(1)-(4), and comply with Rule 5(B). The Board may then issue the special certificate, which will entitle the attorney to continue current employment if the attorney becomes an active member of the State Bar. If the attorney leaves the current employment, the special certificate automatically expires; if the attorney's new employment is also institutional, the attorney may reapply for another special certificate.

(3) WHO HAS PRACTICED WITH A SPECIAL CERTIFICATE FOR A MINIMUM OF FIVE YEARS IN A SINGLE INSTITUTIONAL SETTING AS COUNSEL TO A CORPORATION NEED NOT COMPLY WITH RULE 5(A)(6) AND CAN BE ADMITTED TO THE BAR IF HE OR SHE MEETS THE REQUIREMENTS IN 5(A)(1)-(5) AND 5(B).

(E) Special Legal Consultants.

(a) To qualify for admission without examination to practice as a special legal consultant one must:

(1) be admitted to practice in a foreign country and have actually practiced, and be in good standing, as an attorney or counselor at law or the equivalent in such foreign country for at least three of the five years immediately preceding the application; and

(2) possess the good moral character and general fitness requisite for a member of the bar of this state; and

(3) fulfill the requirements of MCL 600.934 and 600.937; and

(4) be a resident of this or another state of the United States, its territories or the District of Columbia and maintain an office in this state for the practice of law; and

(5) be over 18 years of age.

(b) In considering whether to license an applicant to practice pursuant to Rule 5(E), the board may in its discretion take into account whether a member of the bar of this state would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission (as referred to in Rule 5[E][a][1]), if there is pending with the board a request to take this factor into account from a member of the bar of this state actively seeking to establish such an office in that country which raises a serious question as to the adequacy of the opportunity for such a member to establish such an office.

(c) An applicant for a license as a special legal consultant shall submit to the board:

(1) a certificate from the authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof and as to the good standing of such attorney or counselor at law or the equivalent, together with a duly authenticated English translation of such certificate if it is not in English; and

(2) a letter of recommendation from one of the judges of the highest law court or intermediate appellate court of such foreign country, together with a duly authenticated English translation of such letter if it is not in English; and

(3) the National Conference of Bar Examiners questionnaire and affidavit along with the payment of the requisite fee and such other evidence of the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Rule 5(E)(a)(1)-(5) as the board may require; and

(4) shall execute and file with the Assistant Secretary of the State Board of Law Examiners, in such form and manner as the board may prescribe,

(i) a duly acknowledged instrument in writing setting forth the special legal consultant's address in the state of Michigan and designating the Assistant Secretary of the State Board of Law Examiners an agent upon whom process may be served, with like effect as if served personally upon the special legal

consultant, in any action or proceeding thereafter brought against the special legal consultant and arising out of or based upon any legal services rendered or offered to be rendered by the special legal consultant within or to residents of the state of Michigan whenever after due diligence service cannot be made upon the special legal consultant at such address or at such new address in the state of Michigan as the special legal consultant shall have filed in the office of the Assistant Secretary of the State Board of Law Examiners by means of a duly acknowledged supplemental instrument in writing; and

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EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL, Ann Arbor, MI
Candidate for Juris Doctor (May 2013)
Dean's Scholar (three-year merit scholarship)
Activities: Associate Editor and 2012 Symposium Search
Committee Member, *University of Michigan Journal of Law Reform*
Research Assistant, Professor Richard D. Friedman (Spring 2011)
Student Attorney, Michigan Unemployment Insurance Project
Senior Judge, Legal Practice Program (Fall 2011-Winter 2012)

UNIVERSITY OF TOLEDO, Toledo, OH
Bachelor of Arts in Political Science, *summa cum laude*, May 2007
Senior Thesis: Diversionary Politics and the Double Security Dilemma
Honors: Outstanding Graduating Senior in Political Science
Vice President for Student Affairs Exemplary Leadership Award
Phi Kappa Phi & Pi Sigma Alpha
Activities: Hurricane Rita Relief Mission Team Leader, Alternative Spring Break
Peer Mentor, First Year Experience (freshman orientation)

PROFESSIONAL EXPERIENCE

CHAMBERS OF JUDGE JACK ZOUHARY, U.S. DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF OHIO, Toledo, OH
Judicial Extern, May 2011-August 2011

- Drafted opinions and orders addressing, *inter alia,* the interpretation of a Bankruptcy Code provision, the breadth of a federal labor statute, and various matters in an antitrust multidistrict litigation.
- Observed civil and criminal trials, motion arguments, and case management conferences.

U.S. SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT, THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA, Washington, D.C.
Professional Staff Member, December 2009-September 2010; ***Legislative Aide,*** July 2009-December 2009

- Advised Subcommittee Ranking Member on areas of legislative responsibility, including chemical security, federal labor relations and workforce policy, federal acquisition, cyber security, rulemaking and regulatory policy, and executive nominations. Organized Subcommittee hearings in partnership with majority staff.
- Advanced Ranking Member's legislative and oversight priorities through collaboration with congressional staff, federal and state agencies, and nonprofit organizations.
- Served as lead minority staffer for the Pre-Election Presidential Transition Act of 2010 (P.L. 111-283), the first significant legislative amendments to the Presidential Transition Act since the Kennedy administration.

THE OFFICE OF U.S. SENATOR GEORGE V. VOINOVICH, Washington, D.C.
Legislative Correspondent, December 2008-July 2009

- Responded to constituent correspondence, met with constituents, and conducted research on areas of legislative responsibility, including homeland security, manufacturing, trade, immigration, auto caucus issues, and labor.

Staff Assistant, May 2007-December 2008

- Provided general administrative support for the Senator's office, including managing constituent correspondence, answering telephones, and leading constituent tours of the U.S. Capitol.

DEMOCRACY AND WORLD POLITICS PROGRAM, INDIANA STATE UNIVERSITY, Terra Haute, IN
Research Fellow, June 2006-August 2006

- Conducted independent research examining the linkages between the normalization of bilateral trade relations and peace in enduring rivalries. Supported by funding from the National Science Foundation.

MADELINE S. THOMAN
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Education

THE UNIVEFtSITY OF MICHIGAN LAW SCHOOL, Ann Arbor, MI *J.D. expected December 2012*
Associate Editor, Michigan Journal of Law Reform

WASHINGTON UNIVERSITY IN ST. LOUIS, St. Louis, MO
B.A. with honors, May 2010
Majors: Political Science; Environmental Studies
Community Service Chair, Mortar Board Senior Honor Society Chair of Policy and Standards Board, Pi Beta Phi Sorority

CET PROGRAM IN PRAGUE, Prague, Czech Republic, Spring Semester 2009 Intensive study in European politics and Czech language and culture

Experience

UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.
Legal Intern in the Civil Rights Division, Employment Litigation Section - Summer 2011
- Researched and drafted memoranda on issues arising under Title VII of the Civil Rights Act
- Reviewed ongoing investigations and strategized plans of action based on evolving legal standards
- Prepared for settlement negotiations in a large gender discrimination lawsuit by drafting arguments to oppose union intervention

MICHIGAN UNEMPLOYMENT INSURANCE PROJECT, Ann Arbor, MI
Volunteer Student Advocate - Fall Semester 2010-Present
- Represent unemployed workers in hearings before administrative law judges
- Serve as student co-lead on policy initiative and potential class action lawsuit
- Recipient of the fall 2010 "Best Written Argument" award

INTERDISCIPLINARY ENVIRONMENTAL CLINIC, St. Louis, MO
Undergraduate Student Consultant, Washington University in St Louis - Spring Semester 2010
- Calculated air emissions levels and researched permitting requirements
- Drafted correspondence to the EPA combining legal and scientific conclusions

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C.
Intern in the Office of the Chair - Summer 2009
- Researched and reported on policy issues for the Chair
- Investigated the advertising industry's corporate structure in preparation for potential litigation

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, New York City District Office
Intern/Assistant Investigator - Summer 2008
- Analyzed charges of discrimination and submitted investigative memoranda
- Attended mediations and conciliation conferences

Languages and Interests
Beginner Czech, Piano, Creative Writing

6-21-12

To The Michigan Law Revision Commission:

The GTLA 691.1407 should be revised to grant no more than a qualified immunity to court-appointed psychological evaluators, whereby gross negligence and intentional torts are actionable. This matter properly belongs to the legislative branch, not with judges. Courts have a legitimate power to void legislation which violates the Constitutional rights of citizens. Courts have no legitimate power to void the Constitutional rights of citizens in the name of exercising legislative and executive branch powers. Courts have the duty to hear and decide cases, not to refuse to hear cases based on their view of the public interest. The Diehl v. Danuloff holding, and courts generally, have addressed this very important matter of absolute quasi-judicial immunity in a very partial, 1-sided manner. The appropriate standard of review for granting absolute immunity (assuming courts should have this power) should include weighing out the competing interests and values at stake, not just listing the reasons for absolute immunity, but not against it. In America, speculations on contributions to mental health evaluator performance are not more important than liberty, justice, human dignity, the rule of law and the rule of the Constitution(s) so as to justify absolute immunity.

What else is wrong with the Diehl holding and the law it proclaims?:

1. In America we believe that holding persons to legal consequences for misconduct and the intentional violation of the rights of others will induce better conduct, improved performance, and more accuracy, more loyalty, more integrity, more care, more honesty, and more objectivity, not the reverse. Where careless, malicious, incompetent, court evaluators can be brought to justice by their victims we can expect to see less of them. The rationale that absolute immunity is necessary to "preserve truthfulness" and prevent evaluators from "coloring their recommendations" is not just wrong, it is upsidedown. The policy goals of perjury, false reporting, obstructing justice, and Constitutional law are supported by the possibility of civil liability. The threat of liability for false statements will not make evaluators less honest, it will make them more honest, accurate, and careful.
2. Judges should not be preventing meritorious lawsuits to "save judicial time", nor should they be engaged in "defending" these suits.
3. Psychological evaluators are fact-finders who serve in an investigative, not adjudicative capacity. It would be misconduct for judges to delegate to these "experts" the adjudicative role of judges or juries. It would also be judicial misconduct for judges to act as fact-finding mental health investigators. Thus, evaluators should receive an investigatory role qualified immunity, not judicial absolute immunity.
4. The exercise of discretionary judgment does not justify absolute immunity, and is not relevant under 691.1407(2)©
5. Whether or not mental health evaluators will be "much less likely" to do these reports without absolute immunity, this issue properly belongs with the legislative and executive branches of government, who can provide solutions such as indemnity, malpractice insurance, recruitment, liability avoidance training, etc.
6. The goals of justice, truth, and competent performance of duties are far more important than the goal of "finality in judgments."
7. It is a strange doctrine which denies the public any chance of compensatory justice under the pretense that it is in the public's interest. It would be unthinkable for most Americans to say they care more about protecting the guilty who have attacked liberty, abused government powers, betrayed the Constitution(s) and public trust to injure a vulnerable citizen, than they do about assuring the unfortunate victim a chance for recovery.
8. The public is better served when evaluators do have to fear for causing harm and violating Constitutional liberties. Accountabilty is more important than "independence" in democracy.

Sincerely, Sean Bennett