Michigan
Law Revision Commission

TWENTY-EIGHTH ANNUAL REPORT
1993

MICHIGAN
LAW REVISION COMMISSION

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MICHIGAN LAW REVISION COMMISSION
Twenty-Eighth Annual Report to the Legislature

To the Members of the Michigan Legislature:

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

The Commission, created by section 401 of that act, MCL 4.1401, consists of: two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. Terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 1993 were Senator William Faust of Westland, Senator David M. Honigman of West Bloomfield, Representative Michael E. Nye of Litchfield, and Representative Ted Wallace of Detroit. As Director of the Legislative Service Bureau, Elliott Smith was the ex-officio Commission member. The appointed members of the Commission were Richard D. McLellan, Anthony Derezinski, Maura D. Corrigan, and Lawrence D. Owen (until October 1993). Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kent Syverud of the University of Michigan Law School served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 1993 Commission members and staff are located at the end of this report.

The Commission's Work in 1993

The Commission is charged by statute with the following duties:

1. To examine the common law and statues of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers, and the public generally as to defects and anachronisms in the law.

4. To recommend such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.

6. To cooperate with the law revision commissions of other states and Canadian provinces.

7. To issue an annual report.

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

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees relating to various proposals previously

recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States (e.g., California, New York, and Ontario). Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

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

The Commission recommends immediate legislative action on three of the topics studied. On one additional topic, the Commission prepared a study report.

The four topics are:

(1) Uniform Trade Secrets Act
(2) Amendments to Michigan's Anatomical Gifts Act

(3) Ownership of A Motorcycle For Purposes of Receiving No-Fault Insurance Benefits

(4) Michigan's Legislative Power Over its Native American Population (study report)

Proposals for Legislative Consideration in 1994

In addition to its new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1993:

(1) Uniform Transfers to Minors Act, 1984 Annual Report, page 17.

(2) Uniform Law on Notarial Acts, 1985 Annual Report, page 17.

(3) Uniform Fraudulent Transfer Act, 1988 Annual Report, page 13.

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

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

(6) Proposed Administrative Procedures Act, 1989 Annual Report, page 27.

(7) Judicial Review of Administrative Agency Action, 1990 Annual Report, Page 19.

(8) Amendment of Uniform Statutory Rule Against Perpetuities, 1990 Annual Report, page 141.

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

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

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

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

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Declaratory Judgment in Libel Law/Uniform Correction or Clarification of Defamation Act

(2) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal)
(3) Health Care Consent for Minors
(4) Health Care Information, Access and Privacy
(5) Public Officials -- Conflict of Interest and Misuse of Office
(6) Reproductive Technology
(7) Uniform Statutory Power of Attorney
(8) Uniform Putative and Unknown Fathers Act
(9) Uniform Custodial Trust Act
(10) Uniform Commercial Code -- Proposed Amendment or Repeal of Article 6
(11) Statutory Definitions of Gross Negligence
(12) Amendments to Michigan's "Lemon" Law
(13) Legislation Concerning Teleconference Participation in Public Meetings
(14) Michigan Legislation Concerning Native American Tribes

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109-1215. The Executive Secretary of the Commission since January 1, 1993, is Professor Kent Syverud, who was responsible for the publication of this report. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 70 Michigan statutes passed since 1967 upon the recommendation of the Commission.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

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

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
Maura D. Corrigan
Senator William Faust
Senator David M. Honigman
Representative Michael E. Nye
Representative Ted Wallace
Elliott Smith

Date: February 15, 1994

UNIFORM TRADE SECRETS ACT

Introduction

The Uniform Trade Secrets Act (UTSA) is a proposed codification of the state law of trade secret protection. After its first official draft in 1979, the UTSA took on its present form through amendments made in 1985. (Reprinted in Appendix A). It has now been adopted (though sometimes with modification) in 37 states. See 14 U.L.A. 433. The Michigan Law Revision Commission recommends that the Legislature adopt the UTSA.

Michigan courts have recognized a common law tort action for the misappropriation of trade secrets since 1897. *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149 (1897). At present, Michigan has no statutory law providing civil remedies for the misappropriation of trade secrets. However, under M.C.L. 752.771-773, the theft or embezzlement of an item or a copy of an item in order to withhold from the item's owner the control of a trade secret is punishable under criminal law as a misdemeanor.

State trade secrets law provides an alternative to federal patent law (35 U.S.C. 1 et seq.) for the protection of inventions, formulas, patterns, etc., that businesses wish to keep confidential in order to preserve a competitive advantage. Patent law provides a legal monopoly for seventeen years in exchange for public disclosure of an invention. However, many inventors choose not to protect their inventions under patent law because (1) they do not want to risk the denial of a patent after public exposure of their invention and loss of confidentiality, or (2) they want to maintain the monopoly for a longer period than 17 years. State trade secrets law can also protect information that is not eligible for the protection of federal patent law.

The UTSA codifies the basic principles of common law trade secret protection. Information must be qualified as a secret before it is protected under trade secret law (see §1(4)). An owner's trade secret is only protected from misappropriation by another party; appropriation by separate invention or "reverse engineering" is not prohibited (see §1(2)). If a court finds that a trade secret has been misappropriated, it can issue an injunction forbidding the use of the misappropriated secret (§2), assess damages for the misappropriation (§3), or both.

Several factors suggest the need for the consistency and unification of state law that the UTSA would provide. First, the growing dependency of industry upon trade secret protection makes necessary a more clear and concise statement of the law in this area to prevent confusion. Second, state law concerning trade secrets has been uneven in its development among the 50 states; some commercially developed states have substantial case law, while less populous and agricultural states do not. The contribution of the UTSA is a substitution of unitary definitions of trade secret and trade secret misappropriation, and a single statute of limitations for any cause of action arising under the Act.

The remainder of this report reviews the text of the UTSA section by section, with the Commission's commentary noting congruence with existing Michigan common law. The Commission's recommendations are summarized in the conclusion.

SECTION ONE: DEFINITIONS

SECTION 1. [Definitions.] As used in this [Act], unless the context requires otherwise:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation" means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

COMMENT

A. *"Improper Means"*

Section 1(1) is a short and nonexclusive list of means of obtaining trade secrets that would be considered improper. Proper means may include (those already recognized as proper means under Michigan law are so noted): (1) discovery by independent investigation; (2) discovery by "reverse engineering," that is, by starting with the properly acquired product and working backward to find the method by which it was developed, *Kubik, Inc. v. Hull*, 56 Mich. App. 335 (1974); (3) discovery under a license from the owner of the trade secret; (4) observation of the item in public use or on public display; (5) obtaining the trade secret from published literature, *Dutch Cookie Machine Co. v. Vande Vrede*, 289 Mich. 272 (1939). Improper means may include activities that are lawful in other contexts; for example, flying over a competitor's factory during

construction to determine the layout of the plant. *E.I. du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. den.* 400 U.S. 1024 (1970). "Improper means" is used in §1(2) to define "misappropriation" and "misappropriation" of a trade secret is necessary for the granting of the remedies of injunction (§2) and/or damages (§3).

Two states which adopted the Uniform Act, Illinois and Oregon, sought to clarify §1(1)'s definition of "improper means." Each stated that "reverse engineering" and "independent development" do not constitute improper means. As noted *supra*, however, both the UTSA and Michigan common law are already consistent with this addition, and the Commission therefore regards the Illinois and Oregon clarification as unnecessary in Michigan.

B. *"Misappropriation"*

Section 1(2) defines "misappropriation" to include direct appropriation of a trade secret by improper means, and the appropriation of the secret through a third party who used improper means to obtain the secret. Acquisition through a third party becomes a "misappropriation" when the acquirer has reason to know that the secret was obtained by improper means. The type of mistake or accident that can result in a misappropriation under §1(2)(ii)(C) does not include a mistake or accident caused by the trade secret holder's failure to take reasonable measures to maintain the secrecy required under §1(4)(ii). A trade secret must be misappropriated before there is any remedy under §2 or 3.

One state which adopted the Uniform Act, Virginia, modified §1(2)'s definition of "misappropriation." Specifically, Virginia omitted §1(2)(ii)(C) and instead added a clause to subsection (2)(ii)(B). This added clause made subsection (b) applicable to a trade secret, "acquired by accident or mistake." The modification explicitly provided that any unauthorized use or disclosure of information known to be a trade secret is a misappropriation. Virginia thus deleted the UTSA's exception in subsection (2)(ii)(C) to the extent that a person does not recognize the accidental acquisition of a trade secret until after making a "material change in his position." However, it is not clear what effect this modification has, since Virginia retained §3(a)'s exception to the recovery of damages to the extent a person makes a "material change of position prior to acquiring knowledge or reason to know of misappropriation." The Commission does not endorse Virginia's modification.

C. *"Trade secret"*

Section 1(4) slightly expands the definition of trade secret under Michigan common law. The Michigan Supreme Court has not firmly defined the term "trade secret," but follows the general guidelines of Restatement (First) of Torts, §757(b) (1939) in determining whether something is a trade secret.

> A trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers *Hayes-Albion Corp. v. Kuberski*, 421 Mich. 170, 181 (1984).

Restatement (First) of Torts §757 suggests five factors to consider when determining whether a party actually holds a trade secret: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known to others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information. The Michigan Supreme Court has recognized an additional factor: that the secret can take on concrete form. *Manos v. Melton*, 358 Mich. 500 (1960). Although Michigan courts have not specifically adopted such a rule, the Restatement (First) of Torts definition of "trade secret" requires continuous use of the trade secret in the trade secret owner's business.

The definition of trade secret in the UTSA expands the Restatement (First) of Torts definition by dropping the continuous use requirement. The expanded definition includes secrets that have not yet been implemented in the trade secret holder's business, and "negative information," or information that a certain process or formula will not work. These two types of information are not protected under the Restatement definition of "trade secret" because they cannot fulfill the continuous use requirement. Unimplemented or negative information may be the result of costly research even if the information is not used in a business. A competitor can avoid research expenditures by misappropriating the information, and gain an advantage over the party who made the original research. The broader definition of "trade secret" in the UTSA provides additional protection for a wider range of valuable information. The Commission favors the UTSA definition, and agrees that Michigan should drop the continuous use requirement.

Several states which adopted the Uniform Act have modified §1(4)'s definition of "trade secret" by expanding on the type of information which may constitute a secret. The most extreme example of this is Colorado which abandoned the Uniform Act's use of the general term "information" and instead provided that:

> Trade secret means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value.

Similar but less drastic modifications were made by Illinois and Montana. Illinois included "financial data, or list of actual or potential customers or suppliers." Montana made clear that "computer software" may contain information constituting a trade secret.

However, it is not clear that making specific these additions is necessary, since state courts have not restricted the type of information to those specifically listed in the UTSA. Instead, courts have tended to focus on subsections (4)(i) and (4)(ii) in order to determine whether a particular form of information constitutes a trade secret. *American Credit Indem. Co. v. Sacks*, 262 Cal. Rptr. 92, 213 C.A.3d 622 (1989); *Rehabilitation Spec. Inc. v. Koering*, 404 N.W.2d 301 (Minn. Ct. App. 1987); *Michels v. Dyna-Kote Industries, Inc.*, 497 N.E.2d 586 (Ind. Ct. App. 1984); *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 434 N.W.2d 773 (Ind. Ct. App. 1989). In fact, Alaska entirely omitted the UTSA's examples of information constituting a trade secret, instead leaving this to subsections (4)(i) and (4)(ii). The Commission does not recommend any expansion of the types of information listed in §1(4).

Both the UTSA and present Michigan law allow for more than one party to hold the same trade secret; the extent to which information is known outside a business is only one factor to consider when determining secrecy. *Hayes-Albion Corp. v. Kuberski*, 421 Mich. 170 (1984). The language in §1(4)(i), "not being generally known to and not being readily ascertainable by proper means by other persons," does not require that information be generally known to the public for trade secrets to be lost. The purpose of trade secrets law is to protect those holding trade secrets from unfair competition arising from a competitors' misappropriation of information. If information is already widely known among competitors within a trade, there is no competitive advantage gained from its misappropriation, and it is no longer a "secret" for the purposes of the UTSA.

Michigan courts have taken a similar approach in the definition of trade secret. Under Michigan law, a plaintiff cannot take advantage of a defendant's ignorance of information generally known within a trade to claim a misappropriation of a trade secret. *Russell v. Wall Wire Products Co.*, 346 Mich. 581 (1956).

Information is "readily ascertainable" if it is available in printed material or is easily discoverable by inspection of a openly marketed product. Under Michigan common law, information is no longer considered "secret" if it has been published in a trade journal, *Dutch Cookie Machine Co. v. Vande Vrede*, 289 Mich. 272 (1939), or is contained in an expired patent. *Russell v. Wall Wire Products Co.*, 346 Mich. 581 (1956). Unrestricted marketing that makes a trade secret generally available to the public through reverse engineering negatively affects the trade secret's status as a secret. However, if reverse engineering of a product is expensive and time consuming, the trade secret may be maintained by both the original owner and those who discover the secret. *Kubik, Inc. v. Hull*, 56 Mich.App. 335 (1974). The present Michigan common law defining when information is "readily ascertainable" would be preserved under the UTSA.

Four states which adopted the Uniform Act, California, Colorado, Illinois and Oregon omitted subsection (4)(i)'s requirement that information not be "readily ascertainable by proper means" to constitute a trade secret. These states apparently decided that the phrase was unnecessary since subsections (4)(i) and (4)(ii) still require that the information have value from not being generally known to competitors and that reasonable efforts have been made to maintain the information's secrecy. However, this modification leaves open the possibility that a misappropriator may be held liable even though the person could have easily acquired the information by proper means. This modification may have been adopted to afford greater protection to computer software developers whose work, once marketed may be readily ascertainable, but nonetheless valuable, not generally known, and difficult to keep secret.

Colorado modified the subsection to require only that the information constituting a trade secret must be "secret and of value." Thus unlike the UTSA, the Colorado Act does not explicitly require that information constituting a trade secret derive its value from being unknown and not readily ascertainable to competitors. This arguably widens the scope of information protected by the Uniform Act.

In contrast, Nebraska seemingly narrowed the scope of information covered by the Uniform Act. It modified subsection (4)(i) by deleting the terms "generally" and "readily" immediately preceding the terms "known" and

"ascertainable." Although not yet interpreted by the Nebraska courts, this modification apparently limits the Act to protecting information which is *in fact* unknown and unascertainable to competitors. Alternatively, the courts could interpret the terms "known" and "ascertainable" as guidelines in determining whether the trade information has value. The information could be held to have value even though not completely unknown and unascertainable by proper means, and Nebraska's modification may not change the UTSA's original meaning.

The Commission recommends that subsection (4)(i)'s requirement that information not be "readily ascertainable by proper means" should be retained.

Section 1(4)(ii) further requires that a trade secret must be the subject of reasonable efforts to maintain its secrecy. A "reasonable effort" under the UTSA does not differ significantly from the precautions now required under Michigan Law:

> Accordingly, to warrant a finding that specific information is "secret" it must be established that the possessor intended, and the employee (or other person to whom the information was disclosed) understood or should have understood that the information was not to be indiscriminately made available to third parties or the public generally. Relevant factors to be considered include (1) the existence or absence of an express agreement restricting disclosure, (2) the nature and extent of security precautions taken by the possessor to prevent acquisition of the information by unauthorized third parties, (3) the circumstances under which the information was disclosed by the possessor to the employee to the extent that they give rise to a reasonable inference that further disclosure, without the consent of the possessor, is prohibited, and (4) the degree to which the information has been placed in the public domain or rendered "readily ascertainable" by third parties through patent applications or unrestricted product marketing. *Kubik, Inc. v. Hull*, 56 Mich.App. 335, 356 (1974).

The measures taken to maintain secrecy are those "reasonable under the circumstances"; the holder of a trade secret need not use extreme and unduly expensive means to preserve a trade secret's secrecy. See *E.I. du Pont de Nemours & Co., Inc. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970), *cert. den.* 400 U.S. 1024 (1970).

One state which adopted the Uniform Act, Minnesota, added an entirely new subsection following (4)(ii) intended to address information a person acquires while under employment:

> The existence of a trade secret is not negated merely because an employee or other person has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained.

However, courts interpreting the original language of the UTSA have already similarly applied it to employer-employee relationships. *Minuteman, Inc. v. Alexander*, 147 Wis.2d 842, 434 N.W.2d 773 (1989); *Davis v. Eagle Prod., Inc.*, 501 N.E.2d 1099 (1986); *Robert S. Weiss and Associates, Inc. v. Wiederlight*, 208 Conn. 525, 546 A.2d 216 (1988).

Of the states adopting the Uniform Act, only Colorado significantly modified subsection (4)(ii). Specifically, it deleted the requirement that efforts made to maintain the information's secrecy be "reasonable under the circumstances." Colorado thus focused upon subsection (4)(i)'s requirement that the information must be secret instead of the degree of the complainant's efforts to maintain that secret.

The Commission favors the USTA version of subsection 4(i) rather than the Minnesota or Colorado versions.

SECTION TWO: INJUNCTIVE RELIEF

SECTION 2. [Injunctive Relief.]

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to

acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

COMMENT

A. **Section 2(a)** provides for the remedy of injunctive relief now available under Michigan trade secrets law. As under Michigan law, an injunction may issue to prevent the threatened misappropriation of a trade secret, *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 149 (1897), or the actual misappropriation, *Dutch Cookie Machine Co. v. Vande Vrede*, 289 Mich. 272 (1939).

The length of an injunction issued against a defendant under §2(a) is limited to the time necessary to prevent any competitive advantage from a misappropriation. This principle has already been applied by Michigan courts. A permanent injunction barring the use of a trade secret by a misappropriator has been rejected by Michigan courts because of its punitive nature. A misappropriator should be prevented from using a trade secret to commercial advantage, but once the trade secret information becomes widely known and ceases to be secret, an injunction prohibiting the misappropriator's use would serve only as a punishment. *Kubik, Inc. v. Hull*, 56 Mich. App. 335 (1974). Permanent injunctions would also prevent third party customers from being able to choose among competitors, and thus diminish the competition of the market place. *Hayes-Albion Corp. v. Kuberski*, 421 Mich. 170 (1984). For these reasons, permanent injunctive relief for the misappropriation of a trade secret has not been allowed under Michigan common law, and would not be allowed under the UTSA.

Several states adopting the Uniform Act chose to modify §2(a). Illinois, for example, created a second purpose for continuing an injunction. Specifically, it stated that in addition to eliminating commercial advantage, an injunction may be continued "where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means." Thus a court may continue an injunction to preserve a plaintiff's rightful commercial advantage as well as to eliminate a misappropriator's wrongfully gained advantage. However, it is not clear how a court would determine the duration of an injunction intended to protect information which is no longer secret. An excessively long injunction would diminish competition in the market place and punish the misappropriator rather than compensate the injured party.

Other states have made less significant changes. Maine and Oregon added that the subsection authorized a court to order many forms of injunctions. In particular, Maine modified the first sentence to state that a misappropriation may be "**restrained or** enjoined," and added a subsection stating that the section applied to "temporary restraining orders, preliminary injunctions and permanent injunctions." Oregon chose to state that a misappropriation may be "**temporarily, preliminarily, or permanently** enjoined." However, although the UTSA would allow a court to order a permanent injunction if it determined that the misappropriator would never have properly acquired the trade information, such a situation seems highly unlikely. To grant a permanent injunction in any other situation would contravene both the UTSA and Michigan trade secret law.

B. **Section 2(b)** deals with the special situation in which future use by a misappropriator will damage a trade secret owner but an injunction against future use nevertheless is inappropriate due to exceptional circumstances. Exceptional circumstances include the existence of an overriding public interest which requires the denial of a prohibitory injunction against future damaging use and a person's reasonable reliance upon acquisition of a misappropriated trade secret in good faith and without reason to know of its prior misappropriation that would be prejudiced by a prohibitory injunction against further use. An example of an overriding public interest in Michigan may be maintaining a competitive marketplace: in *Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng. Corp.*, 255 F.Supp. 645 (E.D. Mich. 1966), a Federal court balanced the injury to a trade secret owner against the Michigan public policy discouraging agreements not to compete as expressed in former M.C.L. 445.761 (repealed by P.A. 1984, No. 274 §17, M.C.L. 445.787(c)), and concluded that an injunction could not prohibit a former employee with knowledge of his past employer's trade secret from working for a competitor. Although the repeal of the "noncompete statute" former M.C.L. 445.761, may allow for a more flexible application of injunctive relief for the misappropriation of trade secrets under Michigan common law, injunctions may still be limited by the public policies of maintaining a competitive marketplace and allowing workers to freely seek employment. With respect to innocent acquirers of misappropriated trade secrets, §2(b) is consistent with the principle of Restatement (First) of Torts, §757(b) (1939), but rejects the Restatement's literal conferral of immunity upon all third parties who have paid value in good faith for a trade secret misappropriated by another. Once a good-faith recipient of a misappropriated trade secret is notified of the misappropriation, he is subject to the remedies of §2 and §3, unless his material reliance on the use of the trade secret before notification of its misappropriation would make the application of these remedies inequitable.

If the application of injunctive relief is limited by public policy or equity, §2(b) provides an alternative remedy which has not yet been applied by Michigan courts. Under §2(b), a court may choose to substitute an injunction conditioning future use upon the payment of a reasonable royalty for an injunction prohibiting future use (see §2(a)). An injunction conditioned upon the payment of royalties, like an injunction under §2(a), would be limited in duration to the time necessary to prevent a misappropriator from gaining competitive advantage from the misappropriation. A royalty order injunction under §2(b) should be distinguished from a reasonable royalty alternative of damages under §3(a). See the comment to §3 for discussion of the differences in the two remedies.

Many states adopting the Uniform Act, including Alaska, Arkansas, California, Connecticut, Delaware, Louisiana, Montana and Washington, chose to avoid the Uniform Act's use of the phrase "in exceptional circumstances" and modified §2(b) as follows:

> If the court determines that it would be unreasonable to prohibit future use of a trade secret, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

Indiana made virtually the same change except that it retained the original language in the beginning of the subsection: "If the court determines in exceptional circumstances that. . . ." In making this change, these states transferred the Act's focus from what constitutes "exceptional circumstances" to what is a "reasonable" course of action for the court to take.

Hawaii retained the Uniform Act's use of the "exceptional circumstances" standard but added a sentence clarifying who has the burden of proof to show that the court should impose a royalty instead of an injunction. Specifically, the sentence states that, "The alleged wrongful user shall have the burden of proof of exceptional circumstances." This addition made clear that a successful plaintiff would not have to further persuade the court to issue an injunction rather than an order for payment of a royalty. The question of who has the burden of proof in such situations has apparently not been addressed by appellate courts in other states which adopted the UTSA. However, it seems likely that even without Hawaii's modification, courts would still require the misappropriator to prove that the standard form of relief would be unreasonable.

The Commission favors the modification of §2(b) adopted by California and seven other states. Rather than require the courts to develop a case law defining "exceptional circumstances," the Commission would leave it to the

courts' equitable discretion to decide when it would be reasonable to substitute a royalty for a ban on future use of a trade secret.

C. **Section 2(c)** authorizes mandatory injunctions requiring the return to the trade secret owner of all the fruits of a misappropriation--those materials which may reveal a trade secret. A person who steals or embezzles an item or a copy of an item in order to deprive or withhold from its owner the control of a trade secret is also guilty of a misdemeanor under Michigan law. M.C.L. 752.771-773.

One state adopting the Uniform Act, Colorado, chose to entirely rewrite §2, combining the subsections into one provision which reads as follows:

> Temporary and final injunctions including affirmative acts may be granted on such equitable terms as the court deems reasonable to prevent or restrain actual or threatened misappropriation of a trade secret.

Colorado thus clearly left greater discretion to the courts to determine the nature and content of injunctions as they deemed necessary.

SECTION THREE: DAMAGES

SECTION 3. [Damages.]

(a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a).

COMMENT

A. **Section 3** provides a remedy of money damages, which may be used in concurrence with the remedy of an injunction provided for in §2, unless money damages would be made inequitable by a good-faith purchaser's material change of position in reliance upon the acquisition of the trade secret. Money damages may be assessed only for the losses sustained by a plaintiff during the time the trade secret was misappropriated, and/or the time during which a competitive advantage from the misappropriation is maintained.

B. **Section 3(a)** allows a complainant to recover damages from actual loss and unjust enrichment, so far as the unjust enrichment was not included in the calculation of actual loss. Michigan courts have also allowed the recovery of actual loss and unjust enrichment. *Hayes-Albion Corp. v. Kuberski,* 108 Mich.App. 642 (1981), *rev'd on other grounds*, 421 Mich. 170 (1984). A Michigan appeals court has offered a few specific suggestions on how a court could calculate money damages in a trade secrets case:

> In determining the amount of those damages, the trial court may properly consider the amount of time, labor, and money expended by plaintiff in designing, fabricating and testing the [trade secret]; profits lost by plaintiff as a result of defendant['s] misappropriation; the existence or absence of competitors other than defendant who manufacture equipment embodying the [trade secret]. . . . Our suggestions here are only illustrative and are in no way to be construed as limiting the traditional power of the trial court to assess damages for the purpose of compensating plaintiff for the loss he sustained as the result of defendant['s] misappropriation of the trade secret. *Kubik, Inc. v. Hull*, 56 Mich.App. 335, 364 (1974).

In the eventuality that other means of calculating damages prove inadequate, §3(a) provides an alternative measure of damages: a demonstrably reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. This alternative measure of damages is adapted from a section of federal patent law, 35 U.S.C. 284, which fixes the minimum amount of damages for a patent infringement case as the payment of a "reasonable royalty." The damage remedy of the payment of reasonable royalties differs from the conditional injunctive remedy of §2(b) in that: (1) an injunction conditioning future use upon the payment of reasonable royalties is only to be used in exceptional circumstances, while the reasonable royalties measure of damages is an option generally available to a plaintiff; (2) the injunctive remedy applies to a misappropriator's future conduct, while the damage remedy applies to a

misappropriator's misconduct in the past; thus, the two remedies cannot both be applied to the same conduct. If a royalty order injunction is appropriate because of a person's material and prejudicial change of position prior to having reason to know that a trade secret has been acquired through misappropriation, damages should not be awarded for past conduct that occurred prior to notice that a misappropriated trade secret has been acquired (see §1(2)(B)).

Many states adopting the Uniform Act chose to modify §3(a). The most common change, made by Alaska, Connecticut, Delaware, Louisiana and Montana, omitted the Uniform Act's exception "to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable." Subsection (a) in these states reads as follows:

> In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

These states apparently found the exception redundant since §1(2)(ii)(C) already stated that such conduct did not constitute a misappropriation.

This modification also omitted the last sentence in the Uniform Act's version allowing a royalty to be imposed "in lieu of damages." These states thus intended to use a royalty only as a substitute for injunctive relief.

California and Indiana similarly modified the Uniform Act except that they retained the use of a royalty in lieu of damages "if neither damages nor unjust enrichment caused by misappropriation are provable." Illinois, Oregon and Virginia also retained modified versions of this part of the provision. Specifically, Illinois permitted a court to impose a royalty "if neither damages nor unjust enrichment caused by the misappropriation are proved by a preponderance of the evidence." Oregon and Virginia made even more significant changes. Oregon's act stated that damages "shall not be less than a reasonable royalty," and Virginia's allowed a court to impose a royalty only "if a complainant is unable to prove a greater amount of damages by other methods of measurement." In both states, a complainant is therefore guaranteed to recover the larger of the two potential awards.

In the Commission's view, the UTSA's version of §3(a) is consistent with existing Michigan case law, and should not be amended in the ways other states have done.

C. **Section 3(b)** allows an additional award of exemplary damages in the case of a willful and malicious misappropriation. As in federal patent law (35 U.S.C. 284), the award of treble damages is left to the discretion of the judge, even if a jury is present. Michigan courts have awarded exemplary damages in trade secrets cases when the conduct of the defendant makes such an award appropriate. Exemplary damages should be awarded with the purpose of making the complainant whole, not punishing the defendant. *Hayes-Albion Corp. v. Kuberski*, 108 Mich.App. 642 (1981), *rev'd on other grounds*, 421 Mich. 170 (1984), *Schwayder Chemical Metallurgy Corp. v. Baum*, 45 Mich.App. 220 (1973). When more than one party holds a trade secret, only the party from whom the trade secret was misappropriated is entitled to a remedy under the UTSA.

A few states which adopted the Uniform Act were not satisfied with subsection (b)'s limiting exemplary damages to twice the award under subsection (a). Thus Connecticut also allowed recovery of reasonable attorneys fees (permitted under §4), and Montana did not limit the amount of exemplary damages which could be recovered.

Colorado apparently did not like the Uniform Acts' use of the phrase "willful and malicious misappropriation," and instead permitted recovery "if the misappropriation is attended by circumstances of fraud, malice, or a willful and wanton disregard of the injured party's right and feelings."

Finally, two states, Arkansas and Louisiana chose to omit the section altogether, apparently leaving the recovery of exemplary damages up to the courts.

The Commission notes that the law of exemplary damages in Michigan varies in significant respects from that of most other states. It therefore recommends that §3(b) be deleted, and that the law of exemplary damages in trade secrets cases be left to case law development, as it has in the past.

SECTION FOUR: Attorneys fees

SECTION 4. [Attorneys fees.] If (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorneys fees to the prevailing party.

COMMENT

Section 4 provides for the award of attorneys fees to a prevailing party under certain circumstances. Section 4(i) and (ii) grant to the court the power to award attorneys fees when pleadings that claim a misappropriation, move for the termination of an injunction, or resist such a termination are made in bad faith. As a general rule, Michigan courts have refused to allow recovery of attorneys fees, either as an element of the costs of a suit or as part of a damage award unless recovery of the fees is specifically allowed for by court rule or statute. *State Farm Mutual Automobile Ins. Co. v. Allen*, 50 Mich.App. 71 (1973), *Matras v. Amoco Oil Co.*, 424 Mich. 675 (1986). Present Michigan court rules and law allow for the award of attorneys fees when pleadings are made in bad faith, or for the purpose of harassing, causing delay, or increasing the costs of litigation. Under Rule 2.114 of the Michigan Court Rules of 1985, a court may award attorneys fees as a sanction for the filing of a signed pleading that is not well grounded in fact or present law, and is not a good-faith argument for the extension, modification, or reversal of existing law. Section 591 of the Revised Judicature Act of 1961, M.C.L. 600.2591, allows a prevailing party to move for the award of costs including attorneys fees if a court finds an action or defense to an action frivolous. Section 4(i) and (ii) of the UTSA applies the principles expressed in Rule 2.114 and M.C.L. 600.2591 to specific motions filed during trade secrets litigation. The award of attorneys fees is intended to act as a deterrent to specious claims and pleadings by either the plaintiff or defendant.

Section 4(iii) gives to the court the discretion to award attorneys fees when a misappropriation is willful or malicious. There is no Michigan court rule or statute that provides for the collection of attorneys fees as part of damages or costs of litigation in a suit involving the commission of a willful and malicious tort. Section 4(iii) would create a new exception to Michigan's general rule of not awarding attorneys fees. A court should take into consideration the amount of exemplary damages received by a plaintiff in these circumstances when determining whether attorneys fees should be awarded.

Three states adopting the Uniform Act, Alaska, Nebraska and Virginia, omitted this section altogether, apparently leaving the recovery of attorneys fees to the discretion of the courts. Other states made slight modifications. For example, Iowa permitted recovery of "**actual or** reasonable attorney fees," and Montana allowed recovery of costs as well as attorneys fees.

As noted *supra*, Connecticut incorporated clause (iii) into §3 and therefore omitted §4. Oregon modified clause (iii) to permit recovery of

attorneys fees if "willful or malicious misappropriation is found by the court or jury."

Rather than create a separate and potentially complex law of attorneys fees for Michigan trade secrets cases, the Commission recommends that §4 be deleted in its entirety. Attorneys fees in trade secrets cases would then be recoverable subject to the same court rules and case law as in other cases.

SECTION FIVE: PROTECTION OF SECRECY

SECTION 5. [Preservation of Secrecy.] In an action under this [Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

COMMENT

Section 5 provides a list of alternative actions a court may take to ensure to continued protection of a trade secret during trade secret litigation. Rule 2.302(C) (Protective Orders) of the Michigan Court Rules of 1985 allows for similar protection under present Michigan law:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and for good cause shown, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders: . . .
>
> (8) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. Mich.Ct.R. 1985 2.302(C).

There are also a number of Michigan statutes providing for the security of trade secrets in the administration of state regulatory law. For example, M.C.L. 299.528 provides an exception to the general rule of public access to information gathered in the administration of the Hazardous Waste Management Act when the provider of the information can demonstrate that public access to the information would compromise the security of a trade

secret. Both the present Michigan court rule and the UTSA measures to protect a trade secret ensure that a plaintiff will not be harmed by pressing a legitimate claim of misappropriation in court. Since the protection of trade secrets law is dependent upon the secret status of the owner's information, it naturally follows that this secrecy should not be compromised in court proceedings to protect it.

Only Nebraska significantly modified §5 upon adopting the Uniform Act. Specifically, it omitted "holding in-camera hearings, sealing records of the action," as means for a court to preserve the secrecy of an alleged trade secret. Nor does the Nebraska Act state that the court may order "any person involved in the litigation" not to disclose an alleged trade secret. Instead, courts may order this regarding "the parties' attorneys, witnesses, or experts." However, since §5 is nonexclusive and the Nebraska Act still permits a court to take "reasonable means" to preserve an alleged trade secret, it is not clear that the above modifications change the meaning of the UTSA version.

Lastly, Nebraska added a sentence to §5 stating that, "The disclosure or publication of a trade secret in a court proceeding or as a result thereof shall not constitute an abandonment of the secret." This addition appears to only make clear what the Uniform Act held as an assumption.

The Commission recommends that §5 be adopted without amendment as it is consistent with current practice in Michigan.

SECTION SIX: STATUTE OF LIMITATIONS

SECTION 6. [Statute of Limitations.] An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

COMMENT

A. **Section 6** places a three year limit from the time a trade secret misappropriation is discoverable for the filing of all actions arising under this statute. The limitation of this section would replace the general Michigan statute of limitations, M.C.L. 600.5805, which places a six year limit on the filing of actions. A fraudulently concealed claim may be filed within two years of the time when it is discovered or is discoverable. M.C.L. 600.5813.

B. Under the UTSA, the misappropriation of a trade secret is considered a single act, not a continuing wrong--thus, the time limitation under this section would run from the time that the trade secret was misappropriated, or the time that the misappropriation was discoverable. Misappropriation of a trade secret is not considered a continuing wrong under Michigan law. *Shatterproof Glass Corp. v. Guardian Glass Co.*, 322 F.Supp. 854 (E.D. Mich. 1970). Thus, the approach taken by the UTSA is consistent with present Michigan law, and is endorsed by the Commission.

A few states which adopted the Uniform Act were not satisfied with its three year statute of limitations. Maine and Nebraska therefore set the limit at four years, and Illinois set it at five.

SECTION SEVEN: EFFECT ON OTHER LAW

SECTION 7. [Effect on Other Law.]

(a) Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

(b) This [Act] does not affect:

(1) contractual remedies, whether or not based upon misappropriation of a trade secret;

(2) other civil remedies that are not based upon misappropriation of a trade secret; or

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

COMMENT

The UTSA does not deal with criminal remedies for the misappropriation of a trade secret, such as M.C.L. 752.771-772, nor is it intended to be a comprehensive statement of civil remedies. It applies to a duty to protect competitively significant secret information that is imposed by law. It does not apply to a duty voluntarily assumed through an express or implied-in-fact contract. The enforceability of covenants not to disclose trade secrets and covenants not to compete that is intended to protect trade secrets, for example,

are governed by other law. The UTSA also does not apply to a duty imposed by law that is not dependent upon the existence of competitively significant information, like an agent's duty of loyalty to his or her principal.

A few states which adopted the Uniform Act were not satisfied with §7(a). California's subsection stated the opposite of the UTSA, declaring that, unless otherwise stated, the Act does **not** supersede "any statute relating to misappropriation of a trade, or any statute otherwise regulating trade secrets." Connecticut modified the Act by stating that it supersedes conflicting law "unless otherwise agreed by the parties."

Illinois added that the Act was intended to displace "unfair competition" law as well as the others listed but also provided that the Act does not affect "the definition of a trade secret in any other Act of this State." However, unfair competition law should already have been covered by the phrase "other law of this State" in subsection 7(a) of the UTSA. Also, as noted previously, the only other Michigan statute which refers to trade secrets is the penal statute, M.C.L. 752.771-773. The UTSA does not purport to displace criminal statutes or criminal remedies, and thus no such modifications are necessary in Michigan.

Indiana added a subsection stating that the Act "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject matter of this chapter among states enacting the provisions of this chapter." This addition seems only to restate the purpose of Uniform Acts in general, although it may strongly suggest that Indiana courts should look to case law from other states which adopt the Act to interpret its language.

Many states which adopted the Uniform Act were not satisfied with subsection (7)(b)'s noninterference with contractual remedies "**whether or not** based upon misappropriation of a trade secret." Instead, Alaska, Arkansas, Connecticut, Delaware, Louisiana, Montana and Washington all provided that the Act does not affect contract law "that is not based upon misappropriation of a trade secret."

Indiana modified subsection (b) differently. It completely omitted the Uniform Act's noninterference with civil remedies not based upon misappropriation of a trade secret, and stated only that its act did not displace "contract and criminal law." Illinois added to the contract law provision that "a contractual or other duty to maintain secrecy or limit use of a trade secret shall not be deemed to be void or unenforceable solely for lack of durational or geographical limitation on the duty."

However, no state court interpretations suggest that the modifications of these states actually change the scope of the Uniform Act. More likely, these states felt that the UTSA's description of contractual remedies "whether or not based on misappropriation of a trade secret," could be interpreted to imply that there is some overlap between contract and trade secret law. Thus the changes make clear that contract law is based on contractual duties, whereas trade secret law is based on duties provided in the UTSA. In fact, subsection 7(b) could be viewed as unnecessarily drawing legal distinctions which the courts are readily able to recognize on their own. Perhaps this was the view of the three states, Iowa, Nebraska and New Mexico, which chose to omit all of §7.

Three states, California, Maine and Oregon added provisions to §7 protecting state agencies or officials. Specifically, California states that its act does not affect disclosure under the California Public Records Act pursuant to law in effect before the Trade Secret Act's operative date. Maine extended this protection to any person under a duty "to disclose information where expressly required by law."

The Oregon provision specifically protects "any defense, immunity, or limitation of liability afforded public bodies, their officers, employees or agents" under Oregon law. It also added a subsection itself granting immunity to such entities "for disclosure or release of information in obedience to or in good faith reliance on any order of disclosure issued pursuant to [and Oregon statute] or on the advice of an attorney authorized to advise the public body. . . ."

Protection for Michigan governmental agencies already appears covered by M.C.L. 691.1407. This Act grants immunity from tort liability to governmental agencies "engaged in the exercise or discharge of a governmental function." M.C.L. 691.1407(1). M.C.L. 691.1407(2) grants immunity to governmental officers, employees, volunteers and members of a board, council, commission or task force while acting in behalf of a governmental agency if the following are met:

> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross

negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether injury results.

Thus it is not clear that Michigan needs to make such a modification. Nevertheless, the Commission recommends amendment of §7 to explicitly protect state agencies or officials from UTSA liability if they meet the requirements of M.C.L. 691.1407.

SECTION EIGHT: UNIFORMITY OF APPLICATION AND CONSTRUCTION

SECTION 8. [Uniformity of Application and Construction.] This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION NINE: SHORT TITLE

SECTION 9. [Short Title.] This [Act] may be cited as the Uniform Trade Secrets Act.

SECTION TEN: SEVERABILITY

SECTION 10. [Severability.] If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION ELEVEN: TIME OF TAKING EFFECT

SECTION 11. [Time of Taking Effect.] This [Act] takes effect on _____, and does not apply to misappropriation occurring prior to the effective date. With respect to a continuing misappropriation that began prior to the effective date, the [Act] also does not apply to the continuing misappropriation that occurs after the effective date.

COMMENT

The misappropriation of a trade secret is not a continuing wrong for the purposes of the UTSA (see comments to §6). The UTSA only applies to a misappropriation that begins after its effective date.

Many states adopting the Uniform Act, Arkansas, Connecticut, Delaware, Iowa, Louisiana, Maine, Minnesota, New Mexico, and North Dakota omitted §11 entirely.

California and Indiana modified the section to cover misappropriation which occurred after the Act took effect even if it began prior to the statute's enactment. Illinois and Washington did not specify whether such misappropriation would be covered by their acts.

SECTION TWELVE: REPEAL

SECTION 12. [Repeal.] The following Acts and parts of Acts are repealed.

Conclusion

For the reasons discussed herein, the Michigan Law Revision Commission recommends adoption of the Uniform Trade Secrets Act, subject only to the following modifications:

1. Section 2(b) of the UTSA should be amended to provide, as in California and seven other states, that

"If the court determines that it would be unreasonable to prohibit future use of a trade secret, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited."

2. Section 3(b) of the UTSA, concerning exemplary damages, should be deleted, thereby leaving to the Michigan common law the continued role of defining rules for exemplary damages in trade secrets cases.

3. Section 4 of the UTSA, concerning attorneys fees, should be deleted in its entirety, thereby making trade secrets cases subject to the same attorneys fee rules as other cases.

4. Section 7 of the UTSA should be amended to indicate explicitly that state agencies or officials acting in accordance with the requirements of M.C.L. 691.1407 are immune from liability under the UTSA.

APPENDIX A

UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment in All the States

At its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FOURTH YEAR
IN MINNEAPOLIS, MINNESOTA
AUGUST 2-9, 1985

With Prefatory Note and Comments

Approved by the American Bar Association
Baltimore, Maryland, February 11, 1986

UNIFORM TRADE SECRETS ACT
WITH 1985 AMENDMENTS

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Trade Secrets Act with 1985 Amendments was as follows:

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Final, approved copies of this Act are available on 8-inch IBM Displaywriter diskettes, and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

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UNIFORM TRADE SECRETS ACT
WITH 1985 AMENDMENTS

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UNIFORM TRADE SECRETS ACT
WITH 1985 AMENDMENTS

(The 1985 Amendments are Indicated
by Underscore and Strikeout)

PREFATORY NOTE

A valid patent provides a legal monopoly for seventeen years in exchange for public disclosure of an invention. If, however, the courts ultimately decide that the Patent Office improperly issued a patent, an invention will have been disclosed to competitors with no corresponding benefit. In view of the substantial number of patents that are invalidated by the courts, many businesses now elect to protect commercially valuable information through reliance upon the state law of trade secret protection. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974), which establishes that neither the Patent Clause of the United States Constitution nor the federal patent laws pre-empt state trade secret protection for patentable or unpatentable information, may well have increased the extent of this reliance.

The recent decision in Aronson v. Quick Point Pencil Co., 99 S.Ct. 1096, 201 USPQ 1 (1979) reaffirmed Kewanee and held that federal patent law is not a barrier to a contract in which someone agrees to pay a continuing royalty in exchange for the disclosure of trade secrets concerning a product.

Notwithstanding the commercial importance of state trade secret law to interstate business, this law has not developed satisfactorily. In the first place, its development is uneven. Although there typically are a substantial number of reported decisions in states that are commercial centers, this is not the case in less populous and more agricultural jurisdictions. Secondly, even in states in which there has been significant litigation, there is undue uncertainty concerning the parameters of trade secret protection, and the appropriate remedies for misappropriation of a trade secret. One commentator observed:

> "Under technological and economic pressures, industry continues to rely on trade secret protection despite the doubtful and confused status of both common law and statutory remedies. Clear, uniform trade secret protection is urgently needed. . . ."
>
> Comment, "Theft of Trade Secrets: The Need for a Statutory Solution", 120 U.Pa.L.Rev. 378, 380-81 (1971).

In spite of this need, the most widely accepted rules of trade secret law, § 757 of the Restatement of Torts, were among the sections omitted from the Restatement of Torts, 2d (1978).

The Uniform Act codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law. Under both the Act and common law principles, for example, more than one person can be entitled to trade secret protection with respect to the same information, and analysis involving the "reverse engineering" of a lawfully obtained product in order to discover a trade secret is permissible. Compare Uniform Act, Section 1(2) (misappropriation means acquisition of a trade secret by means that should be known to be improper and unauthorized disclosure or use of information that one should know is the trade secret of another) with Miller v. Owens-Illinois, Inc., 187 USPQ 47, 48 (D.Md.1975) (alternative holding) (prior, independent discovery a complete defense to liability for misappropriation) and Wesley-Jessen, Inc., v. Reynolds, 182 USPQ 135, 144-45, (N.D.Ill.1974) (alternative holding) (unrestricted sale and lease of camera that could be reversed engineered in several days to reveal alleged trade secrets preclude relief for misappropriation).

For liability to exist under this Act, a Section 1(4) trade secret must exist and either a person's acquisition of the trade secret, disclosure of the trade secret to others, or use of the trade secret must be improper under Section 1(2). The mere copying of an unpatented item is not actionable.

Like traditional trade secret law, the Uniform Act contains general concepts. The contribution of the Uniform Act is substitution of unitary definitions of trade secret and trade secret misappropriation, and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of noncontractual liability utilized at common law. The Uniform Act also codifies the results of the better reasoned cases concerning the remedies for trade secret misappropriation.

The History of the Special Committee on the Uniform Trade Secrets Act

On February 17, 1968, the Conference's subcommittee on Scope and Program reported to the Conference's Executive Committee as follows:

"14. Uniform Trade Secrets Protection Act.

This matter came to the subcommittee from the Patent Law Section of the American Bar Association from President Pierce, Commissioner Joiner and Allison Dunham. It appears that in 1966 the Patent Section of the American Bar Association extensively discussed a resolution to the effect that 'the ABA favors the enactment of a uniform state law to protect against the wrongful disclosure or wrongful appropriation of trade secrets, know-how or other information maintained in confidence by another.' It was decided, however, not to put such a resolution to a vote at that time but that the appropriate Patent Section Committee would further consider the problem. In determining what would be appropriate for the Conference to do at this juncture, the following points should be considered:

(1) At the present much is going on by way of statutory development, both federally and in the states.

(2) There is a fundamental policy conflict still unresolved in that the current state statutes that protect trade secrets tend to keep innovations secret, while our federal patent policy is generally designed to encourage public disclosure of innovations. It may be possible to devise a sensible compromise between these two basic policies that will work, but to do so demands coordination of the statutory reform efforts of both the federal government and the states.

(3) The Section on Patents, the ABA group that is closest to this problem, is not yet ready to take a definite position.

It is recommended that a special committee be appointed to investigate the question of the drafting of a uniform act relating to trade secret protection and to establish liaison with the Patent Law Section, the Corporation, Banking and Business Law Section, and the Antitrust Law Section of the American Bar Association."

The Executive Committee, at its Midyear Meeting held February 17 and 18, 1968, in Chicago, Illinois, "voted to authorize the appointment of a Special Committee on Uniform Trade Secrets Protection Act to investigate the question of drafting an act on the subject with instructions to establish liaison with the Patent Law Section, the Corporation, Banking and Business Law Section, and the Antitrust Law Section of the American Bar Association." Pursuant to that action,

a Special Committee was appointed, which included Professor Richard Cosway of Seattle, Washington, who is the only original Committee member to serve to the present day. The following year saw substantial changes in the membership of the Committee. Professor Richard F. Dole, Jr., of Iowa City, Iowa, became a member then and has served as a member ever since.

The work of the Committee went before the Conference first on Thursday afternoon, August 10, 1972, when it was one of three Acts considered on first reading. Thereafter, for a variety of reasons, the Committee became inactive, and, regrettably, its original Chairman died on December 7, 1974. In 1976, the Committee became active again and presented a Fifth Tentative Draft of its proposed bill at the 1978 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

Despite the fact that there had previously been a first reading, the Committee was of the opinion that, because of the lapse of time, the 1978 presentation should also be considered a first reading. The Conference concurred, and the bill was proposed for final reading and adoption at the 1979 Annual Meeting.

On August 9, 1979, the Act was approved and recommended for enactment in all the states. Following discussions with members of the bar and bench, the Special Committee proposed amendments to Sections 2(b), 3(a), 7 and 11 that clarified the intent of the 1979 Official Text. On August 8, 1985, these four clarifying amendments were approved and recommended for enactment in all the states.

UNIFORM TRADE SECRETS ACT
WITH 1985 AMENDMENTS

SECTION 1. DEFINITIONS. As used in this [Act], unless the context requires otherwise:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;

(2) "Misappropriation" means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

COMMENT

One of the broadly stated policies behind trade secret law is "the maintenance of standards of commercial ethics." Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). The Restatement of Torts, Section 757, Comment (f), notes: "A complete catalogue of improper means is not possible," but Section 1(1) includes a partial listing.

Proper means include:

1. Discovery by independent invention;

2. Discovery by "reverse engineering", that is, by starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must, of course, also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful;

3. Discovery under a license from the owner of the trade secret;

4. Observation of the item in public use or on public display;

5. Obtaining the trade secret from published literature.

Improper means could include otherwise lawful conduct which is improper under the circumstances; e.g., an airplane overflight used as aerial reconnaissance to determine the competitor's plant layout during construction of the plant. E. I. du Pont de Nemours & Co., Inc. v. Christopher, 431 F.2d 1012 (CA5, 1970), cert. den. 400 U.S. 1024 (1970). Because the trade secret can be destroyed through public knowledge, the unauthorized disclosure of a trade secret is also a misappropriation.

The type of accident or mistake that can result in a misappropriation under Section 1(2)(ii)(C) involves conduct by a person seeking relief that does not constitute a failure of efforts that are reasonable under the circumstances to maintain its secrecy under Section 1(4)(ii).

The definition of "trade secret" contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be "continuously used in one's business." The broader definition in the proposed Act extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use. The definition includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will not work could be of great value to a competitor.

Cf. Telex Corp. v. IBM Corp., 510 F.2d 894 (CA10, 1975) per curiam, cert. dismissed 423 U.S. 802 (1975) (liability imposed for developmental cost savings with respect to product not marketed). Because a trade secret need not be exclusive to confer a competitive advantage, different independent developers can acquire rights in the same trade secret.

The words "method, technique" are intended to include the concept of "know-how."

The language "not being generally known to and not being readily ascertainable by proper means by other persons" does not require that information be generally known to the public for trade secret rights to be lost. If the principal ~~person~~ persons who can obtain economic benefit from information ~~is~~ are aware of it, there is no trade secret. A method of casting metal, for example, may be unknown to the general public but readily known within the foundry industry.

Information is readily ascertainable if it is available in trade journals, reference books, or published materials. Often, the nature of a product lends itself to being readily copied as soon as it is available on the market. On the

other hand, if reverse engineering is lengthy and expensive, a person who discovers the trade secret through reverse engineering can have a trade secret in the information obtained from reverse engineering.

Finally, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on "need to know basis", and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.

The efforts required to maintain secrecy are those "reasonable under the circumstances." The courts do not require that extreme and unduly expensive procedures be taken to protect trade secrets against flagrant industrial espionage. See E. I. du Pont de Nemours & Co., Inc. v. Christopher, supra. It follows that reasonable use of a trade secret including controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy.

SECTION 2. INJUNCTIVE RELIEF.

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) ~~If the court determines that it would be unreasonable to prohibit future use~~ In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time ~~the~~ for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

COMMENT

Injunctions restraining future use and disclosure of misappropriated trade secrets frequently are sought. Although punitive perpetual injunctions have been granted, e.g., Elcor Chemical Corp. v. Agri-Sul, Inc., 494 S.W.2d 204 (Tex.Civ.App.1973), Section 2(a) of this Act adopts the position of the trend of authority limiting the duration of injunctive relief to the extent of the temporal advantage over good faith competitors gained by a misappropriator. See, e.g., K-2 Ski Co. v. Head Ski Co., Inc., 506 F.2d 471 (CA9, 1974) (maximum appropriate duration of both temporary and permanent injunctive relief is period of time it would have taken defendant to discover trade secrets lawfully through either independent development or reverse engineering of plaintiff's products).

The general principle of Section 2(a) and (b) is that an injunction should last for as long as is necessary, but no longer than is necessary, to eliminate the commercial advantage or "lead time" with respect to good faith competitors that a person has obtained through misappropriation. Subject to any additional period of restraint necessary to negate lead time, an injunction accordingly should terminate when a former trade secret becomes either generally known to good faith competitors or generally knowable to them because of the lawful availability of products that can be reverse engineered to reveal a trade secret.

For example, assume that A has a valuable trade secret of which B and C, the other industry members, are originally unaware. If B subsequently misappropriates the trade secret and is enjoined from use, but C later lawfully reverse engineers the trade secret, the injunction restraining B is subject to termination as soon as B's lead time has been dissipated. All of the persons who could derive economic value from use of the information are now aware of it, and there is no longer a trade secret under Section 1(4). It would be anti-competitive to continue to restrain B after any lead time that B had derived from misappropriation had been removed.

If a misappropriator either has not taken advantage of lead time or good faith competitors already have caught up with a misappropriator at the time that a case is decided, future disclosure and use of a former trade secret by a misappropriator will not damage a trade secret owner and no injunctive restraint of future disclosure and use is appropriate. See, e.g., Northern Petrochemical Co. v. Tomlinson, 484 F.2d 1057 (CA7, 1973) (affirming trial court's denial of preliminary injunction in part because an explosion at its plant prevented an alleged misappropriator from taking advantage of lead time); Kubik, Inc. v.

Hull, 185 USPQ 391 (Mich.App.1974) (discoverability of trade secret by lawful reverse engineering made by injunctive relief punitive rather than compensatory).

Section 2(b) deals with ~~a distinguishable~~ the special situation in which future use by a misappropriator will damage a trade secret owner but an injunction against future use nevertheless is ~~unreasonable under the particular~~ inappropriate due to exceptional circumstances ~~of a case~~. ~~Situations in which this unreasonableness can exist~~ Exceptional circumstances include the existence of an overriding public interest which requires the denial of a prohibitory injunction against future damaging use and a person's reasonable reliance upon acquisition of a misappropriated trade secret in good faith and without reason to know of its prior misappropriation that would be prejudiced by a prohibitory injunction against future damaging use. Republic Aviation Corp. v. Schenk, 152 USPQ 830 (N.Y.Sup.Ct.1967) illustrates the public interest justification for withholding prohibitory injunctive relief. The court considered that enjoining a misappropriator from supplying the U.S. with an aircraft weapons control system would have endangered military personnel in Viet Nam. The prejudice to a good faith third party justification for withholding prohibitory injunctive relief can arise upon a trade secret owner's notification to a good faith third party that the third party has knowledge of a trade secret as a result of misappropriation by another. This notice suffices to make the third party a misappropriator thereafter under Section 1(2)(ii)(B)(I). In weighing an aggrieved person's interests and the interests of a third party who has relied in good faith upon his or her ability to utilize information, a court may conclude that restraining future use of the information by the third party is unwarranted. With respect to innocent acquirers of misappropriated trade secrets, Section 2(b) is consistent with the principle of 4 Restatement Torts (First) § 758(b) (1939), but rejects the Restatement's literal conferral of absolute immunity upon all third parties who have paid value in good faith for a trade secret misappropriated by another. The position taken by the Uniform Act is supported by Forest Laboratories, Inc. v. Pillsbury Co., 452 F.2d 621 (CA7, 1971) in which a defendant's purchase of assets of a corporation to which a trade secret had been disclosed in confidence was not considered to confer immunity upon the defendant.

When Section 2(b) applies, a court ~~is given~~ has discretion to substitute an injunction conditioning future use upon payment of a reasonable royalty for an injunction prohibiting future use. Like all injunctive relief for misappropriation, a royalty order injunction is appropriate only if a misappropriator has obtained a competitive advantage through misappropriation and only for the duration of that competitive advantage. In some situations, typically those involving good faith acquirers of trade secrets misappropriated by others, a court may conclude that

the same considerations that render a prohibitory injunction against future use inappropriate also render a royalty order injunction inappropriate. See, generally, Prince Manufacturing, Inc. v. Automatic Partner, Inc., 198 USPQ 618 (N.J.Super.Ct.1976) (purchaser of misappropriator's assets from receiver after trade secret disclosed to public through sale of product not subject to liability for misappropriation).

A royalty order injunction under Section 2(b) should be distinguished from a reasonable royalty alternative measure of damages under Section 3(a). See the Comment to Section 3 for discussion of the differences in the remedies.

Section 2(c) authorizes mandatory injunctions requiring that a misappropriator return the fruits of misappropriation to an aggrieved person, e.g., the return of stolen blueprints or the surrender of surreptitious photographs or recordings.

Where more than one person is entitled to trade secret protection with respect to the same information, only that one from whom misappropriation occurred is entitled to a remedy.

SECTION 3. DAMAGES.

(a) ~~In addition to or in lieu of injunctive relief~~ Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant ~~may~~ is entitled to recover damages for ~~the actual loss caused by~~ misappropriation. ~~A complainant also may recover for~~ Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing ~~damages for~~ actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(b) If willful and malicious misappropriation exists, the court may award

exemplary damages in an amount not exceeding twice any award made under subsection (a).

COMMENT

Like injunctive relief, a monetary recovery for trade secret misappropriation is appropriate only for the period in which information is entitled to protection as a trade secret, plus the additional period, if any, in which a misappropriator retains an advantage over good faith competitors because of misappropriation. Actual damage to a complainant and unjust benefit to a misappropriator are caused by misappropriation during this time alone. See Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (CA2, 1949) (no remedy for period subsequent to disclosure of trade secret by issued patent); Carboline Co. v. Jarboe, 454 S.W.2d 540 (Mo.1970) (recoverable monetary relief limited to period that it would have taken misappropriator to discover trade secret without misappropriation). A claim for actual damages and net profits can be combined with a claim for injunctive relief, but, if both claims are granted, the injunctive relief ordinarily will preclude a monetary award for a period in which the injunction is effective.

As long as there is no double counting, Section 3(a) adopts the principle of the recent cases allowing recovery of both a complainant's actual losses and a misappropriator's unjust benefit that are caused by misappropriation. E.g., Tri-Tron International v. Velto, 525 F.2d 432 (CA9, 1975) (complainant's loss and misappropriator's benefit can be combined). Because certain cases may have sanctioned double counting in a combined award of losses and unjust benefit, e.g., Telex Corp. v. IBM Corp., 510 F.2d 894 (CA10, 1975) (per curiam), cert. dismissed, 423 U.S. 802 (1975) (IBM recovered rentals lost due to displacement by misappropriator's products without deduction for expenses saved by displacement; as a result of rough approximations adopted by the trial judge, IBM also may have recovered developmental costs saved by misappropriator through misappropriation with respect to the same customers), the Act adopts an express prohibition upon the counting of the same item as both a loss to a complainant and an unjust benefit to a misappropriator.

As an alternative to all other methods of measuring damages caused by a misappropriator's past conduct, a complainant can request that damages be based upon a demonstrably reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. In order to justify this alternative measure of damages, there must be competent evidence of the amount of a reasonable

royalty.

The reasonable royalty alternative measure of damages for a misappropriator's past conduct under Section 3(a) is readily distinguishable from a Section 2(b) royalty order injunction, which conditions a misappropriator's future ability to use a trade secret upon payment of a reasonable royalty. A Section 2(b) royalty order injunction is appropriate only in exceptional circumstances; whereas a reasonable royalty measure of damages is a general option. Because Section 3(a) damages are awarded for a misappropriator's past conduct and a Section 2(b) royalty order injunction regulates a misappropriator's future conduct, both remedies cannot be awarded for the same conduct. If a royalty order injunction is appropriate because of a person's material and prejudicial change of position prior to having reason to know that a trade secret has been acquired from a misappropriator, damages, moreover, should not be awarded for past conduct that occurred prior to notice that a misappropriated trade secret has been acquired.

Monetary relief can be appropriate whether or not injunctive relief is granted under Section 2. If a person charged with misappropriation has ~~acquired~~ materially and prejudicially changed position in reliance upon knowledge of a trade secret acquired in good faith and without reason to know of its misappropriation by another, however, the same considerations that can justify denial of all injunctive relief also can justify denial of all monetary relief. See Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 1950 (CA2, 1949) (no relief against new employer of employee subject to contractual obligation not to disclose former employer's trade secrets where new employer innocently had committed $40,000 to develop the trade secrets prior to notice of misappropriation).

If willful and malicious misappropriation is found to exist, Section 3(b) authorizes the court to award a complainant exemplary damages in addition to the actual recovery under Section 3(a) an amount not exceeding twice that recovery. This provision follows federal patent law in leaving discretionary trebling to the judge even though there may be a jury, compare 35 U.S.C. Section 284 (1976).

Whenever more than one person is entitled to trade secret protection with respect to the same information, only that one from whom misappropriation occurred is entitled to a remedy.

SECTION 4. ATTORNEY'S FEES. If (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

COMMENT

Section 4 allows a court to award reasonable attorney fees to a prevailing party in specified circumstances as a deterrent to specious claims of misappropriation, to specious efforts by a misappropriator to terminate injunctive relief, and to willful and malicious misappropriation. In the latter situation, the court should take into consideration the extent to which a complainant will recover exemplary damages in determining whether additional attorney's fees should be awarded. Again, patent law is followed in allowing the judge to determine whether attorney's fees should be awarded even if there is a jury, compare 35 U.S.C. Section 285 (1976).

SECTION 5. PRESERVATION OF SECRECY. In an action under this [Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

COMMENT

If reasonable assurances of maintenance of secrecy could not be given, meritorious trade secret litigation would be chilled. In fashioning safeguards of confidentiality, a court must ensure that a respondent is provided sufficient information to present a defense and a trier of fact sufficient information to resolve the merits. In addition to the illustrative techniques specified in the statute, courts have protected secrecy in these cases by restricting disclosures to a party's counsel and his or her assistants and by appointing a disinterested expert

as a special master to hear secret information and report conclusions to the court.

SECTION 6. STATUTE OF LIMITATIONS. An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

COMMENT

There presently is a conflict of authority as to whether trade secret misappropriation is a continuing wrong. Compare Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288 (CA9, 1969) (~~no~~ not a continuing wrong under California law - limitation period upon all recovery begins upon initial misappropriation) with Underwater Storage, Inc. v. U. S. Rubber Co., 371 F.2d 950 (CADC, 1966), cert. den., 386 U.S. 911 (1967) (continuing wrong under general principles - limitation period with respect to a specific act of misappropriation begins at the time that the act of misappropriation occurs).

This Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.

SECTION 7. EFFECT ON OTHER LAW.

(a) ~~This~~ Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State ~~pertaining to~~ providing civil ~~liability~~ remedies for misappropriation of a trade secret.

(b) This [Act] does not affect:

(1) contractual ~~or other civil liability or relief that is~~ remedies,

whether or not based upon misappropriation of a trade secret; ~~or~~

(2) ~~criminal liability for~~ other civil remedies that are not based upon misappropriation of a trade secret~~.~~ ; or

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

COMMENT

This Act ~~is not a comprehensive remedy~~ does not deal with criminal remedies for trade secret misappropriation and is not a comprehensive statement of civil remedies. It applies to ~~duties imposed by law in order~~ a duty to protect competitively significant secret information that is imposed by law. It does not apply to ~~duties~~ a duty voluntarily assumed through an express or an implied-in-fact contract. The enforceability of covenants not to disclose trade secrets and covenants not to compete that are intended to protect trade secrets, for example, ~~are~~ is governed by other law. The Act also does not apply to ~~duties~~ a duty imposed by law that ~~are~~ is not dependent upon the existence of competitively significant secret information, like an agent's duty of loyalty to his or her principal.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 9. SHORT TITLE. This [Act] may be cited as the Uniform Trade Secrets Act.

SECTION 10. SEVERABILITY. If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect

without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 11. TIME OF TAKING EFFECT. This [Act] takes effect on _____, and does not apply to misappropriation occurring prior to the effective date. With respect to a continuing misappropriation that began prior to the effective date, the [Act] also does not apply to the continuing misappropriation that occurs after the effective date.

COMMENT

The Act applies exclusively to misappropriation that begins after its effective date. Neither misappropriation that began and ended before the effective date nor misappropriation that began before the effective date and continued thereafter is subject to the Act.

SECTION 12. REPEAL. The following Acts and parts of Acts are repealed:

(1)

(2)

(3)

AMENDMENTS TO MICHIGAN'S ANATOMICAL GIFT ACT

Introduction

In this report, the Michigan Law Revision Commission recommends updating Michigan's statute regarding anatomical gifts to promote the policies of the 1987 Uniform Anatomical Gift Act, while preserving Michigan's traditional concern for the knowing and voluntary decisions of organ donors.

The National Conference of Commissioners on Uniform State Laws promulgated the first Uniform Anatomical Gift Act[1] in 1968, and in less than five years various versions of the Act had been adopted by all fifty states and the District of Columbia. The 1968 UAGA was enacted to promote uniformity among state law governing anatomical gifts, to replace or supplement the existing organ donation laws and to encourage the donation of anatomical parts.[2] In 1969, Michigan adopted its version of the UAGA. After its passage, the Legislature made the act part of the Public Health Code, Act No. 368 of the Public Acts of 1978.[3]

Although the Michigan amendments addressed some of the problems that arose after the passage of the 1968 UAGA, the supply of organs still falls far short of the demand. According to a widely cited report, "[i]t has become apparent that the public policy instituted in 1969 [by promulgation of the UAGA in 1968] is not producing a sufficient supply of organs to meet the current or projected demand for them."[4] In April of 1986, a report by the Task Force on Organ Transportation estimated that between 8,000 and 10,000 people were on organ waiting lists.[5] Now, that figure has grown to 30,000 individuals.[6] Another

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1 The 1968 Uniform Anatomical Gift Act will be referred to as the 1968 UAGA.

2 Unif. Anatomical Gift Act, *Table of Jurisdictions and Prefatory Note*, 8a U.L.A. 4(Supp. 1993).

3 See Appendix A for the full Michigan Act.

4 Unif. Anatomical Gift Act, *Table of Jurisdictions and Prefatory Note*, 8a U.L.A. 4 (Supp. 1993).

5 Task Force on Organ Transplantation, Office of Organ Transplantation, U.S. Dept. of Health and Human Services, *Organ Transplantation: Issues and Recommendations* (final report), (Apr. 1986).

6 Gina Kolata, *Organ Shortage Leads to Nontraditional Transplants and Ethical Concerns*, N.Y. Times, June 2, 1993, at A1.

current report states that every day, six or seven people on this waiting list die.[7] As a result of increasing organ shortages and decreasing state law uniformity, the authors of the 1968 UAGA promulgated an updated Uniform Anatomical Gift Act in 1987.[8] The new Act attempts to reinstate uniformity while facilitating anatomical gifts.

The 1987 UAGA addresses four primary areas: it

(1) simplifies the making of an anatomical gift (§2, §3, §6-8);

(2) clarifies the rights, duties, and responsibilities of the three potential donor groups

-- an individual (§2), the next of kin (§3), and a public health official (§4);

(3) mandates a uniform routine inquiry/required request program (§5, §9) at hospitals

and

(4) outlaws the sale or purchase or organs and tissues (§10).[9]

As of August of 1991, fourteen states had adopted the 1987 revision.[10]

In Michigan, on January 15, 1992, Representative Griffin introduced House Bill No. 5443[11], which was based on the 1987 UAGA. If enacted the Griffin Bill would have not only updated current Michigan law, but also facilitated organ donations. However, the Griffin Bill was never reported out of the House Committee on Public Health.

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[7] Michael Devita, James Snyder, and Ake Grenvik, *History of Organ Donations by Patients with Cardiac Death*, Kennedy Institute of Ethics Journal, June 1993, at 124.

[8] The 1987 Uniform Anatomical Gift Act will be referred to as the 1987 UAGA and can be found at Appendix B.

[9] Daphne D. Sipes, *Legislative Update on the State Adoption of the 1987 Revision of the Uniform Anatomical Gift Act of 1968*, 4 B.Y.U.J. PUB. L. 395 (1990).

[10] Unif. Anatomical Gift Act, *Table of Jurisdictions and Prefatory Note*, 8a U.L.A. 3 (Supp. 1993).

[11] This bill will be referred to as the Griffin Bill and can be found at Appendix C.

This report summarizes the provisions of the 1987 UAGA and discusses the changes in Michigan law that would be brought about by adopting either the 1987 UAGA or the Griffin Bill. The Report concludes that some but not all provisions of the 1987 UAGA are desirable. Part I contains a section by section analysis of the 1987 UAGA, and compares each section with the current Michigan law and the proposed Griffin Bill. Part II suggests modifications to the 1987 UAGA and the Griffin Bill, in order to increase Michigan's organ supply while respecting donors' rights and wishes.

(I. A Section by Section Comparison of the 1987 UAGA with the Current Michigan Legislation and the Proposed Griffin Bill)

Michigan's current Anatomical Gift Statute, MCL 333.10101-10204, is a slightly amended version of the Uniform Anatomical Gift Act, and is attached to this Report as Appendix A. The 1987 Uniform Anatomical Gift Act and the Griffin Bill are attached as Appendices B and C. The section-by-section analysis of the 1987 UAGA below focuses upon differences between that Act and current law and the Griffin Bill.

A. UAGA §1: Definitions

1. UAGA §1

The 1987 UAGA adds five new defined terms to the statute, bringing the number of defined terms up to twelve. The definitions of "anatomical gift"[12] and "document of gift"[13] are added to simplify the complexity of the 1968 Act and to reduce its length.[14] The 1987 UAGA also adds the definitions of "technician"[15]

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12 An "anatomical gift" is defined as "a donation of all or part of a human body part to take effect upon or after death." See Unif. Anatomical Gift Act §1, 8A U.L.A. 9 (Supp. 1993).

13 A "document of gift" is defined as "a card, a statement attached to or imprinted on a motor vehicle operator's or chauffeurs license, a will, or other writing used to make an anatomical gift." See Unif. Anatomical Gift Act §1, 8A U.L.A. 9 (Supp. 1993).

14 Unif. Anatomical Gift Act §1, 8A U.L.A. 10 (Supp. 1993).

15 A technician is "an individual who is [licensed] [certified] by the [State Board of Medical Examiners] to remove or process a part." See Unif. Anatomical Gift Act §1, 8A U.L.A. 10 (Supp. 1993).

and "enucleator"[16]. These two groups broaden the scope of individuals who are authorized to remove a part, thereby facilitating transplants.[17] The 1987 UAGA also adds the definition of a "procurement organization," ("a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts") which replaces the Michigan definition of "bank or storage facility" and encompasses a broader range of institutions than the Michigan definition of "bank or storage facility." The 1987 UAGA also deletes the definition of a "state medical school" and modifies the definition of "physician or surgeon."

2. MCL 333.10101 and Griffin Bill §10111

As mentioned in the previous paragraph, the 1987 UAGA defines more terms than the current Michigan legislation, and these terms help in clarifying later sections of the Act.

With two exceptions, the Griffin Bill and the 1987 UAGA contain identical definitions. The first difference is that the 1987 UAGA states that: " "physician" or "surgeon" means an individual licensed or otherwise authorized to practice medicine and surgery or osteopathy and surgery under the laws of any state."[18] This definition differs from the current Michigan definition: " "physician" or "surgeon" means a physician or surgeon licensed or authorized to practice under the laws of any state." (MCL 333.10101(g) (emphasis added)). It is clearer under the current Michigan definition than under the 1987 UAGA definition that the doctor involved in the organ transplant does not have to be a surgeon. The Griffin Bill defines a physician as "an individual licensed or otherwise authorized to practice medicine or osteopathic medicine and surgery under the laws of the state." (emphasis added). By dropping the word "surgeon" from the definition, the Griffin Bill avoids implying that the attending physician must be a surgeon.

The Commission recommends that the Griffin Bill's definition be followed in amending Michigan's statute.

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16 A enucleator is "an individual who is licensed by the State Board of Medical Examiners to remove or process eyes or parts of eyes." See Unif. Anatomical Gift Act §1, 8A U.L.A. 10 (Supp. 1993).

17 Unif. Anatomical Gift Act §1, 8A U.L.A. 10 (Supp. 1993).

18 Unif. Anatomical Gift Act §9, 8A U.L.A. 10 (Supp. 1993) (emphasis added).

B. UAGA §2: Making, Amending, Revoking, and Refusing to Make Anatomical Gifts By Individuals

1. UAGA §2

In §2, the 1987 UAGA allows individuals who are at least 18 years of age: (1) to make an anatomical gift, (2) to limit their gift to a specific purpose, such as transplantation, or (3) to refuse to donate via a signed writing. The addition of an option to refuse to donate supports the position that the absence of a donor card or the absence of a person's donation in the past are not contrary indications by the decedent that prevent the next of kin or public health official from donating the individual's parts at death. Section 2 also requires that the "document of gift" be signed by the donor, and the 1987 UAGA adds the option of having the document of gift placed on driver's licenses; Michigan employs this option pursuant to its motor vehicle statutes.[19]

In subsection (j), the 1987 UAGA addresses the potential problem of donor cards, which are circulated by various groups and which in some circumstances appear to limit the gift to a specific organ, such as eyes or kidneys. This provision ensures that these cards are not read to limit the gift to a specific part and allows other organs to be removed as well so long as the decedent did not express wishes to the contrary. This provision advances the Act's goal of increasing the supply of all organs.

Section 2 of the 1987 UAGA expressly states that "an anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death."[20] This amendment seeks to discourage the practice by physicians of confirming a gift with the next of kin after a donor's death, prior to permitting an organ to be removed. This practice is not necessary under Michigan law or the 1968 UAGA, but is nevertheless very common. The result of this practice is that organs are usually not removed if the next of kin cannot be located to confirm the gift. As this 1987 UAGA provision is consistent with existing Michigan law, the Commission endorses it.

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19 MCL 257.310(5)-(6).

20 Unif. Anatomical Gift Act §2, 8A U.L.A. 12 (Supp. 1993).

2. MCL 333.10102 and Griffin Bill §10113

The 1987 UAGA improves the organization of the 1968 Act and the Michigan Act by breaking the old Michigan provision (MCL 333.10102) into three separate UAGA sections--gifts by the individual donor (§2), gifts by the next of kin (§3), and gifts by the public health official (§4). In both the Michigan Act and the 1987 UAGA, potential donors must be at least eighteen years of age. The Michigan statute requires that the potential donor be of sound mind, a requirement not found in the 1987 Act. The Commission urges the retention of this requirement.

The 1987 UAGA would also remove the current Michigan requirement, MCL 333.10104(2), that two witnesses sign the document of gift. This requirement has proven cumbersome in Michigan, and it appears an unnecessary protection against abuse. The Commission recommends Michigan follow the 1987 UAGA in abolishing the requirement of witnesses. Finally, the 1987 UAGA would remove the sample forms found in the current Michigan legislation from the text of the Act and place them in the comment sections. This is not a significant change, and is endorsed by the Commission.

As in the definition sections of the two acts, only minor differences exist between the Griffin Bill and UAGA §2. For example, the Griffin Bill in §10113 uses the word "shall" instead of the UAGA's "must." To illustrate, '[i]f the donor cannot sign [the document of gift], the document of gift must be signed by another individual," while the Griffin Bill reads "[i]f the donor cannot sign . . . the document of gift shall be signed by another individual." Either version is endorsed by the Commission.

C. Making, Revoking, and Objecting to Anatomical Gifts By Others

1. UAGA §3

Section 3 of the 1987 UAGA permits a small class of relatives and guardians of a deceased person to donate that person's organs or tissues as long as the following conditions are not violated:

(1) the deceased did not explicitly refuse to donate;
(2) the deceased did not espouse contrary indications of a willingness to donate (mere failure to give an anatomical gift in the past is treated as ambiguous and not a contrary indication that prevents a donation by the next of kin); and
(3) no available member of a higher class (i.e. closer relative) as listed in UAGA §3 objects.[21]

Under §3, donations by the next of kin are governed by a hierarchical system that lists the priority of each next of kin group by order of their closeness to the deceased (from spouse to adult children to parents to guardian). The highest "available" class member's decision controls the disposal of the body. Thus, for example, the spouse of a deceased person takes precedence over adult children and parents.

An important clarification initiated by the 1987 UAGA involves the situation of an undecided family member. Under the 1968 UAGA and Michigan Act, "if a higher priority member was 'available but could not decide whether to make a gift, that [undecidedness] would probably end any further inquiry [into a gift]."[22] Even if a lower priority family member (such as an adult child) desired to make a gift of the decedent's body parts, the inability of a family member in a higher class (such as a widow or widower) to decide would render it unlikely that physicians would remove the organ and offer someone a vital part. The comments to the 1987 UAGA change this, by stating that if a higher class member is available, is undecided, and does not clearly object to an anatomical gift, then this ambivalence permits a lower priority member to make a donation.[23]

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21 Unif. Anatomical Gift Act §3, 8A U.L.A. 15 (Supp. 1993).

22 Sipes, *supra* , note 9, at 407.

23 Unif. Anatomical Gift Act §3, 8A U.L.A. 17 (Supp. 1993).

The Commission after deliberation has rejected this provision of the 1987 UAGA, and recommends retention of the current Michigan statutory language. In the opinion of several Commissioners, it would be undesirable for a donation to occur absent the concurrence of the family member who is both available and of the highest class.

As mentioned earlier, if a person in a "higher" class is "available at the time of death" that person's decision with respect to the giving or refusing of an anatomical gift controls. However, the meaning of the phrase, "available at the time of death" is left undefined. The Commission recommends that the Michigan Legislature, following the lead of the California and Illinois legislatures, define what it means to be "available at the time of death" for the purposes of this Act. In particular, the Commission endorses California's requirement that there be a "diligent search" for higher class members before allowing a lower class member to act. The Commission is concerned that, prior to permitting more distant relatives such as adult children or parents to consent to a donation, a diligent search for the spouse be conducted.

2. MCL 333.10102(2), 333.10106(5), and 333.10107; Griffin Bill §10115

In addition to adding grandparents to the list of the next of kin who under limited circumstances have the power to authorize a gift, the 1987 UAGA would change the current Michigan legislation by substituting the word "knows" for "actual notice." To demonstrate, the 1987 UAGA reads, "if the person proposing to make an anatomical gift knows of a refusal . . . by the decedent"[24] then a gift cannot be made. The similar Michigan provision reads "[i]f the donee has actual knowledge of a refusal . . . by the decedent."[25] The drafters of the 1987 UAGA implemented this change because they felt that "knowledge, i.e., what is known, is a more useful concept than actual notice, i.e., what should be known."[26] The Commission endorses this change.

The Griffin Bill §10115 varies slightly from the 1987 UAGA §3. UAGA §3 speaks of "classes of persons" while the Griffin Bill uses "classes of

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[24] Unif. Anatomical Gift Act §3, 8A U.L.A. 17 (Supp. 1993).

[25] MCL 333.10102(3).

[26] Comment to Unif. Anatomical Gift Act §3, 8A U.L.A. 18 (Supp. 1993).

individuals." Either term, if employed consistently, is acceptable. UAGA §3(d) and Griffin Bill §10115(4) also vary. The UAGA states:

> An anatomical gift by a person authorized under subsection (a) may be revoked . . . [if] the physician surgeon, technician, or enucleator removing the part knows of the revocation.[27]

By contrast, the Griffin Bill, in §10115(4), states:

> An anatomical gift by an individual authorized under subsection (1) may be revoked . . . by communicating the intent to revoke the anatomical gift to the physician, technician, or enucleator removing the part.[28]

The Griffin Bill makes it more difficult to revoke a donation than the 1987 UAGA, because it requires that the person authorized to make the revocation communicate to the physician, rather than merely that the physician know of the revocation. After deliberation, the Commission endorses the 1987 UAGA approach. The Commission does not wish to place added impediments to the admitted and desirable right to revoke a donation.

D. UAGA §4: Authorization by [Coroner] [Medical Examiner] or [Local Public Health Official]

1. UAGA §4

The purpose of §4 is to "balance societal and family interests, that is, to increase the size of the donor pool [while giving] the family the opportunity to make or to refuse to make an anatomical gift. The balance in this subsection is on the side of increasing the size of the donor pool."[29] Section 4 describes how medical examiners, the third donor group, can donate a deceased's organs. Medical examiners may permit the removal of a part for transplantation or therapy when the following conditions are met: (1) the body is under the authority of the medical examiner, (2) the examiner has received a request for a

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27 Unif. Anatomical Gift Act §3, 8A U.L.A. 17. (Supp. 1993).

28 MCL 333.10115(4).

29 Comment to Unif. Anatomical Gift Act §4, 8A U.L.A. 20 (Supp. 1993).

part, (3) he has made "a reasonable effort, taking into account the useful life of the part" to locate any next of kin whose opinion takes precedence over the medical examiner, and (4) the examiner has searched the medical records and is unaware of any refusal or contrary indications by the decedent regarding donations.

Section 4, which applies only to transplant and therapy uses, also lists who may remove the part, and orders cosmetic restoration of the cadaver if necessary. One of the issues that may need to be addressed with this provision is the search requirement, a "reasonable effort, taking into account the useful life of the part." This phrase is not defined. However, because the viability and useful life of the gift depends on the organ and the circumstances of the transplant, the flexibility in interpreting this phrase is desirable.

2. MCL 333.10102(2)(f) and Griffin Bill §10117

All of section 4 of the 1987 UAGA was derived from a single sentence in the 1968 UAGA and Michigan Act.[30] The sentence, which was a residual authorization for the medical examiner to make a gift of the decedent's parts when the next of kin was not available, reads, "in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or prior class," "any other person authorized or under obligation to dispose of the body [may] make a gift of decedent's body parts."[31] The 1987 UAGA has deleted this phrase and replaced and clarified it with §4. Thus, with a clearer and better developed section, medical examiners will be more willing to consent to removal of life saving organs from cadavers.

Section 4 of the 1987 UAGA and §10117 of the Griffin Bill are nearly identical. The Griffin Bill adds the caveat in §10117(4), "[t]his section does not apply to the removal of a cornea pursuant to Part 102." This is a reference to MCL 333.10202 which allows presumed consent for cornea removal. Because the Griffin Bill is specifically tailored to related Michigan provisions, the Griffin Bill's section is more appropriate than the corresponding 1987 UAGA provision, and is endorsed by the Commission.

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30 MCL 333.10102(2)(f).

31 Id.

E. UAGA §5: Routine Inquiry and Required Request of a Anatomical Gift

1. UAGA §5

Upon admission to a hospital, UAGA §5 requires a hospital staff member to ask patients, who are at least eighteen, if they are organ or tissue donors. This question comes in the midst of the other routine questions that patients are asked at admission. If an answer is not given or if the person refuses to donate, a hospital staff member discusses the option of making or refusing to make an anatomical gift with the patient. Section 5 also mandates that if at or near the time of death of a patient, there is no medical record of a gift or refusal, this option shall, with reasonable discretion, be discussed with the next of kin and a request for an anatomical gift will be made.

Proponents of section 5 believe that the more people are asked about donating, the greater will be the number of donations. Also by making this a routine question at hospital admission, the public consciousness of the need to donate will be increased.[32] However, opponents of this section respond that asking a person's donor status at admission to a hospital actually discourages anatomical gifts because the timing and hospital setting scare people who are worried about dying, and who consequently do not want to acknowledge their mortality by consenting to be a donor. Opponents of this section also argue that some patients may be afraid that if they consent to donation and donees need their organs, their doctors might not do as much to save them, preferring instead to perform a transplant. Testing the pervasiveness of these fears, a survey by the Maximus organization in 1987 found that asking hospital patients to be donors may not really deter gifts: "[h]ospitals that had initiated a request on admission program, reported no opposition from patients and believed that the program, when handled appropriately, [was] beneficial."[33] The 1987 UAGA might be improved by only asking non-emergency hospital patients if they are or would like to become donors. Maryland has taken this approach,[34] which is desireable

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32 Sipes, *supra*, note 9, at 435.

33 Maximus, Inc., *Evaluations of Methods Used by States to Expand the Number of Organ and Tissue Donors*, at Es-29 (Apr. 1988) (Final Report) (prepared for the U.S. Health Resources and Service Dep't. (HRSA Contract No. 240-86-0048)

34 MD. HEALTH-GEN CODE ANN. §19-310 (Supp. 1988). Other commentators have suggested that lawyers, when drafting a will, should ask their clients if they wish to donate. It has also been suggested that life insurance forms have an organ request on them. These approaches not only greatly expand the potential donor pool, but also improve the timing of donation requests because

because non-emergency patients are less likely to confront dangerous situations, and less likely to make uninformed decisions.[35]

Section 5 of the 1987 UAGA also imposes a duty on emergency personnel to search accident victims for information as to their donor status. This addresses one of the conclusions of a Hastings Center Report on why organ supply is too low: Donor cards are not found at accident sites so that the appropriate action by the hospital can not be undertaken. Another change in the 1987 UAGA is its requirement that hospitals notify donees or procurement agencies when a anatomical gift becomes available. This addressed another Hastings Center conclusion that potential gifts were being wasted by poor coordination between hospitals who have donors and procurement organization who have the donees.

2. MCL 333.10102a and Griffin Bill §10119

Unlike the 1987 UAGA, the current Michigan provision does not require hospitals to ask patients their donor status upon admission. Indeed, many of the states who have already adopted the 1987 UAGA have chosen not to adopt this section. However, in the light of the shortage of donated organs, the Commission recommends that Michigan follow Maryland's approach, and require only that non-emergency patients be asked about donor status. Under current Michigan law, although hospitals do not ask patients at admission if they are donors, the appropriate hospital official will ask for a donation from the next of kin at or near the death of the patient. This request is mandatory, unless the official has actual knowledge of contrary indications by the decedent, knows of opposition from the highest available next of kin, or knows that it is contrary to the religious beliefs of the decedent. The 1987 UAGA does not contain an exception for religious beliefs, and although this would seem to be helpful, it appears to be unnecessary because, "[o]rgan donation is accepted by all major western religions today."[36]

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the drafting of a will and the purchasing of life insurance are times when people are already acknowledging their mortality.

35 Other commentators have suggested that lawyers, when drafting a will, should ask their clients if they wish to donate. It has also been suggested that life insurance forms have an organ request on them. These approaches not only greatly expand the potential donor pool, but also improve the timing of donation requests because the drafting of a will and the purchasing of life insurance are times when people are already acknowledging their mortality.

36 Miller, *A Proposed Solution to the Present Organ Donation Crisis Based on a Hard Look at the Past*, 75 CIRCULATION 20 (1987)

MCL 333.10102a(9), which reads, "[t]his section shall not be construed to authorize the withdrawal or withholding of medical care for a patient who is a possible donor and who is near death" is not contained in the 1987 UAGA or Griffin Bill. This issue could become significant. The University of Pittsburgh Medical Center has recently adopted an explicit policy regarding organ donations from terminally ill patients.[37] Non-heart beating-cadavers represent a new source of donors, separate and distinct from the traditional and typical brain dead donors (whose hearts are still beating). One researcher concludes that by utilizing non-heart-beating cadavers, the donor pool can be increased by twenty to twenty-five percent.[38] Data gathered from the Netherlands, a country which procures organs from non-heart-beating cadavers, supports this figure.[39] After deliberation and consideration of the policy underlying MCL 333.10102a(9), the Commission urges that it be retained in the new statute.

The differences between Griffin Bill §10119 and UAGA §5 are minor. In the Griffin Bill §10119(3) the list of individuals who are required to search for information on the individual's status as a donor or non-donor have been expanded to include "medical first responder[s], emergency medical technician[s], emergency medical technician specialist[s], paramedic[s], [and] emergency medical services instructor-coordinator[s]." If these groups do not come under the UAGA's "other emergency rescuer," then the Griffin Bill expands the class of people who have a duty to search. Otherwise, the Griffin Bill differs only stylistically from the 1987 UAGA. Because the Griffin Bill's provisions are tailored to the emergency personnel existing in Michigan, it should be adopted over the corresponding 1987 UAGA section.

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37 Michael A. Devita & James V. Snyder, *Development of the University of Pittsburgh Medical Center Policy for the Care of Terminally Ill Patients Who May Become Organ Donors After Death Following the Removal of Life Support*, KENNEDY INSTITUTE OF ETHICS JOURNAL Vol. 3 June 1993, at 132.

38 Devita, Snyder, and Grenvik, supra, Note 7, at 125 citing Howard Nathan, *Impact of Procuring Organs from Non-Heart Beating Cadaver Donors.* Paper presented at Conference on the Ethical, Psychosocial, and Public Policy Implications of Procuring Organs from Non-Heart-Beating Cadaver Donors, 9-11 October, Pittsburgh, PA.

39 Id. at 126 citing G. Koostra, R. Wijnen, J.P. Van Hoof, and C.J. Van Der Linden, *Twenty Percent More Kidneys Through a Non-Heart-Beating Program* TRANSPLANTATION PROCEEDINGS 23: 910-11.

F. UAGA §6: Persons Who May Become Donees

1. UAGA §6

Section 6 lists the people and organizations--hospitals, physicians, procurement agencies, accredited medical or dental schools, colleges, universities, or designated individuals--who may become donees of anatomical gifts for "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science."[40] This order reverses both the 1968 UAGA and the Michigan provision which currently lists "transplantation" last. The reordering was done to "emphasize transplantation as a primary purpose"[41] of the 1987 UAGA.

2. UAGA §6 and Griffin Bill §10121

As mentioned, by adopting Section 6 of the 1987 UAGA, the order of purposes for which anatomical gifts may be made is reversed. This symbolic change, placing transplantation first, advances the purposes of the updated Act. Also, in subsection (b), which corresponds to MCL 333.10104(3), the 1987 UAGA substitutes "hospitals" for "attending physicians," which is the group used in the Michigan Act as the residual donee. A residual donee is the person authorized to take control of the gift when no specific group is specified. The drafters of the 1987 Act state that "[t]his [change] will facilitate coordination of procurement of the gift."[42]

The corresponding section of the Griffin Bill is nearly identical to the 1987 UAGA.

G. UAGA §7: Delivery of Document of Gift

1. UAGA §7

Section 7 states that the delivery of the gift document does not have to

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40 Unif. Anatomical Gift Act §6, 8A U.L.A. 24 (Supp. 1993).

41 Comment to §6 Unif. Anatomical Gift Act, 8A U.L.A. 26 (Supp. 1993).

42 Comment to §6 Unif. Anatomical Gift Act, 8A U.L.A. 26 (Supp. 1993).

occur during the donor's life for it to be valid. Also, the document may be stored at a hospital, registry office, or procurement agency for safekeeping or to facilitate the transplant. The filing provisions of this section are uncomplicated, thereby expediting post mortem transplant procedures. Finally, although this section indicates that, on request, an "interested person" must be given a copy of any recorded anatomical gift, neither the 1987 UAGA or the Michigan legislation define an "interested person." However, this should not pose any problems and a broad construction of this term would be appropriate.

2. MCL 333.10106 and Griffin Bill §10123

Section 7 of the 1987 UAGA is equivalent to MCL 333.10106, but by employing the 1987 UAGA's new definitions (document of gift), the UAGA section reads more fluidly.

The Griffin Bill and the UAGA are identical in their wording of these sections.

H. UAGA §8: Rights and Duties at Death

1. UAGA §8

This section of the 1987 UAGA proclaims that the "rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies."[43] To prevent the appearance of a conflict of interest, this section states that an anatomical gift may not be removed until a physician, independent of the transplant procedures, has made a determination of death. The provision concludes by establishing the rights and duties of donees with respect to anatomical gifts.

2. MCL 333.10104(3) and 333.10108(1)-(2) and Griffin Bill §10125

The 1987 UAGA's §8 combines part of MCL 333.10104(3) and part of MCL 333.10108(1)-(2). However, protection for morticians, which is found in the Michigan provision, is not incorporated into either the 1987 UAGA or the Griffin Bill. In the opinion of the Commission, this protection should be

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[43] Unif. Anatomical Gift Act §8, 8A U.L.A. 25 (Supp. 1993).

retained.

The Griffin Bill advances the same purposes of the 1987 UAGA, but employs minor semantic differences.

I. UAGA §9: Coordination of Procurement and Use

1. UAGA §9

To improve the coordination of anatomical gifts, section 9 requires that all hospitals in the state establish an affiliation with an organ procurement agency and that they develop procedures for identifying potential organ and tissue donors among their patients. Section 9 was enacted pursuant to a recommendation by the Task Force on Organ Transplantation. The task force found that poor coordination between donees and donors was resulting in a waste of gifts and unnecessary deaths.

2. Griffin Bill §10127

Currently, there is no provision in the Michigan Act comparable to UAGA §9 and adoption of the 1987 UAGA would improve Michigan law in this area. The Griffin Bill adopts the identical provision found in the 1987 UAGA.

J. UAGA §10: Sale or Purchase of Parts Prohibited

1. UAGA §10

Section 10 prohibits the sale and/or purchase of body parts if the removal of the part is to occur after the death of the seller. Although the UAGA prohibits the knowing purchase or sale of a dead person's body parts, this prohibition does not apply if the body part is removed before the person's death.[44] However, another federal law prohibits the interstate sale and purchase of organs.[45]

Commentators who have spoken in favor of allowing the sale and purchase

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[44] Comment to Unif. Anatomical Gift Act §10, 8A U.L.A. 29 (Supp. 1993).

[45] 42 U.S.C. §274e (Supp. IV 1986).

of organs believe that it offers a means of eliminating the current organ supply deficit.[46] The benefits of this system are that some people who may have died because they were unable to procure an organ through the current voluntary system, would be able to save their life by financially inducing a person to donate the necessary organ. Proponents claim that both the potential buyer and seller are made worse off by a system which prohibits the sale of body parts . Even if organ sales are allowed, the direct transfer of money can still be prohibited, by limiting the compensation to the deceased's hospital bills, funeral expenses, etc.[47]

Those who favor the current ban on the sale of organs argue that the implementation of a market in organs might actually decrease supply. They argue that not only would many people not sell their organs at any price, but also the current numbers of voluntary donors may decrease; altruism is a powerful factor in making a decision to donate[48] and an organ market would cut against this factor. In addition, donations from the next of kin could decrease because of strong misgivings about receiving money for selling a deceased relatives' organs. However, these same next of kin may have made an anatomical gift, out of altruism, if no market existed. The sale of organs might also increase concealment of medically diseased and defective organs which people may try to sell. Also, even if an organ is healthy when sold, if it becomes diseased later, there is an incentive to conceal this fact and this places an unfair and devastating risk on potential buyers. Most importantly, the sale of organs leads to scenarios whereby people are economically forced or pressured into selling their organs in order to better provide for their families. Although this problem may be minimized by allowing a sale only a decedent's organs, these leads to the problems mentioned earlier. Another peril potentially created by the sale of organs is the possibility of the donation leading to the donor's premature death or injury. The final problem is one of fairness. Only wealthy individuals may be able to pay the purchase price of an organ. These unfortunate individuals might become a mere source of organs for the wealthy. This creates a fundamental fairness problem that does not arise with the current voluntary giving of the 1968 or 1987 UAGA.

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46 See Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 Geo. Wash. L. Rev. 1, (1989); Roger D. Blair & David L. Kaserman, *The Economics and Ethics of Alternative Cadaveric Organ Procurement Policies*, 8 Yale J. on Reg. 403 1991.

47 Jesse Dukeminier, *Supplying Organs for Transplantation*, 68 Mich. L. Rev. 811, (1970).

48 Comment to §10 Unif. Anatomical Gift Act, 8A U.L.A. 30 (Supp. 1993).

2. MCL 333.10204

Although there was no section on the sale of organs in the 1968 Act, the Michigan Legislature addressed this issue in MCL 333.10204. The Michigan statute makes it a felony for a person to buy, sell, or offer to buy or sell human body parts. This applies to living donors and organs from a cadaver. Under Michigan law, the compensation a donor receives for an anatomical gift is limited to reimbursement for the expenses incurred as a result of the donation. The Michigan provision, which is more thorough, is an improvement over the UAGA provision. The idea of allowing a living donor to sell his or her organs presents too many ethical problems of fairness. This is not a decision we should allow or economically force a person to make; there are better ways to promote the supply of organs. For example, if presumed consent (which allows the removal of an organ so long as there has not been indications of a belief against donating) increases organ supply it would reduce the need to induce an increase in organ supply via financial means.

The Griffin Bill retains the current Michigan statute prohibiting organ sales, rather than adopting UAGA §10. The Commission endorses the Griffin Bill's approach.

K. UAGA §11: Examination, Autopsy, Liability

1. UAGA §11

Section 11 of the 1987 UAGA authorizes a post mortem examination to insure that the potential anatomical gift is free from diseases that could injure the potential new host. The section also explicitly exempts donors from liability involving a gift and provides assurances to physicians that they will not be held liable for problems with the transplant as long as they attempt to act in "good faith." Finally, this section clarifies that the provisions of this Act are subject to the state laws governing autopsies. However, the comments to this section note:

> [It] is necessary to preclude the frustration of the important medical examiners' duties in cases of death by suspected crime or violence. However, since such cases often can provide transplants of value to living persons, it may prove desirable in many if not most states to reexamine and amend, the medical examiner statutes to authorize and direct medical examiners to expedite their autopsy procedures in

cases in which the public interest will not suffer.[49]

2. MCL 333.10102(4), MCL 333.10108(3) and Griffin Bill §10131

Under the applicable Michigan statute, physicians, hospitals, and donors who "act in good faith" can not be held liable for any injuries resulting from the gift. Thus, a donor or his estate could be potentially sued for an anatomical gift. The 1987 UAGA modifies this standard by removing liability if the hospital or physician "attempts to act in good faith." The 1987 UAGA also exempts donors from all liability. Lawsuits would curtail the making of anatomical gifts and further exacerbate the organ supply shortage. By making it harder to prevail on these suits, the 1987 UAGA section is an improvement over the current Michigan Act. The Griffin Bill adopts the 1987 UAGA §11 provisions in full. The Commission recommends that 1987 UAGA §11 be enacted.

L. UAGA §§12 - 17: Transitional Provisions, Uniformity of Application and Construction, Severability, Short Title, and Repeals

Sections 12 - 17 of the 1987 UAGA are general uniform law provisions. Only section 13, which handles construction of the Act, is found in the current Michigan legislation. Thus, the section by section comparison between the 1987 UAGA and current Michigan Act ends here.

Section 12 states that the Act is applicable to gifts made before and after enactment. Section 13 states that the Act should be applied and construed to promote its general purpose (uniformity), and section 14 holds that if any provision of the 1987 Act is held invalid, this invalidity does not the affect other provisions of the Act. Section 15 states that the Act may be cited as the "Uniform Anatomical Gift Act (1987), and section 16 deals with the laws that would be repealed by enacting the 1987 UAGA (in this case MCL 333.10101 to 333.10204). Section 17, the final section, lists when the Act is to take effect. The Griffin Bill adopts all of these sections except for section 14, which deals with severability.

II. Conclusions

Human organs can provide the rarest of gifts--life. In formulating the

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[49] Comment to §11 Unif. Anatomical Gift Act, 8A U.L.A. 30 (Supp. 1993).

policy for the giving of anatomical gifts, the potentially competing claims of the individual, the next of kin, and the potential donee need to be balanced. This task falls upon legislators, especially in an area like this, where the case law is scant. The Commission in this Report has carefully struck this balance, endorsing some but not all of the provisions of the 1987 UAGA. A revision of Michigan's Anatomical Gifts Law is long overdue, and the Commission urges prompt action.

The Commission's many specific recommendations discussed herein are summarized as follows:

1. 1987 UAGA §1:
   Adopt §10111 of the Griffin Bill, which is virtually identical to UAGA §1.

2. 1987 UAGA §2:
   Adopt §10113 of the Griffin Bill, which is virtually identical to UAGA §2, provided however that the current requirement of Michigan law that a donor be of sound mind should be retained.

3. 1987 UAGA §3:
   Adopt §3 of the 1987 UAGA, subject to two alterations
   (a) Preclude a donation absent the concurrence of the family member who is both available and of the highest class;
   (b) Require a "diligent search" for a relative of the highest class before permitting a donation by a relative of a lower class.

4. 1987 UAGA §4:
   Adopt §10117 of the Griffin Bill, which is virtually identical to UAGA §4.

5. 1987 UAGA §5:
   Adopt §10119 of the Griffin Bill, which is virtually identical to UAGA §5, subject to two alterations
   (a) Specify that only non-emergency hospital admittees should be asked about donor status;
   (b) Retain the current requirement of MCL 333.10102(a)(9) that this section shall not be construed to authorize the withdrawal or withholding of medical care for a patient who is a possible donor and who is near death.

6. 1987 UAGA §6 & 7:
Adopt §§10121 and 10123 of the Griffin Bill, which are virtually identical to §§6 and 7 of the 1987 UAGA.

7. 1987 UAGA §8:
Adopt §10125 of the Griffin Bill, which is virtually identical to §8 of the 1987 UAGA, subject to one alteration: the current protection of morticians pursuant to MCL 333.10108(1) should be retained.

8. 1987 UAGA §9
Adopt §10127 of the Griffin Bill, which is virtually identical to 1987 UAGA §9.

9. 1987 UAGA §10:
Retain MCL 333.10204, which, unlike UAGA §10, bans entirely the sale of human body parts in Michigan. This is the approach taken in the Griffin Bill.

10. Adopt the remaining provisions of the Griffin Bill: §§10131, 10133, 10135 and 10151.

APPENDIX A

PUBLIC HEALTH CODE
Act 368 of 1978

333.10101 Definitions.

Sec. 10101. As used in this part:

(a) "Bank or storage facility" means a facility licensed, accredited, or approved under the laws of any state for storage of human bodies or physical parts thereof.

(b) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(c) "Donor" means an individual who makes a gift of all or a physical part of his or her body.

(d) "Hospital" means a hospital licensed, accredited, or approved under the laws of any state. It includes a hospital operated by the United States government, a state or a subdivision thereof, although not required to be licensed under state laws.

(e) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(f) "Physical part" means organs, tissues, eyes, bones, arteries, blood, other fluids, and any other portions of a human body.

(g) "Physician" or "surgeon" means a physician or surgeon licensed or authorized to practice under the laws of any state.

(h) "State medical school" means the university of Michigan school of medicine, the Michigan state university college of human medicine, the Michigan state university college of osteopathic medicine, or the Wayne state university school of medicine.

333.10102 Gift of all or any physical part of individual's body; gift effective upon death; authorized persons; priority; notice of contrary indications; notice of opposition; time of making gift; examination; rights of donee.

Sec. 10102. (1) An individual of sound mind and 18 years of age or more may give all or any physical part of the individual's body for any purpose specified in section 10103, the gift to take effect upon death.

(2) Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any physical part of the decedent's body for any purpose specified in section 10103:

(a) The spouse.

(b) An adult son or daughter.

(c) Either parent.

(d) An adult brother or sister.

(e) A guardian of the person of the decedent at the time of the death.

(f) Any other person authorized or under obligation to dispose of the body.

(3) If the donee has actual notice of contrary indications by the decedent or that a gift by a member of a class is opposed by a member of the same or a prior class, the donee shall not accept the gift. The persons authorized by subsection (2) may make the gift after or immediately before death.

(4) A gift of all or a physical part of a body authorizes any examination necessary to assure medical acceptability of the gift for the purposes intended.

(5) The rights of the donee created by the gift are paramount to the rights of others except as provided by section 10108(4).

333.10102a Requesting consent to gift of all or any physical part of decedent's body; conditions prohibiting request for consent; organ donation log; transmitting summary of information in log to department; execution of gift; development and implementation of policy regarding requests; rules; withdrawal or withholding of medical care not authorized.

Sec. 10102a. (1) Subject to section 10102(3) and subsections (2) to (7), the person designated pursuant to subsection (7) shall, at or near the death of a patient whose body, according to accepted medical standards, is suitable for donation or for the donation of physical parts, request 1 of the persons listed in section 10102(2), in the order of priority stated, to consent to the gift of all or any physical part of the decedent's body.

(2) The person designated pursuant to subsection (7) shall not make a request for consent pursuant to subsection (1) if 1 or more of the following conditions exist:

(a) The person designated pursuant to subsection (7) has actual notice of contrary indications by the patient or decedent.

(b) The person designated pursuant to subsection (7) has actual notice of opposition by a person listed in section 10102(2) unless a person in a prior class under that section is available for a request to be made.

(c) The person designated pursuant to subsection (7) has knowledge that the gift of all or a physical part of a body is contrary to the religious beliefs of the decedent.

(3) Each hospital shall maintain a hospital organ donation log sheet on a form provided by the department. The organ donation log sheet shall include all of the following information:

(a) The name and age of the patient or decedent for whom a request is made pursuant to this section.

(b) A list of patients or decedents for whom a request was not made pursuant to this section and the reason for not making the request, as set forth in subsection (2).

(c) An indication that a request for consent to a gift of all or a physical part of a body has been made.

(d) An indication of whether or not consent was granted.

(e) If consent was granted, an indication of which physical parts of the body were donated, or whether the entire body was donated.

(f) The name and signature of the person making the request.

(4) After making a request for a gift pursuant to subsection (1), the person designated pursuant to subsection (7) shall complete the hospital's organ donation log sheet.

(5) A summary of the information contained in the organ donation log sheets annually shall be transmitted by each hospital to the department. The summary shall include all of the following:

(a) The number of deaths.

(b) The number of requests made.

(c) The number of consents granted.

(d) The number of bodies or physical parts donated in each category as specified on the organ donation log sheet.

(6) A gift made pursuant to a request required by this section shall be executed pursuant to this part.

(7) The chief executive officer of each hospital shall develop and implement a policy regarding requests made pursuant to this section. The policy shall provide, at a minimum, for all of the following:

(a) The designation of persons who shall make requests under this section.

(b) That if a patient's religious preference is known, a clergy of that denomination shall, if possible, be made available upon request to the persons to whom a request under this section is made.

(c) The development of a support system which facilitates the making of requests under this section.

(d) The maintenance of the organ donation log sheet required by subsection (3).

(8) The director may promulgate rules to establish minimum training standards for persons required to make requests pursuant to this section and to revise the organ donation log sheet required by subsection (3).

(9) This section shall not be construed to authorize the withdrawal or withholding of medical care for a patient who is a possible donor and who is near death.

333.10103 Authorized donees.

Sec. 10103. The following persons may become donees of gifts of bodies or physical parts thereof for the purposes stated:

(a) Any hospital, surgeon, or physician for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation.

(b) Any accredited medical or dental school, college, or university for education, research, advancement of medical or dental science, or therapy.

(c) Any bank or storage facility for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation.

(d) Any specified individual for therapy or transplantation needed by that individual.

(e) Any approved or accredited school of optometry, nursing, or veterinary medicine.

333.10104 Gift by will or document other than will.

Sec. 10104. (1) A gift of all or a physical part of the body under section 10102(1) may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated, or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(2) A gift of all or a physical part of the body under section 10102(1) may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, shall be signed by the donor in the presence of 2 witnesses who shall sign the document in the donor's presence. If the donor cannot sign, the document may be signed for the donor at his or her direction and in his or her presence in the presence of 2 witnesses who shall sign the document

in the donor's presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid. A document which conforms substantially to the following form is sufficient for the purposes of this subsection:

Uniform Donor Card

of.....

Print or type name of donor

In the hope that I may help others, I hereby make this anatomical gift if medically acceptable, to take effect upon my death. The words and marks below indicate my desires.

I give: (a) ..... any needed organs or physical parts

(b) ..... only the following organs or physical parts

_____

Specify the organ(s) or physical part(s)

For the purposes of transplantation, therapy, medical research or education;

(c) ..... my body for anatomical study if needed.

Limitations or special wishes, if any: _____

Signed by the donor and the following 2 witnesses in the presence of each other:

_____	_____
Signature of donor	Date of birth of donor
_____	_____
Date signed	City and state
_____	_____
Witness	Witness

(3) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee. The physician who becomes a donee under this subsection shall not participate in the procedures for removing or transplanting a physical part.

(4) Notwithstanding section 10108(4), the donor may designate in his or her will, card, or other document of gift the surgeon or physician to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any surgeon or physician for the purpose.

(5) Any gift by a person designated in section 10102(2) shall be made by a document signed by the person or made by the person's telegraphic, recorded telephonic, or other recorded message.

(6) A document of gift executed in another state or foreign country and in accord with the laws of that state or country is valid as a document of gift in this state, although the document does not conform substantially to the form set forth in subsection (2).

333.10105 Excising eye or physical part thereof; operation and placement of gift in eye bank; persons qualified to perform operation.

Sec. 10105. In the absence of designation of a physician or surgeon by either the donor or the donee of an eye or a physical part thereof of a decedent, or because the physician or surgeon is not readily available to excise the eye or physical part thereof as specified in a donor card or will, a licensed physician or a person who is certified by a state medical school may perform the operation and arrange for placement of the gift in the nearest eye bank. A state medical school may certify a person as qualified to perform the operation required for the removal of an eye or a physical part thereof only after successfully completing a comprehensive course in eye enucleation organized and conducted by the state medical school or who has successfully completed a similar course offered by a nationally accredited medical school located outside this state.

333.10106 Gift to specified donee; delivery and deposit of will, card, or other document, or executed copy thereof; examination of document.

Sec. 10106. If the gift is made by the donor to a specified donee, the will, card, or other document, or an executed copy thereof, may be delivered to the donee to expedite the appropriate procedures immediately after death. Delivery is not necessary to the validity of the gift. The will, card, or other document, or an executed copy thereof, may be deposited in any hospital, bank or storage facility, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of any interested party upon or after the donor's death, the person in possession shall produce the document for examination.

333.10107 Methods of amending or revoking gift.

Sec. 10107. (1) If the will, card, or other document or executed copy thereof, has been delivered to a specified donee, the donor may amend or revoke the gift by any of the following methods:

(a) The execution and delivery to the donee of a signed statement.

(b) An oral statement made in the presence of 2 persons and communicated to the donee.

(c) A statement during a terminal illness or injury addressed to an attending physician and communicated to the donee.

(d) A signed card or document found on the donor's person or in the donor's effects.

(2) Any document of gift which has not been delivered to the donee may be revoked by the donor in the manner set out in subsection (1), or by destruction, cancellation, or mutilation of the document and all executed copies thereof.

(3) Any gift made by a will may also be amended or revoked in the manner provided for amendment or revocation of wills, or as provided in subsection (1).

333.10108 Acceptance or rejection of gift by donee; embalming and use of body in funeral services; custody of remainder of body after removal of physical part; liability of holder of license for practice of mortuary science; determining time of death; restriction on attending or certifying physician; immunity of person acting in good faith; applicability of laws with respect to autopsies.

Sec. 10108. (1) The donee may accept or reject the gift. If the donee accepts a gift of the entire body, the surviving spouse, next of kin, or other persons having authority to direct and arrange for the funeral and burial or other disposition of the body, subject to the terms of the gift, may authorize embalming and the use of the body in funeral services. If the gift is a physical part of the body, the donee, upon the death of the donor and prior to embalming, shall cause the physical part to be removed without unnecessary mutilation. After removal of the physical part, custody of the remainder of the body vests in the surviving spouse, next of kin, or such other persons having authority to direct and arrange for the funeral and burial or other disposition of the remainder of the body. The holder of a license for the practice of mortuary science under article 18 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.1801 to 339.1812 of the Michigan Compiled Laws, who acts pursuant to the directions of persons alleging to have authority to direct and arrange for the funeral and burial or other disposition of the remainder of the body, is relieved of any liability for the funeral and for the burial or other disposition of the remainder of the body. A holder of a license for the practice of mortuary science under that act may rely on the instructions and directions of any person alleging to be either a donee or a person authorized under this part to donate a body or any physical part thereof. A holder of a license for the practice of mortuary science under that act is not liable for removal of any physical part of a body donated under this part.

(2) The time of death shall be determined by a physician who attends the donor at the death, or, if none, the physician who certifies the death. The attending or certifying physician shall not participate in the procedures for removing or transplanting a physical part.

(3) A person, including a hospital, who acts in good faith in accord with the terms of this part or with the anatomical gift laws of another state or a foreign country is not liable for damages in any civil action or subject to prosecution in any criminal proceeding for the act.

(4) This part is subject to the laws of this state prescribing powers and duties with respect to autopsies.

333.10109 Construction.

Sec. 10109. This part shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

333.10201 Definitions.

Sec. 10201. As used in this part:

(a) "Bank or storage facility" means a facility licensed, accredited, or approved under the laws of any state for storage of human bodies or physical parts of human bodies.

(b) "Next of kin" means the spouse of a deceased individual or a person related to a deceased individual within the third degree of consanguinity as determined by the civil law method.

333.10202 Removal of cornea; circumstances.

Sec. 10202. (1) In any case in which an autopsy is to be done by a county medical examiner or a county medical examiner causes an autopsy to be done, the cornea of the deceased person may be removed by a person authorized by the county medical examiner.

(2) Removal under subsection (1) may be made only under the following circumstances:

(a) An autopsy has already been authorized by the county medical examiner.

(b) The county medical examiner does not have knowledge of an objection by the next of kin of the decedent to the removal of the cornea.

(c) The removal of the cornea will not interfere with the course of any subsequent investigation or autopsy or alter post-mortem facial appearance.

333.10203 Removal of cornea; liability.

Sec. 10203. The county medical examiner, the assistant county medical examiner, a bank or storage facility, or any person authorized by the county medical examiner to remove the cornea of a deceased person, shall not be liable in a civil action if it is subsequently alleged that authorization for the removal was required of the next of kin.

333.10204 Prohibited conduct; felony; permissible practices; definitions; rules.

Sec. 10204. (1) Except as otherwise provided in subsection (2), a person shall not knowingly acquire, receive, or otherwise transfer a human organ or part of a human organ for valuable consideration for any purpose, including but not limited to transplantation, implantation, infusion, injection, or other medical or scientific purpose. A person who violates this subsection is guilty of a felony.

(2) This section does not prohibit any of the following practices:

(a) The removal and use of a human cornea pursuant to section 10202, or the removal and use of a human pituitary gland pursuant to section 2855.

(b) An anatomical gift pursuant to part 101, or the acquisition or distribution of bodies or parts by the anatomy board pursuant to sections 2651 to 2663.

(c) Financial assistance payments provided under a plan of insurance or other health care coverage.

(3) As used in this section:

(a) "Human organ" means the human kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, skin, cartilage, dura mater, ligaments, tendons, fascia, pituitary gland, and middle ear structures and any other human organ specified by rule promulgated by the department. Human organ does not include whole blood, blood plasma, blood products, blood derivatives, other self-replicating body fluids, or human hair.

(b) "Valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the medical expenses and expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the human organ.

(4) The department may promulgate rules to specify human organs in addition to the human organs listed in subsection (3)(a).

APPENDIX B

UNIFORM ANATOMICAL GIFT ACT (1987)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-SIXTH YEAR
IN NEWPORT BEACH, CALIFORNIA
JULY 31 - AUGUST 7, 1987

With Prefatory Note and Comments

Approved by the American Bar Association
Philadelphia, Pennsylvania, February 9, 1988

UNIFORM ANATOMICAL GIFT ACT (1987)

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Final, approved copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

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UNIFORM ANATOMICAL GIFT ACT (1987)

PREFATORY NOTE

The Uniform Anatomical Gift Act was promulgated in 1968. It has been adopted in all 50 states and the District of Columbia. In the prefatory note it was observed:

> "... if utilization of bodies and parts of bodies is to be effectuated, a number of competing interests in a dead body must be harmonized, and several troublesome legal questions must be answered. . . . Both the common law and the present statutory picture is one of confusion, diversity, and inadequacy. . . . The Uniform Anatomical Gift Act herewith presented by the National Conference of Commissioners on Uniform State Laws carefully weighs the numerous conflicting interests and legal problems. Wherever adopted it will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures. . . . It will provide a useful and uniform legal environment throughout the country for this new frontier of modern medicine."

The contemporary significance of the Uniform Anatomical Gift Act has been recently assessed by the Hastings Center; in the Preface to its Report of the project on organ transplantation, "Ethical, Legal and Policy Issues Pertaining to Solid Organ Procurement" (October, 1985), it is stated:

> "The issue of transplantation remained quiescent for many years. It was only with the successes occasioned by the introduction of powerful new immunosuppressive drugs such as Cyclosporine and improvements in surgical techniques for transplanting organs and tissues in the past few years that the issue of organ procurement was brought back into the center stage of public policy concern. Enhancements in the capacity to perform transplants increased the demand for solid organs. It has become apparent that the public policy instituted in 1969 [by promulgation of the Uniform Anatomical Gift Act in 1968] is not producing a sufficient supply of organs to meet the current or projected demand for them."

A 1985 Gallup Poll commissioned by the American Council on Transplantation reported that 93 percent of Americans surveyed knew about organ transplantation and, of these, 75 percent approved of the concept of organ

donation. Although a large majority approves of organ donation, only 27 percent indicate that they would be very likely to donate their own organs, and only 17 percent have actually completed donor cards. Of those who were very likely to donate, nearly half have not told family members of their wish, even though family permission is usually requested before an organ is removed. (Report of the Task Force on Organ Transplantation pursuant to the 1984 National Organ Transplant Act -- P.L. 98-507 -- "Organ Transplantation: Issues and Recommendations" (April 1986)).

The inadequacies in the present system of encouraging voluntary donation of organs were enumerated in the Hastings Center Report:

"The key problems that hinder organ donation include:

1. Failure of persons to sign written directives.

2. Failure of police and emergency personnel to locate written directives at accident sites.

3. Uncertainty on the part of the public about circumstances and timing of organ recovery.

4. Failure on the part of medical personnel to recover organs on the basis of written directives.

5. Failure to systematically approach family members concerning donation.

6. Inefficiency on the part of some organ procurement agencies in obtaining referrals of donors.

7. High wastage rates on the part of some organ procurement agencies in failing to place donated organs.

8. Failure to communicate the pronouncement of death to next of kin.

9. Failure to obtain adequate informed consent from family members."

State and federal legislation have addressed several of these problems. For example, a majority of states have enacted a variety of "required request"

laws that require hospital administrators to discuss with next of kin the option of donating, or requesting the donation of, the organs of a decedent. Congress enacted the National Organ Transplant Act in 1984 prohibiting the purchase of organs in interstate commerce and providing grants to organ procurement agencies and a national organ-sharing system. The Act also provides for appointment of a Task Force on Organ Transplantation to conduct a comprehensive examination of organ donation and procurement, organ sharing within the United States, access by patients to donor organs and transplant procedures, diffusion and adoption of organ transplant technology, and future directions in research. The Task Force submitted a report in April 1986 entitled "Organ Transplantation: Issues and Recommendations." Among the findings:

> "An overriding problem common to all organ transplantation programs as well as to the well-established programs in tissue banking (for corneal, skin and bone transplantation) is the serious gap between the need for the organs and tissues and the supply of donors. Despite substantial support for transplantation and a general willingness to donate organs and tissues after death, the demand far exceeds the supply. At any one time, there are an estimated 8,000 to 10,000 people waiting for a donor organ to become available."

Citing a recommendation of the Task Force, the bill for the reconciliation of the 1987 budget amended the Social Security Act to require that hospitals, as a condition to receiving Medicare or Medicaid after October 1, 1987, establish written protocols "for the identification of potential organ donors that [make families] ... aware of the option of organ or tissue donation and their option to decline." (P.L. 99-509 § 9318).

Several amendments to the Uniform Act have been made since it was promulgated in 1968. In 1980, the NCCUSL voted to make optional the language that previously required the donor card to be signed "in the presence of two witnesses who must sign the document in his presence." Amendments have been made by several states authorizing individuals other than doctors to remove eyes and to address specific emerging problems. As a result, the objective of the 1968 Uniform Act has been eroded, i.e., "When generally adopted, even if the place of death, or the residence of the donor, or the place of use of the gift occurs in a state other than that of the execution of the gift, uncertainty as to the applicable law will be eliminated and all parties will be protected."

In 1984, the Executive Committee of NCCUSL approved the appointment of a study committee, and then in 1985 of a drafting committee, to propose amendments to the Uniform Anatomical Gift Act. The Committee has consulted with individuals and national organizations involved in organ procurement about possible changes in the generic provisions of the Uniform Act and to solicit comments and suggestions. A first draft of proposed amendments to the Uniform Act was considered at the annual meeting of NCCUSL in 1986.

The sequence of sections in the original Act has been changed, to combine the concept of "persons who may make an anatomical gift" (original Section 2), "manner of making anatomical gifts" (original Section 4), and "amendment or revocation of the gift" (original Section 6). The authorization of gifts by next of kin or a guardian of the person contained in Section 2 of the original Act is Section 3 of the amended Act. Several subsections of the original Act have been shifted to accommodate change in title and sequential arrangement of sections of the Act as amended. These changes are noted in the Comments. The scope of the Act continues to be limited to procurement. It does not cover processing except for a provision requiring coordination of procurement and utilization between hospitals and procurement organizations (Section 9). It does not cover distribution except for a provision prohibiting sale or purchase (Section 10).

The proposed amendments simplify the manner of making an anatomical gift and require that the intentions of a donor be followed. For example, no witnesses are required on the document of gift (Section 2(b)) and consent of next of kin after death is not required if the donor has made an anatomical gift (Section 2(h)). The identification of actual donors is facilitated by a duty to search for a document of gift (Section 5(c)) and of potential donors by the provisions for routine inquiry (Section 5(a)) and required request (Section 5(b)). A gift of one organ, e.g., eyes, is not a limitation on the gift of other organs after death, in the absence of contrary indication by the decedent (Section 2(j)). The right to refuse to make an anatomical gift and the manner of expressing the refusal are specified (Section 2(i)). Revocation by a donor of an anatomical gift that has been made is effective without communication of the revocation to a specified donee (Section 2(f)). Hospitals have been substituted for attending physicians as donees of anatomical gifts (Section 6(b)), and they are required to establish agreements or affiliations with other hospitals and procurement organizations in the region to coordinate the procurement and utilization of anatomical gifts (Section 9). If a request for an anatomical gift has been made for transplant or therapy by a person specified in the Act and if there is no contrary indication by the decedent or known objection by the next of kin to an

anatomical gift, the [coroner] [medical examiner] or [local public health official] may authorize release and removal of a part subject to specific requirements (Section 4(a) and (b)). The categories of persons that may remove anatomical parts are expanded to include eye enucleators and certain technicians (Section 8(c)). The sale or purchase of parts is prohibited (Section 10). Persons who act, or attempt to act, in good faith in accordance with the terms of the Act are not liable in any civil action or criminal proceeding. The categories of persons covered by this exemption are specified (Section 11(c)).

The growing promise of transplantation was described in the Hastings Center Report:

> "It is now possible to transplant vital organs such as hearts, livers and kidneys. Efforts are currently underway to perfect the transplantation of the heart and lung together, the pancreas and the small bowel. Post-mortem donors of these vital organs must have sustained brain death under circumstances in which their respiration and circulation can be supported artificially.
>
> "Other human tissue such as corneas, bone and inner ear parts and skin can be utilized to restore important biological functions. These tissues may be removed some time after circulation and respiration have ceased. The cornea, for example, remains suitable for removal for transplantation for approximately six hours after the donor's heart has stopped beating."

UNIFORM ANATOMICAL GIFT ACT (1987)

SECTION 1. DEFINITIONS. As used in this [Act]:

(1) "Anatomical gift" means a donation of all or part of a human body to take effect upon or after death.

(2) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(3) "Document of gift" means a card, a statement attached to or imprinted on a motor vehicle operator's or chauffeur's license, a will, or other writing used to make an anatomical gift.

(4) "Donor" means an individual who makes an anatomical gift of all or part of the individual's body.

(5) "Enucleator" means an individual who is [licensed] [certified] by the [State Board of Medical Examiners] to remove or process eyes or parts of eyes.

(6) "Hospital" means a facility licensed, accredited, or approved as a hospital under the law of any state or a facility operated as a hospital by the United States government, a state, or a subdivision of a state.

(7) "Part" means an organ, tissue, eye, bone, artery, blood, fluid, or other portion of a human body.

(8) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, government, governmental subdivision or agency, or any other legal or commercial entity.

(9) "Physician" or "surgeon" means an individual licensed or otherwise authorized to practice medicine and surgery or osteopathy and surgery under the laws of any state.

(10) "Procurement organization" means a person licensed, accredited, or approved under the laws of any state for procurement, distribution, or storage of human bodies or parts.

(11) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(12) "Technician" means an individual who is [licensed] [certified] by the [State Board of Medical Examiners] to remove or process a part.

COMMENT

This is Section 1 of the original Act. Definitions (1) "Anatomical Gift" and (3) "Document of Gift" have been added to reduce the length and complexity of operative provisions of the Act.

In subsection (2) the committee decided it was unnecessary to expand the definition of "decedent" to include the definition of death contained in the Uniform Determination of Death Act. That Act provides:

> "An individual who has sustained either irreversible cessation of circulatory and respiratory functions or irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."

Almost all states have similar definitions either by statute or appellate court decisions.

The Report to Congress of the Task Force appointed under the 1984 National Organ Transplant Act (P.L. 98-507) recommends:

> "... that the Uniform Determination of Death Act be enacted by the legislatures of states that have not adopted this or a similar act. ... that each state medical association develop and adopt model hospital policies and protocols for the determination of death based upon irreversible cessation of brain function that will be available to guide hospitals in developing and implementing institutional policies and protocols concerning brain death."

In subsections (5) and (12), the individuals authorized to remove a part have been expanded to include enucleators for eyes and technicians. Satisfactory completion of a prescribed course of training and experience is a prerequisite to certification of these nonphysician specialists. The type of certification and the person making it are bracketed. It may be done by a professional peer group organization, an organ procurement organization, agency or association, or by a hospital or state agency.

In subsection (10), "procurement organization" has been substituted for "bank or storage facility" and the function has been expanded to include procurement and distribution to reflect the diffusion of function, i.e., procurement, distribution or storage, and of objective, i.e., organs, tissues, eyes, bones, skin, fluids, etc. In the case of solid or visceral organs, they must be removed while bodily functions of the decedent are sustained with life support systems. If solid or visceral organs are not involved, life support systems are not required, although there are time limits following death within which removal must be completed, e.g., six hours in the case of eyes.

SECTION 2. MAKING, AMENDING, REVOKING, AND REFUSING TO MAKE ANATOMICAL GIFTS BY INDIVIDUAL.

(a) An individual who is at least [18] years of age may (i) make an anatomical gift for any of the purposes stated in Section 6(a), (ii) limit an anatomical gift to one or more of those purposes, or (iii) refuse to make an anatomical gift.

(b) An anatomical gift may be made only by a document of gift signed by the donor. If the donor cannot sign, the document of gift must be signed by another individual and by two witnesses, all of whom have signed at the direction and in the presence of the donor and of each other, and state that it has been so signed.

(c) If a document of gift is attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, the document of gift must comply with

subsection (b). Revocation, suspension, expiration, or cancellation of the license does not invalidate the anatomical gift.

(d) A document of gift may designate a particular physician or surgeon to carry out the appropriate procedures. In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the anatomical gift may employ or authorize any physician, surgeon, technician, or enucleator to carry out the appropriate procedures.

(e) An anatomical gift by will takes effect upon death of the testator, whether or not the will is probated. If, after death, the will is declared invalid for testamentary purposes, the validity of the anatomical gift is unaffected.

(f) A donor may amend or revoke an anatomical gift, not made by will, only by:

(1) a signed statement;

(2) an oral statement made in the presence of two individuals;

(3) any form of communication during a terminal illness or injury addressed to a physician or surgeon; or

(4) the delivery of a signed statement to a specified donee to whom a document of gift had been delivered.

(g) The donor of an anatomical gift made by will may amend or revoke the gift in the manner provided for amendment or revocation of wills, or as provided in subsection (f).

(h) An anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death.

(i) An individual may refuse to make an anatomical gift of the individual's body or part by (i) a writing signed in the same manner as a

document of gift, (ii) a statement attached to or imprinted on a donor's motor vehicle operator's or chauffeur's license, or (iii) any other writing used to identify the individual as refusing to make an anatomical gift. During a terminal illness or injury, the refusal may be an oral statement or other form of communication.

(j) In the absence of contrary indications by the donor, an anatomical gift of a part is neither a refusal to give other parts nor a limitation on an anatomical gift under Section 3 or on a removal or release of other parts under Section 4.

(k) In the absence of contrary indications by the donor, a revocation or amendment of an anatomical gift is not a refusal to make another anatomical gift. If the donor intends a revocation to be a refusal to make an anatomical gift, the donor shall make the refusal pursuant to subsection (i).

COMMENT

The major structural changes from the original Act are found in Sections 2 and 3. The persons who may make an anatomical gift are divided into the individual donor (new Section 2) and next of kin or guardians of the person (new Section 3). The manner of executing (old Section 4), and amending or revoking (old Section 6) anatomical gifts are incorporated in new Section 2 as well as provisions of other sections that involve "making, amending, revoking, and refusing to make anatomical gifts by the individual." Provisions of old Section 2 that do not relate directly to this topic have been shifted to later sections. In the original Act there is the following Comment:

> "To minimize confusion there is merit in having a uniform provision throughout the country. Also it is desirable to enlarge the class of possible donors as much as possible. Subsection (a) of Section 2, providing that any person of sound mind and 18 years or more of age may execute a gift, will afford both nationwide uniformity and a desirable enlargement of the class of donors. Persons 18 years of age or more are of sufficient maturity to make the required decisions and the Uniform Act takes advantage of this fact."

In subsection (a) the Act has been expanded by inserting the right to refuse to make an anatomical gift. The absence of a donor card or the lack of an entry authorizing a gift on a driver's license are ambiguous and are not "contrary indications" of a decedent preventing an anatomical gift by next of kin under Section 2(b) of the original Act. This amendment and a provision specifying the manner of making a refusal (subsection (i)) provide the option to individuals who are definitely opposed to the donation for any purpose or of any part of their body as an anatomical gift. If the donor wishes to limit the anatomical gift to a specific purpose, e.g., transplantation, or to a specified part, e.g., eyes, the limitation must be stated clearly, i.e., "transplantation only," "eyes only."

Subsection (b) incorporates the provisions of Section 4(b) of the original Act. Section 4(a) of the original Act has been relocated to subsection (e) to reflect the change from using wills to choosing other forms of documents of gift to make anatomical gifts.

The requirement of two witnesses signing a donor card or other document of gift has been deleted to simplify the making of anatomical gifts. Self authentication of a document of gift by a donor who cannot sign relieves the donee of the duty to search for the witnesses upon death of the donor.

In the original Act there were several forms included in the Comments with this admonition:

> "As the Uniform Act becomes widely accepted it will prove helpful if the forms by which gifts are made are similar in each of the participating states. Such forms should be as simple and understandable as possible."

The forms in these Comments are suggested for the 1987 Act.

ANATOMICAL GIFT BY A LIVING DONOR

Pursuant to the Anatomical Gift Act, upon my death, I hereby give (check boxes applicable):

1. [ ] Any needed organs, tissues, or parts;
2. [ ] The following organs, tissues, or parts only _____;

3. [ ] For the following purposes only

_____.

(transplant-therapy-research-education)

_____	_____
Date of Birth	Signature of Donor
_____	_____
Date Signed	Address of Donor

INSTRUCTIONS

Check box 1 if the gift is unrestricted, i.e., of any organ, tissue, or part for any purpose specified in the Act; do not check box 2 or box 3. If the gift is restricted to specific organ(s), tissue(s), or part(s) only, e.g., heart, cornea, etc., check box 2 and write in the organ or tissue to be given. If the gift is restricted to one or more of the purposes listed, e.g., transplant, therapy, etc., check box 3 and write in the purpose for which the gift is made.

A gift category included in some forms "of my body for anatomical study if needed" has not been included. Although a gift of the entire body is authorized by the Act, the exercise of this option usually requires an agreement with a medical school before a gift is made.

A simple form of refusal under the Act could provide:

Pursuant to the Anatomical Gift Act, I hereby refuse to make any anatomical gift.

_____	_____
Date of Birth	Signature of Declarant
_____	_____
Date of Signing	Address of Declarant

Subsection (c) incorporates an amendment to the original Act in many states providing that an anatomical gift may be made by an attachment to the driver's license. The cross reference to subsection (b) incorporates the concept that a signature is required. A signature on the driver's license or on the card attached to the driver's license is sufficient. The hospital or other donee may rely on the anatomical gift even though the license has expired or has been terminated by official act.

The following form is suggested for attachment to the driver's license:

_____

Print or Type Name of Donor

Pursuant to the Anatomical Gift Act, upon my death, I hereby give (check boxes applicable):

1. [ ] Any needed organs, tissues, or parts;
2. [ ] The following organs, tissues, or parts only _____;
3. [ ] For the following purposes only _____;
   (transplant-therapy-research-education)

Refusal:

4. [ ] I refuse to make any anatomical gift.

_____

Signature

INSTRUCTIONS

See Section 2(b) Comments. If the applicant for a driver's license refuses to make any anatomical gift, check box 4 only.

Subsection (d) is Section 4(d) of the original Act.

Subsection (e) is a restatement of Section 4(a) of the original Act.

Subsection (f) is a restatement of Section 6(a) and (b) of the original Act.

Subsection (g) is Section 6(a) of the original Act.

Subsection (h) states expressly the intention of the original Act that an anatomical gift not revoked by the donor cannot be revoked after the donor's death by any other person. This was explicit in the Comments to the original Act: "Subsection (e) [of Section 2] recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others." The Hastings Center Report cited the results of a telephone survey of organ procurement agencies in the United States in 1983 as follows:

> "... the survey revealed that few transplant centers were willing to procure organs solely on the basis of a donor card or driver's license consent by the deceased. In situations in which family members could not be located, less than twenty-five percent of the respondents said they would proceed with organ procurement despite the presence of a written directive."

This subsection removes any uncertainty.

Subsection (i) expands the original Act by providing a method of refusing to make an anatomical gift. A potential donor has several options. The donor may make an anatomical gift (Section 2(a)), may express or imply a contrary indication that an anatomical gift shall not be made (Section 2(j)(k)), or may refuse to make an anatomical gift (Section 2(i)). Contrary indications may include membership in organizations that do not approve of organ donation, statements or actions by the potential donor that are inconsistent with organ donations, etc. To be effective as a limitation on a gift by next of kin under Section 3 or on a release of a part by other persons under Section 4, after death, the contrary indications must be known to the persons authorized to act under Sections 3 and 4. The option of refusal to make an anatomical gift provided for by subsection (i) is a method of documenting contrary indications that might not be communicated otherwise and therefore not effective as a limitation on next of kin and other persons authorized to give or release a part under Sections 3 and 4 of the Act. If the potential donor is unable to speak because of paralysis or other disability, any form of communicating a refusal is sufficient, e.g., responding to a direct inquiry by a nod of the head, squeeze of the hand, blink of eyes, etc.

Subsection (j) addresses the problem of donor cards that have been circulated by various organizations and that appear to limit the anatomical gift

to only one organ, e.g., eyes, kidneys, etc. This type of card should not be construed as an expression of the intention of the donor to limit the anatomical gift to that organ only, in the absence of a refusal to give other organs or of other contrary indications.

Subsection (k) provides that a revocation of an anatomical gift made previously by a donor is neither a refusal to make any anatomical gift nor a contrary indication by the donor that no part shall be given or released for any purpose authorized by the Act. It merely restores the donor to the status of an individual who has neither made nor refused to make an anatomical gift. In the absence of any other action or contrary indication by that individual before death, the next of kin or guardian of the person may make an anatomical gift pursuant to Section 3 or the appropriate person may authorize release and removal of a part pursuant to Section 4.

An amendment of an anatomical gift made previously by the donor, whether the amendment relates to a part or a purpose, is not a refusal nor a limitation on a gift or release of other parts for any purpose specified in the Act. If the amendment is intended to be a refusal it must be expressed clearly as provided in subsection (i).

Revocation or amendment of a previous anatomical gift is ambiguous. It does not indicate an intention of the donor to refuse to make an anatomical gift. This subsection removes that ambiguity.

SECTION 3. MAKING, REVOKING, AND OBJECTING TO ANATOMICAL GIFTS, BY OTHERS.

(a) Any member of the following classes of persons, in the order of priority listed, may make an anatomical gift of all or a part of the decedent's body for an authorized purpose, unless the decedent, at the time of death, has made an unrevoked refusal to make that anatomical gift:

(1) the spouse of the decedent;

(2) an adult son or daughter of the decedent;

(3) either parent of the decedent;

(4) an adult brother or sister of the decedent;

(5) a grandparent of the decedent; and

(6) a guardian of the person of the decedent at the time of death.

(b) An anatomical gift may not be made by a person listed in subsection (a) if:

(1) a person in a prior class is available at the time of death to make an anatomical gift;

(2) the person proposing to make an anatomical gift knows of a refusal or contrary indications by the decedent; or

(3) the person proposing to make an anatomical gift knows of an objection to making an anatomical gift by a member of the person's class or a prior class.

(c) An anatomical gift by a person authorized under subsection (a) must be made by (i) a document of gift signed by the person or (ii) the person's telegraphic, recorded telephonic, or other recorded message, or other form of communication from the person that is contemporaneously reduced to writing and signed by the recipient.

(d) An anatomical gift by a person authorized under subsection (a) may be revoked by any member of the same or a prior class if, before procedures have begun for the removal of a part from the body of the decedent, the physician, surgeon, technician, or enucleator removing the part knows of the revocation.

(e) A failure to make an anatomical gift under subsection (a) is not an objection to the making of an anatomical gift.

COMMENT

Section 3 combines Sections 2(b) and 4(e) of the original Act, clarifies the limited right of revocation by next of kin and provides for the effect of

failure to make a gift by persons other than the donor. Subsection (a), as explained in Comments to the original Act:

> "... spells out the right of survivors to make the gift. Taking into account the very limited time available following death for the successful removal of such critical tissues as the kidney, the liver, and the heart, it seems desirable to eliminate all possible question by specifically stating the rights of and the priorities among the survivors."

The Act defines an anatomical gift as one "to take effect upon or after death." Survivors may execute the necessary documents of gift even prior to death. The following form is suggested:

Anatomical Gift by Next of Kin or
Guardian of the Person

Pursuant to the Uniform Anatomical Gift Act, I hereby make this anatomical gift from the body of _____ who died on
Name of Decedent
_____ at _____ in _____. The
Date Place City and State
marks in the appropriate squares and the words filled into the blanks below indicate my relationship to the decedent and my wishes respecting the gift.

I survive the decedent as [ ] spouse; [ ] adult son or daughter; [ ] parent; [ ] adult brother or sister; [ ] grandparent; [ ] guardian of the person.

I hereby give (check boxes applicable):

[ ] Any needed organs, tissues, or parts;
[ ] The following organs, tissues, or parts only
_____;
[ ] For the following purposes only
_____.

_____ _____
Date Signature of Survivor

_____
Address of Survivor

INSTRUCTIONS

See Section 2(b) Comments.

As described in the Comments to the original Act, subsection (b):

> "... provides for the effect of indicated objections by the decedent, and differences of view among the survivors. . . . In view of the fact that persons under 18 years of age are excluded from [Section 2] (a), it is especially desirable to cover with care the status of survivors, so younger decedents may be included."

"Knows" is substituted for "actual notice" in subsection (b) and throughout the Act. Knowledge, i.e., what is known, is a more useful concept than actual notice, i.e., what should be known.

Subsection (c) is Section 4(e) of the original Act with the addition of "other form of communication."

Subsection (d) limits the right of revocation of a gift made by other survivors pursuant to subsection (a). If there is no prior knowledge of the revocation by the individual removing the organ or tissue, the revocation is ineffective for any purpose and the anatomical gift may be procured and utilized as though no attempted revocation had occurred.

Subsection (e) is based on the concept that failure to act is ambiguous. This subsection removes that ambiguity. If a person of a prior class under subsection (a) is available but does not make a gift, subsection (e) authorizes a gift by a person of a lower class. If an anatomical gift is not made pursuant to Section 3, the provisions of Section 4 apply.

SECTION 4. AUTHORIZATION BY [CORONER] [MEDICAL EXAMINER] OR [LOCAL PUBLIC HEALTH OFFICIAL].

(a) The [coroner] [medical examiner] may release and permit the removal of a part from a body within that official's custody, for transplantation or therapy, if:

(1) the official has received a request for the part from a hospital, physician, surgeon, or procurement organization;

(2) the official has made a reasonable effort, taking into account the useful life of the part, to locate and examine the decedent's medical records and inform persons listed in Section 3(a) of their option to make, or object to making, an anatomical gift;

(3) the official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act as listed in Section 3(a);

(4) the removal will be by a physician, surgeon, or technician; but in the case of eyes, by one of them or by an enucleator;

(5) the removal will not interfere with any autopsy or investigation;

(6) the removal will be in accordance with accepted medical standards; and

(7) cosmetic restoration will be done, if appropriate.

(b) If the body is not within the custody of the [coroner] [medical examiner], the [local public health officer] may release and permit the removal of any part from a body in the [local public health officer's] custody for transplantation or therapy if the requirements of subsection (a) are met.

(c) An official releasing and permitting the removal of a part shall maintain a permanent record of the name of the decedent, the person making the request, the date and purpose of the request, the part requested, and the person to whom it was released.

COMMENT

Under Section 2(b) of the original Act, the last category of persons authorized to make an anatomical gift "in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class" was:

> "(6) any other person authorized or under obligation to dispose of the body."

This was a residuary authorization, to apply in situations in which an individual did not "give all or any part of his body for any purpose" and the next of kin or guardian of the person did not make a gift. This residuary authorization in the original Act has been deleted in the proposed amendments and replaced by the more limited provisions of new Section 4.

It is a residuary authorization for transplant or therapeutic purposes only.

The Task Force on Organ Transplantation reported that the number of potential donors annually is much smaller than the estimated one million deaths that occur each year in hospitals in the United States. The Hastings Center Report explained the uncertainty:

> "There is no generally accepted figure for the number of persons who die each year in the United States under circumstances that would allow them to serve as cadaver organ donors. Studies conducted by the Centers for Disease Control of the U.S. Public Health Service suggest that at least 12,000 [based upon an age range of brain-dead donors from five to fifty-five years] and perhaps as many as 27,000 [based upon an age range of brain-dead donors from birth to age sixty-five] deaths which would permit cadaver organ recovery occur each year in hospitals in the United States. . . . Given the available estimates of the size of the donor pool, the current system for procuring organs yields somewhere between nine and twenty percent of the possible pool of donors for various types of organs and tissues."

In several states, there are statutes authorizing the medical examiner to remove eyes or corneal tissue under specified circumstances. These statutes are constitutional, Georgia Lions Eye Bank Inc. v. Lavant, 255 Ga. 60, 335 S.E.2d 127, 129 (1985) - "The protection of the public health is one of the duties devolving upon the State as a sovereign power;" cert. denied 475 U.S. 1084,

106 S.Ct. 1464, 89 L. ed 721 (1986); Florida v. Powell, Fla., 497 So.2d 1188 (1986). There has been a significant increase in the number of corneal tissues available for transplant as a result of these statutes. For example, before passage of the statute in Georgia in 1978 approximately 25 corneal transplants were performed each year. In 1984, more than 1,000 persons regained their sight through transplants. In Florida, the increase was from 500 to more than 3,000.

Section 4 applies this statutory concept to the removal of "any part from a body" for transplant or therapy only. Specific circumstances must exist and conditions for removal are prescribed. The title of the public official is bracketed to permit each state to designate the appropriate official. There is a variation among existing statutes in the requirement to inform or seek consent of next of kin before organs or tissues are removed. In several states, including Georgia and Florida, there is no requirement to inform or seek consent if the other conditions prescribed by statute are satisfied. In others, information and consent are required. Subsection (a)(2) seeks to balance societal and family interests, that is, to increase the size of the donor pool and to give the family the opportunity to make or refuse to make an anatomical gift. The balance in this subsection is on the side of increasing the size of the donor pool. The duty to search the medical record or to inform next of kin is limited to "a reasonable effort taking into account the useful life of the part ... ." This reflects a concern expressed in the Comments to the original Act: "... the very limited time available following death for the successful recovery of such critical tissues ... ." The time will vary depending upon the part involved. In the case of corneal tissue, the time is within six hours after death. In the case of organs, the need, availability, and efficacy of life support systems must be considered. If removal must be immediate and there is no medical or other record and no person specified in Section 3(a) is present, the requirement of subsection (a)(2) is satisfied.

Subsection (b) is a companion provision to subsection (a) to cover similar situations but in cases where the [coroner] [medical examiner] is not authorized to act. Under both subsections, the removal and release is limited to transplant or therapeutic purposes.

SECTION 5. ROUTINE INQUIRY AND REQUIRED REQUEST; SEARCH AND NOTIFICATION.

(a) On or before admission to a hospital, or as soon as possible thereafter, a person designated by the hospital shall ask each patient who is at least [18] years of age: "Are you an organ or tissue donor?" If the answer is affirmative the person shall request a copy of the document of gift. If the answer is negative or there is no answer and the attending physician consents, the person designated shall discuss with the patient the option to make or refuse to make an anatomical gift. The answer to the question, an available copy of any document of gift or refusal to make an anatomical gift, and any other relevant information, must be placed in the patient's medical record.

(b) If, at or near the time of death of a patient, there is no medical record that the patient has made or refused to make an anatomical gift, the hospital [administrator] or a representative designated by the [administrator] shall discuss the option to make or refuse to make an anatomical gift and request the making of an anatomical gift pursuant to Section 3(a). The request must be made with reasonable discretion and sensitivity to the circumstances of the family. A request is not required if the gift is not suitable, based upon accepted medical standards, for a purpose specified in Section 6. An entry must be made in the medical record of the patient, stating the name and affiliation of the individual making the request, and of the name, response, and relationship to the patient of the person to whom the request was made. The [Commissioner of Health] shall [establish guidelines] [adopt regulations] to implement this subsection.

(c) The following persons shall make a reasonable search for a document of gift or other information identifying the bearer as a donor or as an individual who has refused to make an anatomical gift:

(1) a law enforcement officer, fireman, paramedic, or other emergency rescuer finding an individual who the searcher believes is dead or near death; and

(2) a hospital, upon the admission of an individual at or near the time of death, if there is not immediately available any other source of that information.

(d) If a document of gift or evidence of refusal to make an anatomical gift is located by the search required by subsection (c)(1), and the individual or body to whom it relates is taken to a hospital, the hospital must be notified of the contents and the document or other evidence must be sent to the hospital.

(e) If, at or near the time of death of a patient, a hospital knows that an anatomical gift has been made pursuant to Section 3(a) or a release and removal of a part has been permitted pursuant to Section 4, or that a patient or an individual identified as in transit to the hospital is a donor, the hospital shall notify the donee if one is named and known to the hospital; if not, it shall notify an appropriate procurement organization. The hospital shall cooperate in the implementation of the anatomical gift or release and removal of a part.

(f) A person who fails to discharge the duties imposed by this section is not subject to criminal or civil liability but is subject to appropriate administrative sanctions.

COMMENT

Each individual upon admission to a hospital is asked a series of routine questions, such as "Do you have insurance?" and "Are you allergic to any

drugs?" Subsection (a) adds to the list a routine inquiry about organ donation. It requires that a question be asked to identify organ donors and mandates discussion about organ donation, after the consent of the attending physician, with those who answer in the negative. If there is an affirmative response, a request is made for the organ donor card, driver's license, or other document of gift to determine if there are limitations, e.g., of a particular part (eyes) or of a particular purpose (transplant only) and to place a copy in the medical record as evidence of a valid gift to be effective at death. Although the amendment is limited to the admission process of hospitals, doctors are encouraged to include a similar routine inquiry of patients in their office procedures and hospitals are encouraged to extend the routine inquiry to outpatient, emergency, minor surgery, and similar procedures that do not require admission to the hospital.

Among the major findings of the Hastings Center Report was the following:

> "While many Americans believe that signing a donor card or other written directive assures that their wishes will be respected and acted upon, it does not. . . . Few, if any, organs are donated solely on the basis of donor cards or written directives. Written directives are only effective if hospital protocols and practices are designed to discover and act upon the contents of such directives."

Subsection (b) is a variation of the required request concept. All but a few states have passed a variety of required request statutes since 1985. Some specify that next of kin be informed of the option to give, others that a request to give be made. Federal law requires written protocols by hospitals participating in Medicare or Medicaid that "assure that families of potential organ donors are made aware of the option of organ or tissue donation and their option to decline." Subsection (b) requires a discussion of the option and, if there is no response, a request to make an anatomical gift. No discussion or request is necessary if the medical record discloses a prior gift or a refusal to make a gift or if the gift would not be suitable according to accepted medical standards.

The requirement is imposed on the institution. The title of the chief executive officer should be substituted for [administrator]. "Representative" is not limited to employees of the hospital. It may be a doctor, organ procurement specialist, etc.

Subsection (c) is based upon the Uniform Duties to Disabled Persons Act promulgated by NCCUSL in 1972. The purpose of that Act is to provide,

insofar as practicable, for a minimum level of duty towards persons in an unconscious state and toward those who are conscious but otherwise unable to communicate the existence of a condition requiring special treatment.

Subsection (d) reflects a conclusion of The Hastings Center Report:

> "Donor cards are often not found at accident sites, and even when they are, they are rarely located in hospital settings when needed."

This subsection requires that the hospital be notified as soon as a document of gift or refusal is located and that it be sent to the hospital with the individual or the body to which it relates, not taken to the hospital at some later time. Notification of the hospital of the existence and the contents of the document will enable the hospital to notify the organ procurement organization if there is a gift, that there is a potential donor, and the limitations, if any, of the gift.

Subsection (e) incorporates a recommendation of The Task Force Report pursuant to the National Organ Transplant Act of 1984 that "The Commission for Uniform State Laws develop model legislation that requires acute care hospitals to develop an affiliation with an organ procurement agency and to adopt routine inquiry policies and procedures." The present draft incorporates this recommendation in Sections 5 and 9.

Subsection (f) encourages hospital accrediting agencies, law enforcement, and other state agencies that have existing disciplinary procedures to impose sanctions for failure to discharge the duties imposed by Section 5.

SECTION 6. PERSONS WHO MAY BECOME DONEES; PURPOSES FOR WHICH ANATOMICAL GIFTS MAY BE MADE.

(a) The following persons may become donees of anatomical gifts for the purposes stated:

(1) a hospital, physician, surgeon, or procurement organization, for transplantation, therapy, medical or dental education, research, or advancement of medical or dental science;

(2) an accredited medical or dental school, college, or university for education, research, advancement of medical or dental science; or

(3) a designated individual for transplantation or therapy needed by that individual.

(b) An anatomical gift may be made to a designated donee or without designating a donee. If a donee is not designated or if the donee is not available or rejects the anatomical gift, the anatomical gift may be accepted by any hospital.

(c) If the donee knows of the decedent's refusal or contrary indications to make an anatomical gift or that an anatomical gift by a member of a class having priority to act is opposed by a member of the same class or a prior class under Section 3(a), the donee may not accept the anatomical gift.

COMMENT

Subsection (a) is Section 3 of the original Act changed to combine subsections (1) and (3) and to reverse the sequence of purposes for which anatomical gifts may be made, i.e., transplantation followed by therapy rather than education, research, therapy, or transplantation. This emphasizes transplantation as a primary purpose.

Subsection (b) is a restatement of Section 4(c) of the original Act which provided that the attending physician would be the donee under specified circumstances. Hospitals are substituted for the attending physician. This will facilitate coordination of procurement and utilization of the gift pursuant to Section 9.

Subsection (c) is substantially Section 2(c) of the original Act. The last sentence has been deleted because it does not apply to donees or purposes.

SECTION 7. DELIVERY OF DOCUMENT OF GIFT.

(a) Delivery of a document of gift during the donor's lifetime is not required for the validity of an anatomical gift.

(b) If an anatomical gift is made to a designated donee, the document of gift, or a copy, may be delivered to the donee to expedite the appropriate procedures after death. The document of gift, or a copy, may be deposited in any hospital, procurement organization, or registry office that accepts it for safekeeping or for facilitation of procedures after death. On request of an interested person, upon or after the donor's death, the person in possession shall allow the interested person to examine or copy the document of gift.

COMMENT

Subsection (a) is the last sentence of Section 4(b) of the original Act.

Subsection (b) is Section 5 of the original Act. The Comments to that subsection include the following:

> "... in the great majority of the states, no provision is made for filing, recording, or delivery to the donee. The gift is by implication effective without such formality. ... permissive filing provisions [are included] to expedite post mortem procedures."

SECTION 8. RIGHTS AND DUTIES AT DEATH.

(a) Rights of a donee created by an anatomical gift are superior to rights of others except with respect to autopsies under Section 11(b). A donee may accept or reject an anatomical gift. If a donee accepts an anatomical gift of an entire body, the donee, subject to the terms of the gift, may allow embalming and use of the body in funeral services. If the gift is of a part of a body, the donee, upon the death of the donor and before embalming, shall cause the part

to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the person under obligation to dispose of the body.

(b) The time of death must be determined by a physician or surgeon who attends the donor at death or, if none, the physician or surgeon who certifies the death. Neither the physician or surgeon who attends the donor at death nor the physician or surgeon who determines the time of death may participate in the procedures for removing or transplanting a part unless the document of gift designates a particular physician or surgeon pursuant to Section 2(d).

(c) If there has been an anatomical gift, a technician may remove any donated parts and an enucleator may remove any donated eyes or parts of eyes, after determination of death by a physician or surgeon.

COMMENT

In subsection (a) the first sentence is a restatement of Section 2(e) of the original Act. The remainder of the subsection is Section 7(a) of the original Act.

The Comments to the original Act state:

> "Subsection 2(e) recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others. . . . If the donee accepts the gift, absolute ownership vests in him. . . . The only restrictions are that the part must be removed without mutilation and the remainder of the body vests in the next of kin."

Subsection (b) is a restatement of Section 7(b) of the original Act.

The Comments to that original subsection include the following:

> "... because time is short following death for a transplant to be successful, the transplant team needs to remove the critical organ

as soon as possible. Hence there is a possible conflict of interest between the attending physician and the transplant team, and accordingly subsection (b) excludes the attending physician from any part in the transplant procedures. . . . However, the language of the provision does not prevent the donor's attending physician from communicating with the transplant team or other relevant donees. This communication is essential to permit the transfer of important knowledge concerning the donor ... ."

SECTION 9. COORDINATION OF PROCUREMENT AND USE. Each hospital in this State, after consultation with other hospitals and procurement organizations, shall establish agreements or affiliations for coordination of procurement and use of human bodies and parts.

COMMENT

Among the recommendations of the Task Force pursuant to the 1984 National Organ Transplant Act, was the following:

"The Joint Commission on the Accreditation of Hospitals develop a standard that requires all acute care hospitals to both have an affiliation with an organ procurement agency and have formal policies and procedures for identifying potential organ and tissue donors and providing next of kin with appropriate opportunities for donation."

The failure of a hospital to establish the agreements or affiliations specified in this section will not affect gifts made to the hospital or gifts by patients in the hospital.

SECTION 10. SALE OR PURCHASE OF PARTS PROHIBITED.

(a) A person may not knowingly, for valuable consideration, purchase or sell a part for transplantation or therapy, if removal of the part is intended to occur after the death of the decedent.

(b) Valuable consideration does not include reasonable payment for the removal, processing, disposal, preservation, quality control, storage, transportation, or implantation of a part.

(c) A person who violates this section is guilty of a [felony] and upon conviction is subject to a fine not exceeding [$50,000] or imprisonment not exceeding [five] years, or both.

COMMENT

The report of the Task Force pursuant to the 1984 National Organ Transplant Act recommended that states pass laws prohibiting "the sale of organs from cadavers or living donors within their boundaries."

This section is not limited to donors. It applies to any person and to both purchases and sales for transplantation or therapy. It does not cover the sale by living donors if removal is intended to occur before death.

A major finding of the Hastings Center Report is:

> "Altruism and a desire to benefit other members of the community are important moral reasons which motivate many to donate. Any perception on the part of the public that transplantation unfairly benefits those outside the community, those who are wealthy enough to afford transplantation, or that it is undertaken primarily with an eye toward profit rather than therapy will severely imperil the moral foundations, and thus the efficacy of the system."

SECTION 11. EXAMINATION, AUTOPSY, LIABILITY.

(a) An anatomical gift authorizes any reasonable examination necessary to assure medical acceptability of the gift for the purposes intended.

(b) The provisions of this [Act] are subject to the laws of this State governing autopsies.

(c) A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or a foreign country] or attempts in good faith to do so is not liable for that act in a civil action or criminal proceeding.

(d) An individual who makes an anatomical gift pursuant to Section 2 or 3 and the individual's estate are not liable for any injury or damage that may result from the making or the use of the anatomical gift.

COMMENT

Subsection (a) is Section 2(d) of the original Act.

The purpose of this subsection was explained in a Comment to the original Act:

> "[It] is added at the suggestion of members of the medical profession who regard a post mortem examination, to the extent necessary to ascertain freedom from disease that might cause injury to the new host for transplanted parts, as essential to good medical practice."

Subsection (b) is a restatement of Section 7(d) of the original Act. The Comments to the original Act gave the reason for this subsection:

> "[It] is necessary to preclude the frustration of the important medical examiners' duties in cases of death by suspected crime or violence. However, since such cases often can provide transplants of value to living persons, it may prove desirable in many if not most states to reexamine and amend, the medical examiner statutes to authorize and direct medical examiners to expedite their autopsy procedures in cases in which the public interest will not suffer."

In 1986 the Task Force on Organ Transplantation made a similar recommendation:

"To enact laws that would encourage coroners and medical examiners to give permission for organ and tissue procurement from cadavers under their jurisdiction."

Subsection (c) is a restatement of Section 7(c) of the original Act. It provided in part that "a person who acts in good faith ... ." Concern was expressed that the term person was not sufficiently descriptive and may be construed to exclude hospitals and individuals. The present provision is more explicit. "Attempts to act in good faith" has also been added to the subsection.

Subsection (d) provides for limitation of liability for the benefit of the individual making a gift under the Act and that individual's estate. Some states have amended the uniform act by describing an anatomical gift as a service and not a sale or disclaiming any warranty of the part that is given. Similar provisions are found in statutes relating to blood banks.

SECTION 12. TRANSITIONAL PROVISIONS. This [Act] applies to a document of gift, revocation, or refusal to make an anatomical gift signed by the donor or a person authorized to make or object to making an anatomical gift before, on, or after the effective date of this [Act].

SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 14. SEVERABILITY. If any provision of this [Act] or its application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 15. SHORT TITLE. This [Act] may be cited as the "Uniform Anatomical Gift Act (1987)."

SECTION 16. REPEALS. The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 17. EFFECTIVE DATE. This [Act] takes effect _____.

HOUSE BILL No. 5443

January 15, 1992, Introduced by Rep. Griffin and referred to the Committee on Public Health.

A bill to amend Act No. 368 of the Public Acts of 1978, entitled as amended

"Public health code,"

as amended, being sections 333.1101 to 333.25211 of the Michigan Compiled Laws, by adding sections 10111, 10113, 10115, 10117, 10119, 10121, 10123, 10125, 10127, 10129, 10131, 10133, 10135, and 10151; and to repeal certain parts of the act.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Act No. 368 of the Public Acts of 1978, as amended, being sections 333.1101 to 333.25211 of the Michigan Compiled Laws, is amended by adding sections 10111, 10113, 10115, 10117, 10119, 10121, 10123, 10125, 10127, 10129, 10131, 10133, 10135, and 10151 to read as follows:

SEC. 10111. AS USED IN THIS PART:

HOUSE BILL No. 5443

(A) "ANATOMICAL GIFT" MEANS A DONATION OF ALL OR PART OF A HUMAN BODY TO TAKE EFFECT UPON OR AFTER DEATH.

(B) "DECEDENT" MEANS A DECEASED INDIVIDUAL AND INCLUDES A STILLBORN INFANT OR FETUS.

(C) "DOCUMENT OF GIFT" MEANS A CARD, A STATEMENT ATTACHED TO OR IMPRINTED ON A MOTOR VEHICLE OPERATOR'S OR CHAUFFEUR'S LICENSE, A WILL, OR OTHER WRITING USED TO MAKE AN ANATOMICAL GIFT.

(D) "DONOR" MEANS AN INDIVIDUAL WHO MAKES AN ANATOMICAL GIFT OF ALL OR PART OF THE INDIVIDUAL'S BODY.

(E) "ENUCLEATOR" MEANS A PHYSICIAN LICENSED UNDER ARTICLE 15 WHO IS QUALIFIED TO REMOVE OR PROCESS EYES OR PARTS OF EYES.

(F) "HOSPITAL" MEANS A FACILITY LICENSED, ACCREDITED, OR APPROVED AS A HOSPITAL UNDER THE LAW OF ANY STATE OR A FACILITY OPERATED AS A HOSPITAL BY THE UNITED STATES GOVERNMENT, A STATE, OR A SUBDIVISION OF A STATE.

(G) "PART" MEANS AN ORGAN, TISSUE, EYE, BONE, ARTERY, BLOOD, FLUID, OR OTHER PORTION OF A HUMAN BODY.

(H) "PERSON" MEANS AN INDIVIDUAL, CORPORATION, BUSINESS TRUST, ESTATE, TRUST, PARTNERSHIP, JOINT VENTURE, ASSOCIATION, GOVERNMENT, GOVERNMENTAL SUBDIVISION OR AGENCY, OR ANY OTHER LEGAL OR COMMERCIAL ENTITY.

(I) "PHYSICIAN" MEANS AN INDIVIDUAL LICENSED OR OTHERWISE AUTHORIZED TO PRACTICE MEDICINE OR OSTEOPATHIC MEDICINE AND SURGERY UNDER THE LAWS OF ANY STATE.

(J) "PROCUREMENT ORGANIZATION" MEANS A PERSON LICENSED, ACCREDITED, OR APPROVED UNDER THE LAWS OF ANY STATE FOR PROCUREMENT, DISTRIBUTION, OR STORAGE OF HUMAN BODIES OR PARTS.

(K) "STATE" MEANS A STATE, TERRITORY, OR POSSESSION OF THE UNITED STATES, THE DISTRICT OF COLUMBIA, OR THE COMMONWEALTH OF PUERTO RICO.

(*l*) "TECHNICIAN" MEANS A HEALTH PROFESSIONAL LICENSED UNDER ARTICLE 15 AND QUALIFIED TO REMOVE OR PROCESS A PART.

SEC. 10113. (1) AN INDIVIDUAL WHO IS AT LEAST 18 YEARS OF AGE MAY DO 1 OF THE FOLLOWING:

(A) MAKE AN ANATOMICAL GIFT FOR ANY OF THE PURPOSES STATED IN SECTION 10121.

(B) LIMIT AN ANATOMICAL GIFT TO 1 OR MORE OF THE PURPOSES STATED IN SECTION 10121.

(C) REFUSE TO MAKE AN ANATOMICAL GIFT.

(2) AN ANATOMICAL GIFT MAY BE MADE ONLY BY A DOCUMENT OF GIFT SIGNED BY THE DONOR. IF THE DONOR CANNOT SIGN, THE DOCUMENT OF GIFT SHALL BE SIGNED BY ANOTHER INDIVIDUAL AND BY 2 WITNESSES, EACH OF WHOM SIGNS AT THE DIRECTION AND IN THE PRESENCE OF THE DONOR AND OF EACH OTHER, AND SHALL STATE THAT IT HAS BEEN SO SIGNED.

(3) IF A DOCUMENT OF GIFT IS ATTACHED TO OR IMPRINTED ON A DONOR'S MOTOR VEHICLE OPERATOR'S OR CHAUFFEUR'S LICENSE, THE DOCUMENT OF GIFT SHALL COMPLY WITH SUBSECTION (2). REVOCATION, SUSPENSION, EXPIRATION, OR CANCELLATION OF THE LICENSE DOES NOT INVALIDATE THE ANATOMICAL GIFT.

(4) A DOCUMENT OF GIFT MAY DESIGNATE A PARTICULAR PHYSICIAN TO CARRY OUT THE APPROPRIATE PROCEDURES. IN THE ABSENCE OF A DESIGNATION OR IF THE DESIGNEE IS NOT AVAILABLE, THE DONEE OR OTHER PERSON AUTHORIZED TO ACCEPT THE ANATOMICAL GIFT MAY EMPLOY OR AUTHORIZE ANY PHYSICIAN, TECHNICIAN, OR ENUCLEATOR TO CARRY OUT THE APPROPRIATE PROCEDURES.

(5) AN ANATOMICAL GIFT BY WILL TAKES EFFECT UPON DEATH OF THE TESTATOR, WHETHER OR NOT THE WILL IS PROBATED. IF, AFTER DEATH, THE WILL IS DECLARED INVALID FOR TESTAMENTARY PURPOSES, THE VALIDITY OF THE ANATOMICAL GIFT IS UNAFFECTED.

(6) A DONOR MAY AMEND OR REVOKE AN ANATOMICAL GIFT NOT MADE BY WILL ONLY BY 1 OR MORE OF THE FOLLOWING METHODS:

(A) A SIGNED STATEMENT.

(B) AN ORAL STATEMENT MADE IN THE PRESENCE OF AT LEAST 2 INDIVIDUALS.

(C) ANY FORM OF COMMUNICATION DURING A TERMINAL ILLNESS OR INJURY ADDRESSED TO A PHYSICIAN.

(D) THE DELIVERY OF A SIGNED STATEMENT TO A SPECIFIED DONEE TO WHOM A DOCUMENT OF GIFT HAD BEEN DELIVERED.

(7) THE DONOR OF AN ANATOMICAL GIFT MADE BY WILL MAY AMEND OR REVOKE THE GIFT IN THE MANNER PROVIDED BY LAW FOR AMENDMENT OR REVOCATION OF WILLS, OR AS PROVIDED IN SUBSECTION (6).

(8) AN ANATOMICAL GIFT THAT IS NOT REVOKED BY THE DONOR BEFORE DEATH IS IRREVOCABLE AND DOES NOT REQUIRE THE CONSENT OR CONCURRENCE OF ANY PERSON AFTER THE DONOR'S DEATH.

(9) AN INDIVIDUAL MAY REFUSE TO MAKE AN ANATOMICAL GIFT OF THE INDIVIDUAL'S BODY OR PART BY 1 OR MORE OF THE FOLLOWING:

(A) A WRITING SIGNED IN THE SAME MANNER AS A DOCUMENT OF GIFT.

(B) A STATEMENT ATTACHED TO OR IMPRINTED ON A DONOR'S MOTOR VEHICLE OPERATOR'S OR CHAUFFEUR'S LICENSE.

(C) ANY OTHER WRITING USED TO IDENTIFY THE INDIVIDUAL AS REFUSING TO MAKE AN ANATOMICAL GIFT.

(10) DURING A TERMINAL ILLNESS OR INJURY, A REFUSAL TO MAKE AN ANATOMICAL GIFT MAY BE AN ORAL STATEMENT OR OTHER FORM OF COMMUNICATION.

(11) IN THE ABSENCE OF CONTRARY INDICATIONS BY THE DONOR, AN ANATOMICAL GIFT OF A PART IS NEITHER A REFUSAL TO GIVE OTHER PARTS NOR A LIMITATION ON AN ANATOMICAL GIFT UNDER SECTION 10115 OR ON A REMOVAL OR RELEASE OF OTHER PARTS UNDER SECTION 10117.

(12) IN THE ABSENCE OF CONTRARY INDICATIONS BY THE DONOR, A REVOCATION OR AMENDMENT OF AN ANATOMICAL GIFT IS NOT A REFUSAL TO MAKE ANOTHER ANATOMICAL GIFT. IF THE DONOR INTENDS A REVOCATION TO BE A REFUSAL TO MAKE AN ANATOMICAL GIFT, THE DONOR SHALL MAKE THE REFUSAL PURSUANT TO SUBSECTION (9).

SEC. 10115. (1) ANY MEMBER OF THE FOLLOWING CLASSES OF INDIVIDUALS, IN THE ORDER OF PRIORITY LISTED, MAY MAKE AN ANATOMICAL GIFT OF ALL OR A PART OF A DECEDENT'S BODY FOR AN AUTHORIZED PURPOSE, UNLESS THE DECEDENT, AT THE TIME OF DEATH, HAS MADE AN UNREVOKED REFUSAL TO MAKE THAT ANATOMICAL GIFT:

(A) THE SPOUSE OF THE DECEDENT.

(B) AN ADULT SON OR DAUGHTER OF THE DECEDENT.

(C) EITHER PARENT OF THE DECEDENT.

(D) AN ADULT BROTHER OR SISTER OF THE DECEDENT.

(E) A GRANDPARENT OF THE DECEDENT.

(F) A GUARDIAN OF THE PERSON OF THE DECEDENT AT THE TIME OF DEATH.

(2) AN ANATOMICAL GIFT SHALL NOT BE MADE BY AN INDIVIDUAL LISTED IN SUBSECTION (1) IF 1 OR MORE OF THE FOLLOWING CONDITIONS ARE MET:

(A) AN INDIVIDUAL IN A PRIOR CLASS IS AVAILABLE AT THE TIME OF DEATH TO MAKE AN ANATOMICAL GIFT.

(B) THE INDIVIDUAL PROPOSING TO MAKE AN ANATOMICAL GIFT KNOWS OF A REFUSAL OR CONTRARY INDICATIONS BY THE DECEDENT.

(C) THE INDIVIDUAL PROPOSING TO MAKE AN ANATOMICAL GIFT KNOWS OF AN OBJECTION TO MAKING AN ANATOMICAL GIFT BY A MEMBER OF THE INDIVIDUAL'S CLASS OR A PRIOR CLASS.

(3) AN ANATOMICAL GIFT BY AN INDIVIDUAL AUTHORIZED UNDER SUBSECTION (1) SHALL BE MADE BY 1 OF THE FOLLOWING METHODS:

(A) A DOCUMENT OF GIFT SIGNED BY THE INDIVIDUAL.

(B) THE INDIVIDUAL'S TELEGRAPHIC, RECORDED TELEPHONIC, OR OTHER RECORDED MESSAGE, OR OTHER FORM OF COMMUNICATION FROM THE INDIVIDUAL THAT IS CONTEMPORANEOUSLY REDUCED TO WRITING AND SIGNED BY THE RECIPIENT OF THE MESSAGE.

(4) AN ANATOMICAL GIFT BY AN INDIVIDUAL AUTHORIZED UNDER SUBSECTION (1) MAY BE REVOKED BY ANY MEMBER OF THE SAME OR A PRIOR CLASS BEFORE PROCEDURES HAVE BEGUN FOR THE REMOVAL OF A PART FROM THE BODY OF THE DECEDENT BY COMMUNICATING THE INTENT TO REVOKE THE ANATOMICAL GIFT TO THE PHYSICIAN, TECHNICIAN, OR ENUCLEATOR REMOVING THE PART.

(5) A FAILURE TO MAKE AN ANATOMICAL GIFT UNDER SUBSECTION (1) IS NOT AN OBJECTION TO THE MAKING OF AN ANATOMICAL GIFT.

SEC. 10117. (1) A MEDICAL EXAMINER MAY RELEASE AND PERMIT THE REMOVAL OF A PART FROM A BODY WITHIN THE MEDICAL EXAMINER'S CUSTODY, FOR TRANSPLANTATION OR THERAPY, IF ALL OF THE FOLLOWING REQUIREMENTS ARE MET:

(A) THE MEDICAL EXAMINER HAS RECEIVED A REQUEST FOR THE PART FROM A HOSPITAL, PHYSICIAN, OR PROCUREMENT ORGANIZATION.

(B) THE MEDICAL EXAMINER HAS MADE A REASONABLE EFFORT, TAKING INTO ACCOUNT THE USEFUL LIFE OF THE PART, TO LOCATE AND EXAMINE THE DECEDENT'S MEDICAL RECORDS AND INFORM INDIVIDUALS LISTED IN SECTION 10115(1) OF THEIR OPTION TO MAKE, OR OBJECT TO MAKING, AN ANATOMICAL GIFT.

(C) THE MEDICAL EXAMINER DOES NOT KNOW OF A REFUSAL OR CONTRARY INDICATION BY THE DECEDENT OR OBJECTION BY AN INDIVIDUAL HAVING PRIORITY TO ACT AS LISTED IN SECTION 10115(1).

(D) THE REMOVAL WILL BE BY A PHYSICIAN OR TECHNICIAN, OR IN THE CASE OF EYES, BY AN ENUCLEATOR.

(E) THE REMOVAL WILL NOT INTERFERE WITH ANY AUTOPSY OR INVESTIGATION.

(F) THE REMOVAL WILL BE IN ACCORDANCE WITH ACCEPTED MEDICAL STANDARDS.

(G) COSMETIC RESTORATION WILL BE DONE, IF APPROPRIATE.

(2) IF A BODY IS NOT WITHIN THE CUSTODY OF THE MEDICAL EXAMINER, THE LOCAL HEALTH OFFICER MAY RELEASE AND PERMIT THE REMOVAL OF ANY PART FROM THE BODY IN THE LOCAL HEALTH OFFICER'S

CUSTODY FOR TRANSPLANTATION OR THERAPY IF THE LOCAL HEALTH OFFICER COMPLIES WITH THE REQUIREMENTS OF SUBSECTION (1) IN THE SAME MANNER AS A MEDICAL EXAMINER.

(3) A MEDICAL EXAMINER OR LOCAL HEALTH OFFICER RELEASING AND PERMITTING THE REMOVAL OF A PART UNDER THIS SECTION SHALL MAINTAIN A PERMANENT RECORD OF THE NAME OF THE DECEDENT, THE NAME OF THE PERSON MAKING THE REQUEST, THE DATE AND PURPOSE OF THE REQUEST, THE PART REQUESTED, AND THE NAME OF THE PERSON TO WHOM IT WAS RELEASED.

(4) THIS SECTION DOES NOT APPLY TO THE REMOVAL OF A CORNEA PURSUANT TO PART 102.

SEC. 10119. (1) UPON OR BEFORE ADMISSION TO A HOSPITAL, OR AS SOON AS POSSIBLE AFTER ADMISSION TO A HOSPITAL, AN INDIVIDUAL DESIGNATED BY THE HOSPITAL SHALL ASK EACH PATIENT WHO IS AT LEAST 18 YEARS OF AGE THE FOLLOWING QUESTION: "ARE YOU AN ORGAN OR TISSUE DONOR?" IF THE ANSWER IS AFFIRMATIVE, THE PERSON SHALL REQUEST A COPY OF THE DOCUMENT OF GIFT. IF THE ANSWER IS NEGATIVE OR THERE IS NO ANSWER AND THE ATTENDING PHYSICIAN CONSENTS, THE PERSON DESIGNATED BY THE HOSPITAL SHALL DISCUSS WITH THE PATIENT THE OPTION TO MAKE OR REFUSE TO MAKE AN ANATOMICAL GIFT. THE ANSWER TO THE QUESTION, AN AVAILABLE COPY OF ANY DOCUMENT OF GIFT OR REFUSAL TO MAKE AN ANATOMICAL GIFT, AND ANY OTHER RELEVANT INFORMATION SHALL BE PLACED IN THE PATIENT'S MEDICAL RECORD.

(2) IF, AT OR NEAR THE TIME OF DEATH OF A PATIENT, THERE IS NO MEDICAL RECORD THAT THE PATIENT HAS MADE OR REFUSED TO MAKE AN ANATOMICAL GIFT, THE HOSPITAL ADMINISTRATOR OR A REPRESENTATIVE

DESIGNATED BY THE HOSPITAL ADMINISTRATOR SHALL DISCUSS THE OPTION TO MAKE OR REFUSE TO MAKE AN ANATOMICAL GIFT AND REQUEST THE MAKING OF AN ANATOMICAL GIFT PURSUANT TO SECTION 10115(1). THE REQUEST SHALL BE MADE WITH REASONABLE DISCRETION AND SENSITIVITY TO THE CIRCUMSTANCES OF THE FAMILY. A REQUEST UNDER THIS SUBSECTION IS NOT REQUIRED IF THE GIFT IS NOT SUITABLE BASED UPON ACCEPTED MEDICAL STANDARDS, FOR A PURPOSE SPECIFIED IN SECTION 10121. AN ENTRY SHALL BE MADE IN THE MEDICAL RECORD OF THE PATIENT, STATING THE NAME AND AFFILIATION OF THE INDIVIDUAL MAKING THE REQUEST, AND THE NAME, RESPONSE, AND RELATIONSHIP TO THE PATIENT OF THE INDIVIDUAL TO WHOM THE REQUEST WAS MADE. THE DIRECTOR SHALL PROMULGATE RULES TO IMPLEMENT THIS SUBSECTION.

(3) THE FOLLOWING PERSONS SHALL MAKE A REASONABLE SEARCH FOR A DOCUMENT OF GIFT OR OTHER INFORMATION IDENTIFYING THE BEARER AS A DONOR OR AS AN INDIVIDUAL WHO HAS REFUSED TO MAKE AN ANATOMICAL GIFT:

(A) A LAW ENFORCEMENT OFFICER, FIRE FIGHTER, INDIVIDUAL LICENSED UNDER SECTION 20950, OR OTHER EMERGENCY RESCUER FINDING AN INDIVIDUAL WHO THE SEARCHER BELIEVES IS DEAD OR NEAR DEATH.

(B) A HOSPITAL, UPON THE ADMISSION OF AN INDIVIDUAL AT OR NEAR THE TIME OF DEATH, IF THERE IS NOT IMMEDIATELY AVAILABLE ANY OTHER SOURCE OF THAT INFORMATION.

(4) IF A DOCUMENT OF GIFT OR EVIDENCE OF REFUSAL TO MAKE AN ANATOMICAL GIFT IS LOCATED BY THE SEARCH REQUIRED BY SUBSECTION (3)(A), AND THE INDIVIDUAL OR BODY TO WHOM IT RELATES IS TAKEN TO A HOSPITAL, THE INDIVIDUAL FINDING THE INFORMATION

SHALL NOTIFY THE HOSPITAL OF THE INFORMATION AND SEND THE DOCUMENT OR OTHER EVIDENCE TO THE HOSPITAL.

(5) IF, AT OR NEAR THE TIME OF DEATH OF A PATIENT, A HOSPITAL KNOWS THAT AN ANATOMICAL GIFT HAS BEEN MADE PURSUANT TO SECTION 10115(1) OR A RELEASE AND REMOVAL OF A PART HAS BEEN PERMITTED PURSUANT TO SECTION 10117, OR THAT A PATIENT OR AN INDIVIDUAL IDENTIFIED AS IN TRANSIT TO THE HOSPITAL IS A DONOR, THE HOSPITAL SHALL NOTIFY THE DONEE IF A DONEE IS NAMED AND KNOWN TO THE HOSPITAL; IF NOT, IT SHALL NOTIFY AN APPROPRIATE PROCUREMENT ORGANIZATION. THE HOSPITAL SHALL COOPERATE IN THE IMPLEMENTATION OF THE ANATOMICAL GIFT OR RELEASE AND REMOVAL OF A PART.

(6) A PERSON WHO FAILS TO DISCHARGE THE DUTIES IMPOSED BY THIS SECTION IS NOT SUBJECT TO CRIMINAL OR CIVIL LIABILITY BUT IS SUBJECT TO APPROPRIATE ADMINISTRATIVE SANCTIONS.

SEC. 10121. (1) THE FOLLOWING PERSONS MAY BECOME DONEES OF ANATOMICAL GIFTS FOR THE PURPOSES STATED:

(A) A HOSPITAL, PHYSICIAN, OR PROCUREMENT ORGANIZATION, FOR TRANSPLANTATION, THERAPY, MEDICAL OR DENTAL EDUCATION, RESEARCH, OR ADVANCEMENT OF MEDICAL OR DENTAL SCIENCE.

(B) AN ACCREDITED MEDICAL OR DENTAL SCHOOL, COLLEGE, OR UNIVERSITY FOR EDUCATION, RESEARCH, OR ADVANCEMENT OF MEDICAL OR DENTAL SCIENCE.

(C) A DESIGNATED INDIVIDUAL FOR TRANSPLANTATION OR THERAPY NEEDED BY THAT INDIVIDUAL.

(2) AN ANATOMICAL GIFT MAY BE MADE TO A DESIGNATED DONEE OR WITHOUT DESIGNATING A DONEE. IF A DONEE IS NOT DESIGNATED OR IF

THE DONEE IS NOT AVAILABLE OR REJECTS THE ANATOMICAL GIFT, THE ANATOMICAL GIFT MAY BE ACCEPTED BY ANY HOSPITAL.

(3) IF A DONEE KNOWS OF THE DECEDENT'S REFUSAL OR CONTRARY INDICATIONS TO MAKE AN ANATOMICAL GIFT OR THAT AN ANATOMICAL GIFT BY A MEMBER OF A CLASS HAVING PRIORITY TO ACT IS OPPOSED BY A MEMBER OF THE SAME CLASS OR A PRIOR CLASS UNDER SECTION 10115(1), THE DONEE SHALL NOT ACCEPT THE ANATOMICAL GIFT.

SEC. 10123. (1) DELIVERY OF A DOCUMENT OF GIFT DURING THE DONOR'S LIFETIME IS NOT REQUIRED FOR THE VALIDITY OF AN ANATOMICAL GIFT.

(2) IF AN ANATOMICAL GIFT IS MADE TO A DESIGNATED DONEE, THE DOCUMENT OF GIFT, OR A COPY, MAY BE DELIVERED TO THE DONEE TO EXPEDITE THE APPROPRIATE PROCEDURES AFTER DEATH. THE DOCUMENT OF GIFT, OR A COPY, MAY BE DEPOSITED IN ANY HOSPITAL, PROCUREMENT ORGANIZATION, OR REGISTRY OFFICE THAT ACCEPTS IT FOR SAFEKEEPING OR FOR FACILITATION OF PROCEDURES AFTER DEATH. ON REQUEST OF AN INTERESTED PERSON, UPON OR AFTER THE DONOR'S DEATH, THE PERSON IN POSSESSION SHALL ALLOW THE INTERESTED PERSON TO EXAMINE OR COPY THE DOCUMENT OF GIFT.

SEC. 10125. (1) RIGHTS OF A DONEE CREATED BY AN ANATOMICAL GIFT ARE SUPERIOR TO RIGHTS OF OTHERS EXCEPT WITH RESPECT TO AUTOPSIES AS PROVIDED UNDER SECTION 10131(2). A DONEE MAY ACCEPT OR REJECT AN ANATOMICAL GIFT. IF A DONEE ACCEPTS AN ANATOMICAL GIFT OF AN ENTIRE BODY, THE DONEE, SUBJECT TO THE TERMS OF THE GIFT, MAY ALLOW EMBALMING AND USE OF THE BODY IN FUNERAL SERVICES. IF THE GIFT IS OF A PART OF A BODY, THE DONEE, UPON THE DEATH OF THE DONOR AND BEFORE EMBALMING, SHALL CAUSE THE PART

TO BE REMOVED WITHOUT UNNECESSARY MUTILATION. AFTER REMOVAL OF THE PART, CUSTODY OF THE REMAINDER OF THE BODY VESTS IN THE PERSON UNDER OBLIGATION TO DISPOSE OF THE BODY.

(2) THE TIME OF DEATH SHALL BE DETERMINED BY A PHYSICIAN WHO ATTENDS THE DONOR AT DEATH OR, IF NONE, THE PHYSICIAN WHO CERTIFIES THE DEATH. NEITHER THE PHYSICIAN WHO ATTENDS THE DONOR AT DEATH NOR THE PHYSICIAN WHO DETERMINES THE TIME OF DEATH SHALL PARTICIPATE IN THE PROCEDURES FOR REMOVING OR TRANSPLANTING A PART UNLESS THE DOCUMENT OF GIFT DESIGNATES A PARTICULAR PHYSICIAN PURSUANT TO SECTION 10113(4).

(3) IF THERE HAS BEEN AN ANATOMICAL GIFT, A TECHNICIAN MAY REMOVE ANY DONATED PARTS AND AN ENUCLEATOR MAY REMOVE ANY DONATED EYES OR PARTS OF EYES, AFTER DETERMINATION OF DEATH BY A PHYSICIAN.

SEC. 10127. EACH HOSPITAL IN THIS STATE, AFTER CONSULTATION WITH OTHER HOSPITALS AND PROCUREMENT ORGANIZATIONS, SHALL ESTABLISH AGREEMENTS OR AFFILIATIONS FOR COORDINATION OF PROCUREMENT AND USE OF HUMAN BODIES AND PARTS.

SEC. 10131. (1) AN ANATOMICAL GIFT AUTHORIZES ANY REASONABLE EXAMINATION NECESSARY TO ASSURE MEDICAL ACCEPTABILITY OF THE GIFT FOR THE PURPOSES INTENDED.

(2) THIS PART IS SUBJECT TO THE LAWS OF THIS STATE GOVERNING AUTOPSIES.

(3) A HOSPITAL, PHYSICIAN, MEDICAL EXAMINER, LOCAL HEALTH OFFICER, ENUCLEATOR, TECHNICIAN, OR OTHER PERSON WHO ACTS IN ACCORDANCE WITH THIS PART OR WITH THE APPLICABLE ANATOMICAL GIFT LAW OF ANOTHER STATE OR A FOREIGN COUNTRY OR ATTEMPTS IN GOOD

FAITH TO DO SO IS NOT LIABLE FOR THAT ACT IN A CIVIL ACTION OR CRIMINAL PROCEEDING.

(4) AN INDIVIDUAL WHO MAKES AN ANATOMICAL GIFT PURSUANT TO SECTION 10113 OR 10115 AND THE INDIVIDUAL'S ESTATE ARE NOT LIABLE FOR ANY INJURY OR DAMAGE THAT MAY RESULT FROM THE MAKING OR THE USE OF THE ANATOMICAL GIFT.

SEC. 10133. THE AMENDATORY ACT THAT ADDED THIS SECTION APPLIES TO A DOCUMENT OF GIFT, A REVOCATION, OR A REFUSAL TO MAKE AN ANATOMICAL GIFT BY THE DONOR OR AN INDIVIDUAL AUTHORIZED TO MAKE OR OBJECT TO MAKING AN ANATOMICAL GIFT SIGNED ON OR AFTER THE EFFECTIVE DATE OF THIS SECTION.

SEC. 10135. THIS PART SHALL BE APPLIED AND CONSTRUED TO EFFECTUATE ITS GENERAL PURPOSE TO MAKE UNIFORM THE LAW WITH RESPECT TO THE SUBJECT OF THIS PART AMONG STATES ENACTING IT.

SEC. 10151. THIS PART SHALL BE KNOWN AND MAY BE CITED AS THE "UNIFORM ANATOMICAL GIFT ACT".

Section 2. Sections 10101 to 10109 of Act No. 368 of the Public Acts of 1978, being sections 333.10101 to 333.10109 of the Michigan Compiled Laws, are repealed.

OWNERSHIP OF A MOTORCYCLE FOR PURPOSES OF RECEIVING NO-FAULT INSURANCE BENEFITS PURSUANT TO MICHIGAN COMPILED LAWS SECTION 500.3101(2)(g).

Introduction

In September 1993, the Michigan Court of Appeals decided Auto-Owners Insurance Company v. Hoadley, 201 Mich. App. 555 (1993) (See Appendix A). In this case, the Court of Appeals held that a person having the use of a motorcycle for more than thirty days is not an owner of the motorcycle under MCL 500.3101(2)(g). (See Appendix B). As a result, the user is not barred from receiving personal protection insurance benefits if the motorcycle is not insured. In reaching this decision, the Court of Appeals considered the plain meaning of the statute provision defining the term "owner." The result, however, reveals an inconsistency between the treatment of motorcycles and the treatment of other motor vehicles when determining ownership of the vehicle, and permits owners of uninsured motorcycles to obtain no-fault benefits simply by transferring legal title to a third party. The Michigan Law Revision Commission recommends a revision of the definition of an "owner" to prevent this result.

Current Law

Section 3101(2)(g) of Act No. 218 of the Public Acts of 1956, MCL 500.3101(2)(g); delineates three categories of persons who are "owners" for the purposes of the act:

> (i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. (Emphasis added.)

For purposes of this report, that portion of Act No. 218 of the Public Acts of 1956 that refers to no-fault insurance coverage shall be referred to as the no-fault act. The no-fault act defines "motorcycles" and "motor vehicles" as mutually exclusive categories of "vehicles."

Consequently, under the no-fault act's owner definition, renters or users of motor vehicles for more than thirty days, but not renters or users of motorcycles for more than thirty days, are "owners." Similarly, possessors of motor vehicles under installment sales contracts, but not possessors of motorcycles under installment sales contracts, are "owners." Legal title-holders to motor vehicles and motorcycles are "owners," except legal title-holders to motor vehicles who, as a business, lease motor vehicles to other users for more than thirty days. Legal title-holders to motorcycles who, as a business, lease motorcycles to other users for more than thirty days retain "ownership."

Consequences of this dissimilar treatment emerge with the application of MCL 500.3113(b). Under this law, a person injured in an accident is not entitled to personal protection insurance benefits if "[t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by... section 3101 or 3103 was not in effect." (Emphasis added.) An injured owner of a motor vehicle or motorcycle is not entitled to personal protection insurance benefits if he or she does not have insurance for the vehicle.

Motorcycle renters, users and possessors by virtue of an installment sales contract have a "loophole," as the Hoadley court noted, by which they can fail to purchase insurance for the motorcycle and still receive no-fault insurance payments. Because the aforementioned renters, users, and possessors of motorcycles are not owners, MCL 500.3113(b) does not exclude them from benefits. Consequently, their lack of insurance will not bar payment of personal protection insurance benefits.

Under current law, motorcycle users may guarantee entitlement to personal protection insurance benefits by transferring legal title to a third party. The third party owner's failure to purchase insurance for the motorcycle has no impact on the user's entitlement to no-fault benefits.

The Hoadley Ruling

This is in fact what happened in Auto-Owners Insurance Company v. Hoadley, 201 Mich. App. 544 (1993). Approximately one year prior to his accident, the motorcycle user transferred the legal title of the motorcycle to his mother as payment for a debt. As owner of the vehicle, the mother did not purchase insurance for the motorcycle.

The user was involved in an accident while riding the motorcycle. He alleged that because he was not the owner of the motorcycle, as defined in MCL 500.3101(2)(g), he was not precluded by MCL 500.3113(b), from receiving personal protection insurance benefits.

The defendant insurance company argued that the user was the owner of the motorcycle under MCL 500.3101(2)(g), because he had use of it for more than thirty days.

In deciding this case, the Michigan Court of Appeals looked to the plain meaning of the no-fault act. It noted that the definition of "owner" included persons using motor vehicles for more than thirty days, but not persons using motorcycles for the same time period. The Court of Appeals concluded that the legislature intended the distinction and that the injured user in this case was not an owner. Consequently, he was entitled to personal protection benefits.

Recommendations

The Commission recommends that, solely for the purpose of determining eligibility for personal injury protection benefits, the definition of "owner" in Michigan's no-fault act be expanded to include motorcycle users, or renters, as well as motorcycle possessors by virtue of installment sales contracts. For all other purposes, the definition of "owner" can remain unchanged. This can be accomplished by adding a new subsection (iv) to MCL 500.3101(2)(g), which specifies that, solely for the purpose of determining eligibility for personal injury protection benefits under MCL 500.3114(5), an "owner" includes motorcycle users, renters, or possessors for a period greater than 30 days.

Michigan should adopt the amended statute because it would prevent uninsured motorcycle users from obtaining personal protection payments by simply transferring legal title to third party. Consequently, the amended statute would encourage persons who use motorcycles in excess of thirty days to purchase insurance, a policy that animates the current statute.

APPENDIX A

AUTO-OWNERS INSURANCE COMPANY v HOADLEY

HOADLEY v AUTO-OWNERS INSURANCE COMPANY

Docket Nos. 141580, 142854. Submitted June 3, 1993, at Lansing. Decided September 20, 1993, at 9:35 A.M.

Auto-Owners Insurance Company, the no-fault insurer of a motor vehicle involved in an accident with an uninsured motorcycle ridden by Ronald T. Hoadley, brought an action in the Genesee Circuit Court against Hoadley, seeking a declaration that it had no liability to Hoadley for personal protection insurance benefits under the no-fault act. Hoadley, who was not the title holder or registrant of the motorcycle, brought an action against Auto-Owners in the same court, seeking personal protection insurance benefits. The court, Valdemar L. Washington, J., granted summary disposition for Auto-Owners in both actions. Hoadley appealed in each case. The appeals were consolidated.

The Court of Appeals *held:*

MCL 500.3113(b); MSA 24.13113(b) provides that a person is not entitled to personal protection insurance benefits for accidental bodily injury if at the time of the accident the person was the owner or registrant of an uninsured motorcycle involved in the accident. The term "owner" is defined by MCL 500.3101(2)(g)(i); MSA 24.13101(2)(g)(i) as a person renting or having the use of a motor vehicle for a period longer than thirty days. "Owner" is also defined by MCL 500.3101(2)(g)(ii); MSA 24.13101(2)(g)(ii) as a person who holds the legal title to a vehicle. MCL 500.3101(2)(c); MSA 24.13101(2)(c) defines "motorcycle" as a vehicle with no more than three wheels and powered by a motor that exceeds fifty cubic centimeters in piston displacement, and MCL 500.3101(2)(e); MSA 24.13101(2)(e) defines "motor vehicle" to not include motorcycles. Under

REFERENCES

Am Jur 2d, Automobile Insurance §§ 340-356.

Effect of statutory exclusion, from personal injury protection of no-fault insurance coverage, of owner, registrant, or occupant of uninsured vehicle. 27 ALR4th 176.

What constitutes "motor vehicle" for purposes of no-fault insurance. 73 ALR4th 1053.

the specific definitions of the terms "owner," "motor vehicle," and "vehicle" in the no-fault act, only the person who holds legal title to an uninsured motorcycle may be denied personal protection insurance benefits for accidental bodily injury under MCL 500.3113(b); MSA 24.13113(b).

In this case, because Hoadley is not the owner of the motorcycle, he is not precluded by MCL 500.3113(b); MSA 24.13113(b) from seeking personal protection insurance benefits for the injuries he sustained.

Reversed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — UNINSURED MOTORCYCLES.

Personal protection insurance benefits under the no-fault act are available to a rider of an uninsured motorcycle for accidental bodily injury sustained in an accident involving an insured automobile only if the rider does not hold legal title to the motorcycle (MCL 500.3101[2][c], [e], [g][i], [ii], 500.3113[b]; MSA 24.13101[2][c], [e], [g][i], [ii], 24.13113[b]).

Charles F. Filipiak, for Auto-Owners Insurance Company.

David S. Leyton, for Ronald T. Hoadley.

Before: REILLY, P.J., and SAWYER and P. J. CLULO,* JJ.

SAWYER, J. The circuit court granted summary disposition in favor of Auto-Owners Insurance Company in its action for declaratory judgment and in Ronald Hoadley's action for payment of personal protection insurance benefits under the no-fault act. Hoadley now appeals and we reverse.

Hoadley was operating a motorcycle when he became involved in an accident with a motor vehicle insured by Auto-Owners. The motorcycle at the time of the accident was not insured and was

* Circuit judge, sitting on the Court of Appeals by assignment.

titled in Hoadley's mother's name.[1] Hoadley sought the payment of personal protection insurance benefits under MCL 500.3114(5); MSA 24.13114(5). Auto-Owners denied coverage under the provisions of MCL 500.3113(b); MSA 24.13113(b), which denies personal protection insurance benefits to the owner or registrant of a motor vehicle or motorcycle who has failed to have the required insurance coverage. That statute provides in pertinent part as follows:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The *person was the owner* or registrant *of a* motor vehicle or *motorcycle* involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect. [MCL 500.3113; MSA 24.13113. Emphasis added.]

It is undisputed that the insurance required under § 3103 was not in effect. It is disputed, however, whether Hoadley comes within the definition of "owner" of a motorcycle.

The no-fault act, under MCL 500.3101(2)(g); MSA 24.13101(2)(g), defines the term "owner" as follows:

> (2) As used in this Chapter:
>
> * * *
>
> (g) "Owner" means any of the following:
>
> (i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (ii) A person who holds the legal title to a

[1] Hoadley had previously held title to the motorcycle, but had transferred title to his mother approximately one year before the accident in repayment of a debt.

vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

Auto-Owners argues that Hoadley is an owner of the motorcycle, although title to the motorcycle was held by his mother, because he had use of the motorcycle for a period greater than thirty days, thus coming within the definition of "owner" under § 3101(2)(g)(i). We disagree. That definition, as well as the definition contained in subdivision iii, refers to the owner of a "motor vehicle," while the definition of "owner" in subdivision ii refers to the person who holds legal title to a "vehicle." Section 3101(2) also defines the terms "motorcycle" and "motor vehicle":

(c) *"Motorcycle" means a vehicle* having a saddle or seat for the use of the rider, designed to travel on not more than 3 wheels in contact with the ground, which is equipped with a motor that exceeds 50 cubic centimeters piston displacement. The wheels on any attachment to the vehicle shall not be considered as wheels in contact with the ground. Motorcycle does not include a moped, as defined in section 32b of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan Compiled Laws.

* * *

(e) *"Motor vehicle" means a vehicle,* including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. *Motor vehicle does not include a motorcycle* or a moped, as defined in section 32b of Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan

> Compiled Laws. Motor vehicle does not include a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan vehicle code pursuant to section 216 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.216 of the Michigan Compiled Laws.

In reading these definitions, it can be seen that the term "vehicle" is not interchangeable with "motor vehicle." Rather, "vehicle" is a broad category of objects that includes both motorcycles and motor vehicles. "Motor vehicle" is, on the other hand, a narrower category of objects that specifically excludes motorcycles by definition. Thus, while both motorcycles and motor vehicles are vehicles, a motorcycle is not a motor vehicle.

Returning to the definition of "owner" under § 3101(2)(g), the Legislature employs both the term "vehicle" and the term "motor vehicle" in its definitions. Specifically, two of the definitions of "owner," that relating to persons renting a motor vehicle or having use for a period greater than thirty days and persons who have immediate right of possession of a motor vehicle under a sales contract, involve only "motor vehicles." The remaining definition, referring to persons who hold legal title to a vehicle, employs the broader term "vehicle." Inasmuch as the Legislature had previously within the same section defined "motor vehicles" as being a subset of the category of "vehicles," we must assume that the Legislature understood that the two terms were not interchangeable. Accordingly, we must also conclude that the Legislature intentionally used the term "motor vehicle" in two definitions of the term "owner," while using the broader term "vehicle" in the remaining definition of owner. Thus, the Legislature must have intended one definition of owner to

apply to all vehicles, while the remaining two definitions were only to apply to motor vehicles. Therefore, it must also be concluded that only one of the definitions of "owner" applies to motorcycles, namely the definition contained in subdivision ii, which refers to persons who hold legal title to a vehicle. Accordingly, while persons other than the individual who holds legal title to a motor vehicle may be the owner of a motor vehicle under the no-fault act, only those persons who hold legal title to a motorcycle are owners of the motorcycle under the no-fault act.

Because only the person who holds legal title to a motorcycle is the owner of that motorcycle under the no-fault act, it necessarily follows that Ronald Hoadley was not an owner of the motorcycle because legal title to the motorcycle was held by his mother. Returning to § 3113(b), only a person who is the owner or registrant of a motorcycle is excluded from receiving personal protection insurance benefits for the failure to maintain the insurance required under the act. Because Ronald Hoadley is neither the owner nor the registrant of the motorcycle, he is not precluded under § 3113(b) from obtaining personal protection insurance benefits.

Auto-Owners argues that we should read the no-fault act in pari materia with the Vehicle Code in defining the term "owner" and that, if we do so, Ronald Hoadley comes within the definition of owner of the motorcycle. There are certainly cases arising under the no-fault act in which this Court will look to the Vehicle Code for guidance in determining the meaning of a term used in the no-fault act or in an insurance policy. See, e.g., *Stanke v State Farm Mutual Automobile Ins Co,* 200 Mich App 307; 503 NW2d 758 (1993) (use of the definition of "owner" under the Vehicle Code,

MCL 257.37[a]; MSA 9.1837[a], in interpreting the definition of a non-owned car under an insurance policy).

In the case at bar, however, the no-fault act itself provides specific definitions of the terms involved. Specifically, the Legislature chose to limit the definition of "owner" where the person has use of the vehicle for more than thirty days to those circumstances involving motor vehicles only, while elsewhere providing a definition of the word "owner" that applies to all vehicles. The Legislature provided a specific definition of the word "owner" and specifically chose which portions of that definition were to apply to motor vehicles only and which portions of the definition were to apply to all vehicles, including motorcycles. It would therefore be inappropriate to look to the Vehicle Code in order to apply a definition of "owner" to motorcycles that the Legislature specifically limited to motor vehicles, not including motorcycles, in its definitions under the no-fault act. In other words, while reference to the Vehicle Code may be used to clarify the meaning of a term used in the no-fault act, it cannot be used to change the meaning of a term specifically defined in the no-fault act.

Finally, Auto-Owners also argues that this interpretation of the word "owner" as applied to motorcycles would allow motorcyclists to avoid the requirement to procure insurance without losing the right to personal protection insurance benefits merely by transferring title of the motorcycle to another family member. This is true. However, it is for the Legislature, and not this Court, to determine whether and to what extent to penalize motorcyclists for failure to procure insurance. It would be inappropriate for us to presume that this represents an unintended result by the Legislature

and change the definitions carefully crafted by the Legislature. The Legislature has clearly treated motorcycles differently from motor vehicles under the no-fault act. Therefore, reasoning and policy that apply to motor vehicles do not necessarily translate to motorcycles.

Perhaps this "loophole" was not intended by the Legislature; perhaps, on the other hand, the Legislature simply chose not to penalize motorcyclists as harshly as motor vehicle drivers with respect to the failure to maintain the required insurance coverage in keeping with the different treatment of motorcycles and motor vehicles under the no-fault act. If the latter is the case, then for us to change the statutory definitions would improperly usurp the power of the Legislature. If the former is the case, then we trust that the Legislature will move to close the "loophole" if it deems it advisable. In any event, that represents a decision for the Legislature to make, not this Court.

For the above reasons, we conclude that the trial court erred in granting summary disposition in favor of Auto-Owners. Because Ronald Hoadley did not hold legal title to the motorcycle, he was not an owner of the motorcycle under the no-fault act and, therefore, was not prevented from receiving personal protection insurance benefits under MCL 500.3113(b); MSA 24.13113(b).

Reversed. Appellant may tax costs.

APPENDIX B

THE INSURANCE CODE OF 1956
Act 218 of 1956

500.3101 Security for payment of benefits required; period security required to be in effect; deletion of coverages; definitions; policy of insurance or other method of providing security; filing proof of security; "insurer" defined.

Sec. 3101. (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. Security shall only be required to be in effect during the period the motor vehicle is driven or moved upon a highway. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy on a motor vehicle that is not driven or moved upon a highway may allow the insured owner or registrant of the motor vehicle to delete a portion of the coverages under the policy and maintain the comprehensive coverage portion of the policy in effect.

(2) As used in this chapter:

(a) "Automobile insurance" means that term as defined in section 2102.

(b) "Highway" means that term as defined in section 20 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.20 of the Michigan Compiled Laws.

(c) "Motorcycle" means a vehicle having a saddle or seat for the use of the rider, designed to travel on not more than 3 wheels in contact with the ground, which is equipped with a motor that exceeds 50 cubic centimeters piston displacement. The wheels on any attachment to the vehicle shall not be considered as wheels in contact with the ground. Motorcycle does not include a moped, as defined in section 32b of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan Compiled Laws.

(d) "Motorcycle accident" means a loss involving the ownership, operation, maintenance, or use of a motorcycle as a motorcycle, but not involving the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle.

(e) "Motor vehicle" means a vehicle, including a trailer, operated or designed for operation upon a public highway by power other than muscular power which has more than 2 wheels. Motor vehicle does not include a motorcycle or a moped, as defined in section 32b of Act No. 300 of the Public Acts of 1949, being section 257.32b of the Michigan Compiled Laws. Motor vehicle does not include a farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan vehicle code pursuant to section 216 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.216 of the Michigan Compiled Laws.

(f) "Motor vehicle accident" means a loss involving the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle regardless of whether the accident also involves the ownership, operation, maintenance, or use of a motorcycle as a motorcycle.

(g) "Owner" means any of the following:

(i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.

(ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

(h) "Registrant" does not include a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

(3) Security may be provided under a policy issued by an insurer duly authorized to transact business in this state which affords insurance for the payment of benefits described in subsection (1). A policy of insurance represented or sold as providing security shall be deemed to provide insurance for the payment of the benefits.

(4) Security required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved upon a highway. The person filing the security has all the obligations and rights of an insurer under this chapter. When the context permits, "insurer" as used in this chapter, includes any person filing the security as provided in this section.

STUDY REPORT

MICHIGAN'S LEGISLATIVE POWER OVER ITS NATIVE AMERICAN POPULATION

A REPORT OF THE MICHIGAN LAW REVISION COMMISSION

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STUDY REPORT

MICHIGAN'S LEGISLATIVE POWER OVER ITS NATIVE AMERICAN POPULATION

A REPORT OF THE MICHIGAN LAW REVISION COMMISSION

This report[1] supplies background information concerning Michigan's power to enact legislation concerning its Native American population. Part I discusses the legal status of Native American tribes. Part II surveys the existing Michigan statutes concerning Native Americans, and Part III provides an overview of current law regarding the power of states to enact statutes concerning Indians and describes specific application of that law to issues ranging from taxation to enforcement of judgments to artifacts. Part IV reaches some general conclusions about state authority and sets forth several areas that the Commission and the Legislature should examine in further detail.

The Commission requested this project after it became aware of the relatively undeveloped state of Michigan Native American statutes despite a large population of Native Americans living within our borders. According to the 1990 census, 55,700 Indians, which comprise .6% of Michigan's population, live within the state. A 1985 Michigan Indian Directory, prepared by the Michigan Commission on Indian Affairs, lists six federally recognized tribes and four non-federally recognized tribes within the state. Despite this fact, the Michigan has very few statutes relating to this population.

[1] Melissa L. Koehn, Esq., J.D. 1992, University of Michigan Law School, provided research assistance to the Commission in connection with this report.

I. BACKGROUND

One of the first questions this report must address is why it even needs to be written. Michigan, like all other states, has broad legislative power over its citizens. Why can't the Michigan Legislature enact any law it wants regarding Native Americans, subject only to the strictures of the United States Constitution? The answers all stem from the fact that most Native Americans hold triple citizenship. Like all other Americans, Native Americans are citizens of the United States and of the state wherein they reside.[2] Unlike other Americans, however, Native Americans often hold citizenship in a specific tribe. Contrary to many people's understanding, being Indian is often a political, not just a racial categorization.[3]

Imagine two political entities, one of whose land base is completely surrounded by the other. How do you characterize the relationship between these entities? Is it akin to the Vatican and Italy, two completely separate and equally sovereign governments? Or is it more like the United States and Michigan, where Michigan is a political unit which possesses some sovereignty, but is only a part of the larger political entity known as the United States. Some definition of the relationship between the entities is essential to provide a framework for how they will interact with one another.

To this day, two United States Supreme Court cases are crucial in delineating the place tribes hold in our governmental system. Both of the *Cherokee Nation*[4] cases arose out of attempts by the state of Georgia to enforce its laws within Cherokee territory. In the first case, the Cherokee Nation claimed the status of a foreign nation and petitioned the Supreme Court to exercise its original jurisdiction and settle the case. The Supreme Court declined, stating that Native American tribes were more akin to states than to foreign nations.[5] Chief Justice Marshall, writing for the Court, labelled the tribes "domestic dependent

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[2] 8 U.S.C.A. §1401(a)(2) (1970); U.S. CONST. amend. XIV.

[3] "The Supreme Court has held that federal legislation dealing specifically with Indians does not constitute impermissible racial discrimination, because Indian tribes have a distinct constitutional status." Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW 642 (1982 ed.) [hereinafter, "Cohen"].

[4] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[5] 30 U.S. (5 Pet.) at 17.

nations," likening the relationship to a wardship.[6]

In *Worcester*, Chief Justice Marshall, again writing for the Court, elaborated on this label. In his opinion, the Chief Justice asserted that "[t]he Indian nations had always been considered as distinct, independent, political communities . . ." whose sovereignty had been limited, most notably in the cessation of their ability to deal with other nations outside the United States.[7] Drawing on principles of international law, Marshall argued that the tribes had not surrendered their independence and power of self-government to the United States. Instead, they had simply placed themselves under the protection of a stronger sovereign.[8] Thus, the Supreme Court established that Native American tribes possess limited sovereignty; their external powers have been eliminated, but they do retain the inherent ability to govern their own internal affairs. While the *Cherokee Nation* cases roughly sketch the contours of state, tribal, and federal governmental authority, they do not provide much practical guidance for deciding which government possesses the power to legislate with regard to any specific area.

In our society, the United States Constitution is often viewed as the ultimate document in determining the power of government. Consequently, many people are surprised to learn that most of the provisions of the Constitution, and all of the provisions of the Bill of Rights, do not apply to Native American tribes.[9] The Constitution was essentially a compact between the federal government and the states. Tribes did not consent to or ratify the document. In fact, the Constitution only mentions Native Americans twice. The first mention is in Article I, section 2, clause 3: "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers . . . excluding Indians not taxed . . ."; the second mention

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[6] 30 U.S. (5 Pet.) at 17.

[7] 31 U.S. (6 Pet.) at 559.

[8] 31 U.S. (6 Pet.) at 560-61. President Jackson refused to comply with the Supreme Court's decision. He is rumored to have stated, "Marshall has made his decision, now let him enforce it."

[9] *Talton v. Mayes*, 136 U.S. 376 (1895). The Supreme Court reaffirmed *Talton* in 1978 with the decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, stating:

> As separate sovereigns, pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.

comes in Article I, section 8, clause 3: "The Congress shall have Power To regulate Commerce . . . with the Indian Tribes." These clauses illustrate the Framers' understanding that the Constitution would not govern Native American tribes. Rather, the tribes were distinct entities outside the boundaries of the federal union. In fact, until 1871, much of the relationship between the United States and Native American tribes was conducted through treaties.[10]

Later Supreme Court cases would give the federal government plenary authority over Native Americans. The source of this authority has never been fully explained, but most attempts to provide an explanation usually rely on a combination of the Indian Commerce Clause and the Supremacy Clause. This power also stems historically from the fact that the United States' early relationship with tribal governments was conducted through treaties, which often considered tribes to be the equivalents of foreign governments. In any event, the current reality is that Indian law is governed by a complex web of federal statutes and administrative regulations, as well as by numerous court decisions. States only possess limited legislative jurisdiction over the Indians within their borders.

II. CURRENT MICHIGAN STATUTES

In part because of its historically limited jurisdiction, Michigan currently has only 13 statutes on its books concerning Native Americans. These statutes are collected in Appendix A, and are briefly described below:

1) MCL 16.711-720:
Creation of Michigan Commission on Indian Affairs.

2) MCL 125.1551-1555:
Creation of Indian Housing Authority

3) MCL 211.9(e):
Personal property of Indians who are not citizens is exempt from taxation.

4) MCL 299.51-57:
Aboriginal Records and Antiquities Act

[10] The treaty process was ended by the Act of Mar. 3, 1871, ch. 120, §1, 16 Stat. 544 (codified as carried forward at 25 U.S.C. §71). The statute was passed largely due to the desire of the House of Representatives to have a say in how relations with the Indians were conducted. The statute expressly provided that the obligations set forth in existing treaties were not to be impaired.

5) MCL 318.221-222:
Leasing land in Petoskey State Park to cooperative nonprofit organizations whose purpose is to preserve Indian culture, arts and crafts.

6) MCL 330.1100; 330.1162-1164:
Creation of office of multicultural studies within the Department of Mental Health

7) MCL 388.1716:
Provides an additional allowance to school districts for each Indian pupil who resides on a reservation.

8) MCL 390.1251-1253:
Waives tuition for Indians who are Michigan residents and who attend a public community college, junior college, college, or university.

9) MCL 435.161
Designates the fourth Friday in September as Michigan Indian Day.

10) MCL 436.19d:
Establishes a limit of malt beverage which can be delivered per week to a reservation by a wholesaler.

11) MCL 450.771-776:
Indians are included in the Minority Owned and Woman Owned Businesses Act.

12) MCL 600.2011:
Grants Indians the same judicial rights and privileges as other inhabitants of Michigan

13) MCL 750.348:
Provides that inciting an Indian or a tribe to violate a treaty is a felony.

Most of these Michigan statutes are rarely invoked and have not been amended or revised in many years. Many states have more comprehensive statutory schemes for Native American issues. Part III of this report explains the

rather complex law limiting these state schemes. In light of that law and statutes in other states, a few potential areas for law reform in Michigan stand out.

III. EXISTING LAW ON STATE JURISDICTION

Like much of Federal Indian Law almost all the existing law governing the power of states to enact and enforce legislation concerning Native Americans has been created by the United States Supreme Court, as opposed to Congress. The general test of State power was largely developed through a long series of cases regarding the power of states to tax Indians and Indian tribes, as well as non-Indians who live or do business on reservations. After reviewing the general test, the report presents a few specific examples of which taxes have been upheld and which have been struck down, and explores the specific rules that have developed with regard to various subject matters that repeatedly make their way into the courts.

A. General Test

1. Preliminary Matters

Before delving into the general test, three preliminary matters must be discussed. The first concerns state jurisdictional disclaimers and the so-called "equal footing" doctrine. As a condition of entry into the United States, Congress required some states to explicitly disclaim jurisdiction over Indian land within its borders. Occasionally, a similar disclaimer was incorporated into the federal enabling legislation which recognized the new state. Some older cases put great significance on these disclaimers and the absence of them. This line of cases, however, is now moribund. Although most of the opinions are still on the books as good law, courts usually find ways to distinguish them away. Thus, the existence, or lack, of such disclaimers should not carry much weight. *See* Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, AMERICAN INDIAN LAW at 500-501 (3d ed. 1991) [hereinafter, "Clinton"]; *see also* Cohen, at 268 n. 72. Some modern cases do refer to these disclaimers to buttress an opinion, but the Court has demonstrated a propensity to reach the same decision regardless of whether the disclaimer exists. Thus, the existence of a disclaimer can be one extra factor to support a decision, but the lack of a disclaimer does not change the outcome; it simply means the decision has one less prong to support it.

The second issue relates to a statute commonly referred to as Public Law 280. This Act provides a mechanism whereby states can assume general civil and criminal jurisdiction over Indians within their borders. The statute, however, only confers adjudicatory jurisdiction; it does not grant states either regulatory or taxing powers.[11] Thus, Public Law 280 only extends state legislative jurisdiction minimally, if at all. Michigan has not assumed jurisdiction under this Act, and cannot assume it absent consent of the tribes.

The final preliminary note concerns so-called "protective legislation." Most of the areas and cases discussed below revolve around state attempts to exercise its jurisdiction over Indians in ways that have a potential, if not actual, adverse impact on the tribes. Not all state exercises of jurisdiction fall into this category. Rather, some states have enacted statutes which are protective of Native Americans. The United States Supreme Court "held long ago that the federal relationship with tribes does not preclude protective state laws which do not infringe on federally protected rights." Cohen, at 659 (footnote omitted); *see*

[11] *Bryan v. Itasca*, 426 U.S. 373 (1976). For a discussion on the difference between criminal/regulatory and criminal/prohibitory laws, see Clinton, at 620-22.

also, Cohen, at 658-60. Thus, Michigan can enact protective legislation regarding Indians to some degree, especially where it relates to minority status or to recognizing sovereignty.

2. Deriving and Applying the General Test

The modern era of state jurisdiction in Indian Law began with *Williams v. Lee*, 358 U.S. 217 (1959). *Williams* established the principle that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Although most modern cases will cite *Williams*, they will usually follow an analysis promulgated in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). While some more recent cases have add various glosses to the general test, the basic wording of the test has not varied much.

The test has been applied, however, in wildly varying ways.[12] The Supreme Court's decisions on State Jurisdiction in Indian Country areas are difficult to reconcile.[13] As a result, State efforts to push the boundaries of jurisdiction have tended to invite protracted and costly litigation, which the

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[12] *See, e.g.*, David Getches & Charles Wilkinson, FEDERAL INDIAN LAW 317 (1986)[hereinafter, "Getches"].

> Although the most recent cases make it possible to divine some generally applicable rules, the long line of modern decisions has produced ample confusion and inconsistency. Part of this is due to the nature of the laws the courts have been required to construe. The treaties and treaty substitutes -- executive orders, agreements and statutes establishing Indian reservations -- usually are exceedingly vague concerning the role of the states. The extent of authority of state courts, revenue agencies, and wildlife departments was not explicitly addressed, often because Indian treaties preceded statehood in many areas.

As a result of these discrepancies, the Supreme Court has exhibited a willingness to construe historical documents so that general principles apply across the board, unless relatively plain language to the contrary exists in these foundational documents.

[13] Numerous authors have attempted to synthesize these cases, to no avail. Perhaps the best description of Supreme Court doctrine was provided by Professor Frank Pommersheim:

> Supreme Court litigation in the area of tribal-state relations has drifted further and further away from the foundational mooring of *Worcester v. Georgia*, out past the abandoned buoys of the infringement and preemption tests and into the uncharted seas of the doctrinal incoherence of such recent cases as *Montana v. United States*, *Cotton Petroleum v. New Mexico*, and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation.*

Tribal-State Relations: Hope for the Future?, 36 S.D. LAW REV. 239, 252 (1991).

Commission recommends Michigan should avoid.

In some specific areas of legislation, these problems can be avoided due to the development of a specialized federal jurisdictional test. Thus, in specific areas (discussed below), a specific and more predictable scope of state power has been defined. In other areas, the Commission and the Legislature should consult the following general test to determine whether Michigan has the power to legislate in that area, and if so, what boundaries exist for that power:

> *First, does the activity to be regulated occur on or off the reservation? In answering this question, keep in mind that "reservation" is often used loosely in this context to also include all territory known as "Indian Country".*[14]
>
> > *a) If the activity occurs off the reservation, the Court has declared that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."*[15]

Please note that this provision only permits Michigan to apply its general laws to off-reservation activity, unless Congress has expressly removed the Indian conduct from state jurisdiction. There are no specific rules concerning Michigan's power to enact legislation targeted directly at off-reservation activity

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[14] *A generally accepted and generally applicable definition of Indian Country can be found at 18 U.S.C.A. §1151:*

> "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way and running through the same.

For a case where no reservation existed, see *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); Clinton, at 592-93. Recently, however, the Supreme Court has reemphasized that

> our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly . . . . See 18 U.S.C. §1151.

Oklahoma Tax Comm'n. v. Sac and Fox Nation, 113 S. Ct. 1985 (1993).

[15] *Mescalero Apache v. Jones*, 411 U.S. 145 (1973).

by Indians. Any such legislation would probably be subject to the standard due process and equal protection rules, as well as any other applicable constitutional provisions.[16]

b) If the activity occurs on the reservation, move to step two.

Second: What is the posture of the parties involved in the activity?

a) Non-tribal members on non-Indian owned land and the transaction does not involve either consensual transactions with the tribe or the political integrity, economic security, or health and welfare of the tribe: If so, the state has jurisdiction and the inquiry ends in favor of state regulation.[17] The state does not, however, have general jurisdiction over all non-Indians or nonmember Indians in Indian County. Just as with states and the federal government, tribal sovereignty is territorial and extends throughout Indian Country. As noted above, though, tribal sovereignty has been limited if the specific activity in question has no bearing on the tribe or a tribal member.

b) Either a tribal member or the integrity of tribal self-government is involved: If so, proceed to step three.

Third, have tribes historically maintained power to act in this area? I.e., what is the "backdrop of tribal sovereignty" relevant to this area?

This is the beginning of the preemption analysis, which is the preferred manner of addressing state legislative jurisdiction in the modern era. It was foreshadowed by the "absent governing Acts of Congress" language in *Williams*. As a cautionary note, however, Indian preemption should not be confused with general federal preemption of state power. The Supreme Court has repeatedly warned that the principles of tribal sovereignty are different from state sovereignty, and thus, the preemption analysis is slightly different, most notably in that no express statement of preemption is necessary.[18]

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[16] Remember, although the Constitution does not govern the relationship between tribes and their members, it does control the relationship of states and their citizens.

[17] *Montana v. United States*, 450 U.S. 544 (1981).

[18] *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); Getches, at 332-36.

McClanahan and its progeny instruct that the applicable treaties and federal statutes are to be read in light of the backdrop of tribal sovereignty. Originally, this phrase was used in a very general way, and simply referred to the idea articulated in the *Cherokee Nation* cases that tribes retained some aspects of their sovereignty.[19]

Fourth: What, if any, federal statutes and regulations exist in this area?

This is another area where the Court has repeatedly waffled about how specifically Congress must have acted. Unlike the issue of the "backdrop of tribal sovereignty," however, a clear middle ground does exist here. Essentially, general statutes which illustrate general congressional intentions toward tribes are not enough to preempt state legislation.. The Court looks for specific legislation or regulations directly affecting the issue before the Court. The following examples provide some illustrations:

a) General statutes regarding Congress' intention to promote tribal self-government or encourage tribal economic enterprises were insufficient to preempt state taxation of cigarette sales by reservation shops to nonmembers of the tribe. Federal regulations governing sales by businesses to reservation Indians were also

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[19] *See, e.g., White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980):

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.

In some recent cases, however, the Court has developed a more specific use for this step of the analysis, one which has a highly questionable theoretical basis and which has not been used consistently. Starting with *Rice v. Rehner*, 463 U.S. 713 (1983), the Court has occasionally inquired as to the history of tribal sovereignty as it relates to the specific issue before the Court. In *Rice*, for example, the issue was the extent of state authority to require that a federally licensed Indian trader located on the reservation obtain a state liquor license before selling liquor for off-premises consumption. Consequently, the Court examined the history of regulating liquor sales to Indians, beginning as far back as the colonial days.

The problem with this analysis is that federal policy has vacillated wildly between eliminating tribal governments and encouraging them. It has only been in the last forty or so years that tribes have acquired the know-how and financial means necessary to create and maintain strong tribal governments. Very rarely will any "history" of tribal sovereignty exist in any particular area explored by the Court. In addition, the many changes in federal policy have created a patchwork history that is extremely manipulable. The Court, essentially, will be able to "find" whatever history it wants to. In addition, this concept traps Indians into a historical conception of sovereignty, one which does not permit tribal governments to grow and adapt to current societal and economic conditions. *See, e.g.*, Clinton, at 560-61 (drawing from Cohen and referring to this as a "menagerie theory" of Indian law).

insufficient.[20]

b) Federal regulation of trade with Indians does preempt state taxation of the sale of farm machinery to an Indian tribe, even if the seller was not actually licensed under the regulations.[21]

c) Federal regulation of tribal timber harvesting and sales preempts a state motor vehicle license and use fuel taxes on logging and hauling operations of a corporation which contracts to harvest and sell tribal timber.[22]

Fifth: What are the relevant state, federal, and tribal interests involved?

The Court weighs these factors to determine whether the particular state action at issue violates federal law. This inquiry is very fact specific. For example, Arizona attempted to impose a motor vehicle license and a use fuel tax on a contractor involved in harvesting and selling tribal timber. Arizona was unable to show a legitimate regulatory interest served by these taxes. The highways and roads involved in the logging operation itself were all built and maintained by the federal and tribal governments.[23] This inquiry repeatedly recurs in the state taxation cases; the state must show a specific purpose for imposing the tax which is closely related to the activity being taxed. A general interest in raising revenue is insufficient. As one case noted, though, a "State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention."[24]

Six, if, after a weighting of the state, federal, and tribal interests, state action is not preempted by federal law, does it nevertheless unlawfully infringe on the right of tribal self-government?

This is the analysis conducted by the Court in *Williams v. Lee* in 1959, and it is still good law today. The Court, however, first looks to the preemption

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[20] *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

[21] *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980).

[22] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[23] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

[24] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

analysis outlined above. It will then look to this more general, but still independent, barrier to state legislative jurisdiction. The contours of this barrier are vague, as the Court has rarely employed this test.

Although very flexible and vague, the Supreme Court has provided some guidelines for applying this test. In *Colville*, 447 U.S. 134 (1980), several tribes in Washington State argued that the state cigarette tax did not apply to sales made on the reservation. Although each tribe had its own cigarette tax, each tax was less than the state tax. Thus, absent state taxes, cigarettes were cheaper on the reservation than off. If state taxes did apply, cigarettes would be more expensive on the reservation. The Supreme Court held that the state sales tax did apply to reservation sales made to nonmembers of the tribe. In reaching this conclusion, the Court stated:

> Washington does not infringe the right of reservation Indians to "make their own laws and be ruled by them," merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do no receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.

447 U.S. at 156-57.

This general approach to State jurisdictional issues is somewhat simplified by precedent in several commonly litigated areas: Taxation; Citizenship; Social Services; Enforcement of Judgments; Police Jurisdiction and Extradition; Artifacts; Hunting and Fishing; Water Law; Probate; Zoning; and Liquor Regulation. Each of these areas is discussed below.

B. Taxation

States cannot impose:

1) A personal income tax on a reservation Indian whose income derives solely from sources on the reservation.[25]

2) A sales tax on sales to tribes or tribal members on the reservation.[26]

States can force retailers on reservations to charge a state cigarette tax on sales to persons who are not members of the tribe.[27] In addition to passing on the tax, the state can require the retailer to keep records documenting sales.[28]

Any attempt to tax Michigan's Native Americans would require comprehensive research of the case law regarding the attempts (if any) of other states to impose a similar tax. That case law is extremely extensive.

C. Indians as State Citizens

Native Americans are citizens of the United States and consequently are also citizens of the state wherein they reside.[29] As a result, Indians are entitled to the privileges of state citizenship, including the right

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[25] *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

[26] *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980).

[27] This portion of the Court's ruling is highly suspect, and has been criticized by many Indian Law scholars. *See* Clinton, at 528-29. This portion of the case was not fully briefed, and it is likely that the Court did not fully appreciate either the complexities of the tribal community or the consequences of this ruling.

[28] *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

[29] 8 U.S.C.A. §1401(a)(2) (1970); U.S. CONST. amend. XIV.

to vote in state elections, serve on state court juries, appear as witnesses in state courts, sue in state court, hold state public offices, be counted in legislative apportionment,[30] receive state-supported welfare benefits, attend state-supported public schools,[31] obtain resident state hunting and fishing licenses, and obtain resident state business franchises.

Cohen, at 645-46 (footnotes omitted). Because of this citizenship, states cannot discriminate against Indians for purposes of either state funded programs or joint state-federal programs which are administered by the state. Cohen, at 675. "States that have undertaken to provide services must furnish them equally to all persons without regard to race. Thus Indians have a right to state services on the same terms as other state citizens." Cohen, at 678 (footnotes omitted).

Historically, a variety of reasons were used to deny Native Americans these rights. For a review of these reasons, see Cohen, at 646-53. Michigan does not have any statutes which discriminate against Indians on these bases. It also does not have any comprehensive statute expressly outlawing these practices specifically as they apply to Native Americans.

D. Social Services

As citizens of Michigan, Michigan's Indian population is entitled to use state social services. State and federal benefits programs can and do coexist and overlap. Indians are not precluded from receiving state social services simply because the federal government has assumed responsibility in a similar area.[32]

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[30] Just as with other racial minorities, states cannot establish voting districts that effectively prevent Indians from having a voice in government. *See* Getches, at 587 n. 5.

[31] In 1975, the Department of Health, Education and Welfare issued a memorandum which stated that "state agencies, either directly or by contract with a tribe, may establish schools exclusively for Indians without offending Title VI of the Civil Rights Act of 1964." Getches, at 591 n.3. Attempts by state legislatures to draw school district boundaries coterminous with Indian reservations have met with varied results. *See* Getches, at 590-91 n. 3.

[32] Cohen, at 653. The only exception to this rule was carved out by a federal district court in South Dakota. *White v. Califano*, 437 F. Supp. 543 (D.S.D. 1977), *aff'd.* 581 F.2d 697 (8th Cir. 1978)(holding that the state did not have the authority and consequently the responsibility to care for a mentally ill reservation Indian; rather, the responsibility lay with the Indian Health Service pursuant to the Indian Health Care Improvement Act, 25 U.S.C. §1601-1675).

1. Child Welfare Services

One area where states have traditionally held the primary responsibility toward Indians is the area of child welfare services. In 1978, Congress enacted the Indian Child Welfare Act (ICWA)[33] in response to reports that

> an alarmingly high percentage of Indian families [were] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children [were] placed in non-Indian foster and adoptive homes and institutions; and . . . that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. §1901(4) & (5).

ICWA outlines a number of procedural requirements which must be followed by state courts presiding over these custody cases. The statute also, however, allows states and Indian tribes to

> enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

25 U.S.C. §1919(a). At least two Michigan tribes have already entered into such agreements with the Michigan Department of Social Services. These agreements are included in REPORT OF THE MICHIGAN INDIAN TRIBAL COURT/STATE TRIAL COURT FORUM at Appendix III (1992).

2. State Health and Education Laws

One other federal statute should be noted at this time. 25 U.S.C. §231 provides:

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[33] 25 U.S.C. §1901 et seq.

> The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations, or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations or (2) to enforce the penalties of State compulsory school attendance laws against Indian children, and parents, or other persons in loco parentis except that this subparagraph (2) shall not apply to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application.

The Secretary has promulgated one regulation under this statute. 25 C.F.R. §273.52 states:

> In those States where Pub. L. 83-280, 18 U.S.C. §1162 and 28 U.S.C. §1360 do not confer civil jurisdiction, State employees may be permitted to enter upon Indian tribal lands, reservations, or allotments if the duly-constituted governing body of the tribe adopts a resolution of consent for the following purposes:
>
> (a) Inspecting school conditions in the public schools located on Indian tribal lands, reservations, or allotments.
>
> (b) Enforcing State compulsory school attendance laws against Indian children, parents or persons standing in *loco parentis*.

Three things should immediately be noted. First, the regulation only permits state officials to inspect schools and to enforce state compulsory school attendance laws. The Interior Department has long held the position that the statute does not compel the Secretary to permit inspection of sanitation conditions. Cohen, at 377.

Second, the terms of the statute do not explicitly authorize enforcement or application of state health and sanitation laws on reservation. Indeed, the Interior Department has declared that the statute does not authorize such application or enforcement if it would "directly or indirectly . . . impact or involve the regulation of trust property in any significant way."[34] Third, the tribe must

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[34] Op. Sol. Int., Feb. 7, 1969 (M 36768), *reprinted in* 2 OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 1917-1974, at 1986.

formally adopt a resolution showing consent to such actions.

E. Enforcement of Judgments

One hotly contested issue in many other states centers around the doctrine of full faith and credit. Article IV of the United States Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." This clause does not extend full faith and credit to tribal laws and court judgments.

This problem has already been recognized and addressed in Michigan. In 1992 a committee known as the Indian Tribal Court/State Trial Court Forum issued a report discussing several ways to foster cooperation between Michigan State and Tribal justice systems. The Forum, which consisted of Michigan State Trial Court and Tribal Court judges, determined that under Michigan law, the proper way to address the issue of full faith and credit was through a court rule. The Forum proposed the language of the court rule, as well as a system for implementing and monitoring the adoption of the court rule by Michigan State and Tribal courts. No formal action has yet been taken regarding these proposals, and the Commission should if possible revive efforts to see them carried out.

F. Police Officers and Extradition

One pervasive problem resulting from the jurisdictional tangle of state and tribal authority is the ability of police officers to make arrests. Authority to make a lawful arrest often "depends on whose law is being enforced, where the law is being enforced, who is doing the enforcing, and against whom the law is being enforced."[35] A 1993 bill, House Bill No. 4516, proposed in the Michigan Legislature, would take great steps toward alleviating this problem. The Commission should monitor this bill and if possible promote its passage.

One other potential problem regarding jurisdiction and law enforcement concerns extradition. Cohen succinctly summarizes the law in this area:

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[35] MICHIGAN HOUSE LEGISLATIVE ANALYSIS SECTION, ANALYSIS OF HOUSE BILL 4516 (SUBSTITUTE H-1)(TRIBAL POLICE) 1 (1993); *see also* Op. 4803, Rep. of the Att'y Gen., 108 (1973).

> Besides extant treaty requirements, some tribes have enacted laws providing for extradition to states . . . . No court has directly addressed the question whether a tribe has jurisdiction to extradite Indians absent authority from a treaty or statute. It seems to have been assumed by Congress, treaty makers, and the Interior Department that the tribes do have the power as an aspect of their retained sovereignty.
>
> Extradition of fugitives by state or federal authorities to a tribe has had less attention, possibly because tribal criminal jurisdiction has long been exercised only over minor offenses, where extradition is thought to be less important. State and territorial extradition is controlled primarily by 18 U.S.C. §3182. That law requires extradition at the request of "any State or Territory". It is clear that an Indian tribe is not a "state" within that statute, and [it is not clear whether a tribe qualifies as a "territory"].
>
> . . . .
>
> [S]tates likely have authority to extradite to tribes, subject to Bill of Rights constraints. However, most states now operate under the Uniform Criminal Extradition Act, the territorial terms of which imitate those of 18 U.S.C. §3182. These statutes pose the same issue, whether a tribe and its reservation are a "territory" as that term is used in the Act. One exception is a South Dakota statute authorizing extradition agreements with tribes.

Cohen, at 382-84 (citations omitted). There is no case law in Michigan suggesting whether extradition issues are serious problems here.

G. Protection of Artifacts, Human Remains, and Archeological Sites

One area in which states can legislate is the protection of archeological sites, including artifacts as well as burial sites. Federal law does exist in this area,[36] but it leaves maneuvering room for the states. Many states have enacted statutes in this area.[37]

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[36] Archeological Resources Protection Act of 1979, 16 U.S.C. §470aa-470mm; American Indian Religious Freedom Act, 42 U.S.C. §1996; Native American Graves Protection and Repatriation Act, 25 U.S.C. §3001-3013; National Museum of the American Indian Act, 20 U.S.C. §80q-1 - 80q-15.

[37] See, e.g. Mo. Rev. Stat. §194.00 (unmarked burial sites (1993). For a helpful symposium law

Michigan has enacted a statute entitled the Aboriginal Records and Antiquities Act, MCL 299.51 - 299.57. Among other things, this statute reserves to the state of Michigan the exclusive right to regulate, explore, excavate, and survey "all aboriginal records and other antiquities, including mounds, earthworks, forts, burial and village sites, mines or other relics and abandoned property of historical or recreational value found upon or within any of the lands owned by or under the control of the state." MCL 299.51(1). The Act also prohibits the removal of any relics or records of antiquity from the premises where they were discovered unless the owner of land consents. MCL 299.54.

The Commission should explore tribal reaction to this statute, which varies from those of other states.[38] It is possible for Michigan to enact more extensive legislation than currently exists. For example, one unsettled issue in the law is the status of burial and funerary objects found on private land. Do they belong to the family of the deceased (if they can be identified), the tribe (where tribal affiliation can be determined), to the state, or to the owner of the property? Some states have taken measures to protect funerary objects and burial remains, and even provide for their repatriation whenever possible. *See* Clinton, at 773-74.

H. Hunting and Fishing

Hunting and fishing rights are one of the most contested and controversial rights possessed by Native Americans. The scope of a particular tribe's hunting and fishing rights is a very fact-specific question and is governed by federal law. States, however, do possess some limited regulatory authority. As many readers might already be aware, Michigan has experienced extensive litigation regarding the treaty rights of various tribes to fish in the Great Lakes and the ability of the state to regulate the exercise of those rights. After protracted litigation and involvement by various courts and executive agencies at both the state and federal level, a negotiated agreement was reached by the parties and then adopted by the court as its order. Regardless of the specific terms of that agreement, it is useful for the Legislature to be aware of the more general limits of states' regulatory authority over hunting and fishing.

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review issue on this topic, see 24 ARIZ. STATE LAW J. 1 (1992).

[38]See, e.g. Neb. Rev. Stat. §12-805 et seq. (1993); 1993 N.D. Laws §55-02-01.1; Ohio Rev. Code Ann §149.52 (Anderson 1993).

1. On-Reservation

States have virtually no power to regulate Indians who hunt and fish on their reservations. It does not matter whether the state stocked the reservation with fish or game, whether the lands were allotted, or whether non-Indians have purchased and settled on land. Cohen, at 646. The only exception is *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 176-77 (1977). The *Puyallup* litigation was long and protracted. In its first two trips to the Supreme Court, the issue concerned off-reservation fishing rights. Prior to its third trip to the Supreme Court, though, the parties discovered that the area in dispute was actually part of the reservation. The Supreme Court declined to bar state regulation on this ground. This exception is probably very much a result of the extensive amount of time and effort all parties and the Court had invested in the case. The Court was reluctant to allow this lately-discovered technicality to void all the work that had been done. Consequently, it is unlikely that this exception will be applied outside of the *Puyallup* situation itself. *See* Getches, at 738-39. States may, however, have the authority to regulate non-Indians who hunt or fish on lands held in fee by nonmembers of the tribe, even if those lands are within the exterior boundaries of the reservation. *See Montana v. United States*, 450 U.S. 544 (1981).

As noted by the authors of a preeminent casebook,

> Wild animals do not respect political boundaries and thus wise resource management often demands coordination of goals and regulatory approaches. Action taken by the states or tribes in pursuit of their objectives can affect the numbers and well-being of fish and wildlife throughout their ranges . . . . Consequently, some states and tribes have worked out management agreements in the wake of litigation. Cooperative agreements inspired by litigation typically contain two elements: a clarification of jurisdiction; and an arrangement for the interaction of wildlife managers and the coordination of resource management goals.

Getches, at 729. For example, in Minnesota, the Leech Lake Band of Chippewa Indians and the state litigated the issue of state regulation over on-reservation hunting, fishing, and gathering of wild rice. The Indian plaintiffs won in district court, after which the parties filed appeals and cross-appeals. Rather than continue litigation, the parties reached an agreement which was ratified by the state legislature and entered as a consent judgment. Cohen, at 464; Getches, at 729. The agreement provided that

(a) state regulation did not apply to Indians who hunted, fished, trapped, or gathered on the reservation;

(b) the tribe would promulgate a conservation code which prohibited commercial hunting or fishing by tribal members and which regulated the members' exercise of the treaty rights;

(c) a committee of members of the tribe would establish the amount of a supplemental fee to be charged to non-Indians who wished to hunt and fish on the reservation. The fee would not be greater than one-half the amount charged by the state for a similar license. The state would collect the fee from non-Indians and then turn the proceeds over to the tribe.

Cohen, at 464-65 n. 8, Getches at 729. For a brief overview of other, similar agreements, see Getches, at 729-30.

2. Off-Reservation

Felix Cohen's Handbook of Federal Indian Law, the preeminent treatise in the area, summarizes off-reservation treaty fishing rights in the following fashion:

> Indians cannot be barred from their usual and accustomed fishing place; they have an easement over private as well as public land to gain access to and fish in these areas; their usual and accustomed fishing places may be either on or beyond the territory ceded by that tribe in its treaty with the United States; their right to fish at those locations is a non-exclusive one that must be shared with non-Indians; they do not need to purchase state fishing licenses when exercising their treaty fishing rights; they are entitled to an opportunity to catch a fair share of the fish in waters where this treaty right applies; they can be regulated by the state when necessary for conservation; and they are entitled to appropriate notice and the right to participate in the state regulatory process for managing the fishery where their treaty rights exist.

Cohen, at 450-51 (footnotes omitted).

In actuality, "[t]he extent of federal preemption of state regulation by an

Indian treaty has turned on the intent of the parties as reflected in the circumstances under which the treaty was negotiated." Cohen, at 459 (footnote omitted). Thus, the state may have more or less regulatory power with respect to a specific tribe depending on the scope of the tribe's hunting and fishing rights and on the pertinent language of the relevant treaties. Recall, however, that the scope of these rights is a question of federal law. As an example, in *Puyallup I*, 391 U.S. 392, the relevant treaty reserved to the tribes the right of fishing "at all usual and accustomed grounds and stations." The Court found it significant that the treaty did not reserve the right to fish in the "usual and accustomed manner." Thus, the Court felt that the treaty had opened the door to state regulation of off-reservation treaty fishing. When reading treaties made with Native American, it is important to remember the overriding rule of construction: a treaty is "not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905). This rule is somewhat modified in the area of off-reservation rights, as some language reserving those rights is usually required. Clinton, at 816.

In general, states have the power to regulate Indian off-reservation fishing for conservation purposes. Cohen, at 459-60. Although this rule was developed in fishing rights cases, it is likely to also be the governing rule in hunting cases. *See, e.g., Antoine v. Washington*, 420 U.S. 194 (1975). The definition of "conservation" was the subject of much dispute, but the Supreme Court settled that question in *Puyallup II*, 414 U.S. 44 (1973). In that case, the Court indicated that "conservation" meant the need to preserve the species in question from extinction:

> Rights can be controlled by the need to conserve a species . . . . The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Id. at 49. Lower courts have held that the state bears the burden of proving both that a regulation is reasonable and that it is necessary. *See* Cohen, at 461-62.

As one final note, the Supreme Court of Alaska has sustained the right of Athabascan Indians to kill and possess a moose out of season after the tribe proved that the meat was a very important part of a religious ritual. *See Frank v. Alaska*, 604 P.2d 1068 (Alaska 1979). This decision was based on the Free Exercise clause, rather than on any treaty rights. Consequently, the decision might be different today in light of *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* held that generally applicable, religion-neutral criminal laws that

have the effect of burdening a particular religious practice need not be justified, under the Free Exercise clause, by a compelling state interest. While the Alaska decision was based on the Constitution, Wisconsin has enacted a statute similarly permitting Winnebago Indians to take deer out of season for religious purposes. *See* Wis. Stat. Ann. §29.106.

I. Water Law

The Supreme Court has clearly established that Indian tribes have the rights to use sufficient water to fulfill the purposes of their reservation. This right is prior to all uses that began after the reservation was established. *Winters v. United States*, 207 U.S. 564 (1908). This decision also established that the matter of Indian reserved water rights is governed by federal substantive law, not by state law. Getches, 685; Cohen, at 576, 582-84, 604. *See also* 25 U.S.C. §177 (the alienation of Indian reserved rights is subject to and governed by the NonIntercourse Act).

The issue of regulatory jurisdiction, that is whether states or tribes control the use of water within the reservation, is still very much up in the air. Getches, at 652, 706. Some states have attempted to "assert authority over non-Indians with water rights on Indian reservations and even over Indians who hold rights pursuant to state law." Getches, at 706. The extent of the state authority in this area is very unsettled. Cohen, at 584 n. 38, 604.

The issue of regulatory jurisdiction over Michigan's water resources does not appear to be a subject of much dispute.[39] This is most likely because Michigan uses a riparian rather than a prior appropriation system, and because the state has not experienced the large demands on its water resources, as well as the persistent drought conditions, common to the more western states.

J. Probate and Inheritance

The inheritance of and probate laws concerning Indian-owned lands are a complex web of state, tribal, and federal laws. Which law applies often turns on where the property was located, where the deceased was domiciled, and whether any land involved is either trust or restricted property. Trust property is pretty

[39] This statement, however, is only made with respect to the use of the water itself. Issues of hunting and fishing rights are addressed above.

much what it sounds like -- land "owned by the United States in trust for an Indian." Cohen, at 615. Restricted property is land "owned by an Indian subject to a restriction on alienation in favor of the United States or its officials." Cohen, at 615-16. Rather obviously, the inheritance of these types of property are controlled by federal statute. *See* Cohen, at 633; Antonina Vaznelis, *Probating Indian Estates: Conqueror's Court versus Decedent Intent*, 10 Am. Ind. L. Rev. 287, 290 (1984). According to 25 U.S.C. §348, however, state inheritance laws do apply to Indian allotments. *See* Getches, at 119; Cohen, at 633-34. Allotments are the parcels of property set aside for individual Indians under the General Allotment Act of 1886. This statute does not, however, convey probate jurisdiction to state courts. Cohen, at 634. Instead, land is probated by federal administrative law judges. These judges often distribute non-trust property simultaneously with trust property. *See* Vaznelis, at 290.

States usually possess at least judicial jurisdiction, and often legislative jurisdiction, over unrestricted property located outside Indian country. *See* Cohen, at 633; Vaznelis, at 290. This is especially true if the deceased was domiciled outside the reservation. If the deceased was domiciled on the reservation, or if the property in question is located both on and off the reservation, then an overlapping mix of tribal and state jurisdiction may exist. At least one commentator has suggested that states may disclaim jurisdiction by statute, either in their definition of civil court jurisdiction or in the probate code. Vaznelis, at 300. What current treatises do not make clear, however, is whether the state only has the power to apply general probate laws to Indians, or whether the state may enact special laws that reject, recognize, or even defer to tribal rules of descent.

K. Housing

Pursuant to federal law, Michigan has chosen to create, through state statute, an Indian Housing Authority (IHA). *See* MCL 125.1551-125.1555. The IHA is therefore a creature of state law and the state may choose how it will be organized, who is liable for its obligations, and to what extent it can waive sovereign immunity. See Mark K. Ulmer, *Legal Origin and Nature of Indian Housing Authorities and the HUD Indian Housing Programs*, 13 Am. Ind. L. Rev. 109, 129 (1988). This statute has rarely been construed, and it is unclear how successful the IHA has been in practice.

L. Zoning

The Bureau of Indian Affairs has promulgated a regulation concerning state and local zoning laws. 25 C.F.R. §1.4 declares that such laws do not apply to "property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States," unless specifically adopted by the Secretary of the Interior. One commentator has noted that the authority for this regulation is unclear. Clinton, at 1042. In any event, a court addressing the issue of state and local power to zone such land would probably reach the same conclusion as the regulation, even if the regulation were invalid.

In 1989, in a badly splintered decision,[40] the Supreme Court declared that the Yakima Indian Nation could zone fee lands owned by nonmembers in the "closed" area of the reservation, but that the state and county possessed zoning authority over such lands in the "open" area of the reservation.[41] The "closed" area of the reservation is not open to the general public, while the open area is, obviously, open to the general public. While a majority existed on each of the factual holdings, the members of the Court could not reach agreement on the appropriate legal theory to use in reaching the results. Consequently, *Brendale* is of limited precedential value. Indeed, it has been much criticized, not only for the Court's failure to forge a majority opinion, but also because the actual factual holding flies in the face of conventional notions of land planning. The Court's decision opens the way for "checkerboard" jurisdiction over land use, a subject that does not lend itself to piecemeal planning. For a zoning scheme to be effective it needs to be thoroughly researched and comprehensive, a difficult task. Local entities in Michigan desiring to impose their zoning laws on portions of a reservation which are held in fee by nonmembers of the tribe thus face a daunting assignment.

M. Liquor Regulation

18 U.S.C. §1161 provides that liquor transactions in Indian country are not subject to prohibition under federal law if the transactions conform both to state

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[40] Justice White wrote an opinion, which was joined by Justices Scalia and Kennedy, as well as Chief Justice Rehnquist. Justice Stevens' opinion was joined by Justice O'Connor, and Justice Blackmun wrote for himself, Justice Brennan, and Justice Marshall.

[41] *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).

laws and to tribal ordinances. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court held that this statute does not preempt state power to regulate liquor transactions in Indian Country. Rather, the Court found that the statute was

> intended to remove federal discrimination that resulted from the imposition of liquor prohibitions on Native Americans . . . [and that] by enacting §1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States, so as to fill the void that would be created by the absence of the discriminatory federal prohibition.

Id., at 733. Consequently, state and tribes may have overlapping or concurrent jurisdiction to regulate liquor transactions in Indian Country. One commentator has suggested that this authority could be exercised through a compact between the two governments or perhaps even by a joint licensing board. *See* Dale L. McDonnell, *Federal and State Regulation of Gambling and Liquor Sales within Indian Country*, 8 HAMLINE L. REV. 599, 604 (1985).

IV. CONCLUSION AND SUGGESTIONS FOR FURTHER WORK OF THE COMMISSION

Michigan has very little power to legislate concerning matters which involve solely Indians in Indian Country. The state has greater authority regarding non-Indians on the reservation, and even greater power over Native Americans who engage in off-reservation activity. In addition, it appears that Michigan can enact protective legislation regarding Indians to some degree, especially where it relates to minority status or to recognizing sovereignty.

Many jurisdictional disputes have been resolved by cooperative agreements as opposed to litigation.[42] Some states have even adopted these agreements as statutes. In light of the often confused state of the law in the area of tribal-state jurisdiction, these agreements may be the best method of proceeding. For more information on compacts, see Cohen, at 380-81; Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. LAW REV. 239, 252 (1991); Gover, Stetson, and Williams, P.C., *Tribal-State Dispute Resolution: Recent*

[42] For a collection of these agreements, see American Indian Law Center, Handbook of State-Tribal Relations (1983). In addition, some of the agreements between Michigan tribes and various other governmental bodies are collected in REPORT OF THE MICHIGAN INDIAN TRIBAL COURT/STATE TRIAL COURT FORUM at Appendix III (1992). *See also* Getches, at 547.

Attempts, 36 S.D. LAW REV. 277 (1991).

The research summarized in this Report suggests nine areas in which further legislation or reform may be appropriate. Some states have already enacted legislation in these areas, and examples of those statutes are cited in each area.

1) Full Faith and Credit:

Michigan definitely needs to develop some procedure for mutual recognition of judgments and orders between Michigan state and tribal courts. Much of the work in this area has already been performed by the Michigan Indian Tribal Court/State Trial Court Forum. That Forum drafted a proposed court rule and a procedure for implementing a system of full faith and credit. The Michigan Supreme Court, however, has failed to take action on these recommendations. The Commission should consider turning the proposed court rule and procedure into draft legislation.[43]

2) Extradition:

Theoretically, procedural difficulties can exist to complicate the extradition of persons from tribes to states. The Commission should explore whether this problem has arisen in Michigan. If so, the Commission might want to consider further research in this area, as well as drafting proposed legislation.

3) Official Statement of Michigan's Policy toward Native Americans:

Several states had codified their official policies regarding government to government relations with Native American tribes.[44] These statutes often provide procedures for negotiating and drafting agreements between various governmental entities. Michigan does not have any such statute. The Commission should explore the nature of state authority to promulgate these statutes, and suggest an appropriate statute for Michigan.

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[43]For similar legislation in other states, see, e.g., 1993 N.D. Laws §27-01-09.

[44]See, e.g. , Ga. code Ann §44-12-300 (1993); Idaho Code §67-4001 et seq. (1984); Neb. Rev. Stat. §§13-1501 to 13-1509 (1993).

4) Protection of Archeological Sites and Repatriation of Human Remains and Funerary Objects:

Most states have some type of statute concerning the protection of archeological sites. Many of these statutes are more extensive than Michigan's.[45] The Commission might want to explore this issue with tribes and see whether the Commission should recommend the adoption of more extensive legislation.

5) Repeal of Malt Beverage Delivery Limitations:

In light of modern rulings on equal protection, it is likely that Michigan's limitation on the delivery of alcohol to reservations is unconstitutional. The Commission should recommend the repeal of this statute.

6) Reform of Indian Affairs Commission:

Many states have created Indian Affairs Commissions. The Commission should consider reviewing the duties and powers of these other commissions to see whether Michigan should make any changes to the structure and process of its Indian Affairs Commission.

7) Probate Issues:

State law does govern the distribution of some types of Indian-owned land. The Commission should explore this issue in more detail to see whether changes should be proposed for Michigan probate laws. Potential changes might include a provision for recognition of tribal laws and customs regarding inheritance and descent of property.

8) Protection of Indian Arts and Crafts:

The Commission should consult with representatives of Michigan's Native American population to determine whether any segment of that population is involved in the creation or marketing of Indian arts and crafts. If so, Michigan might want to adopt legislation similar to other states[46] which strives to reduce the fraud often prevalent in these markets.

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[45]See note 38 supra.

[46]See, e.g., Colo. Rev. Stat. §12-44.5 (1993); Me. Rev. Stat. Ann. §§69-1801 et seq. (1986); Neb. Rev. Stat. §44-12-300 (1993).

9) Taxation:

State taxation of tribes or tribal members is a very complicated area of law. If Michigan wishes to involve tribes in any taxation program, the Commission should explore this area in more detail.[47]

[47]For examples of taxation statutes in other states, see, e.g., Conn. Gen. Stat. §12-19a (1993); Idaho code §63-3622Z (1993); Miss. Code Ann. §§27-65-211 to 27-65-221 (1986).

APPENDIX A

INDIAN AFFAIRS COMMISSION
ACT 195 of 1972

AN ACT to provide for the creation and functions of the commission on Indian affairs; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

16.711 Indian affairs commission; creation; appointment, qualifications, and terms of members.

Sec. 1. (1) Within the executive office of the governor an Indian affairs commission is created to consist of 11 members appointed by the governor. Nine members shall have not less than 1/4 quantum Indian blood, 2 of whom shall be from Indian reservations and recommended by the intertribal council, 5 of whom shall be appointed by the governor from geographic areas representative of Indian population, and 2 of whom shall be appointed by the governor from a city having a population greater than 1,000,000 and 2 members at large, not necessarily Indian.

(2) All members shall be appointed for 3-year terms, not more than 4 of which shall expire in the same year except that of the members first appointed, 3 each shall be appointed for terms of 1, 2, and 3 years. A member appointed to fill a vacancy occurring otherwise than by expiration of a term shall be appointed for the unexpired term in accordance with subsection (1).

(3) The governor shall appoint the 2 additional members of the commission before April 1, 1979. Of the additional members appointed, 1 shall be for a term of 2 years and 1 for a term of 3 years.

16.712 Election of officers; terms; meetings; compensation; expenses.

Sec. 2. Annually the commission shall elect such officers from its members as it deems advisable. Officers shall serve at the pleasure of the commission. The commission shall meet at least 4 times in each calendar year. A member of the commission shall receive as compensation for his services in attending meetings of the commission the sum of $35.00 for each such meeting day attended. The number of compensated meetings shall not exceed 25 meetings in each fiscal year. A member shall receive reimbursement for actual and necessary traveling expenses incurred on official business. Reimbursement shall be made in the manner provided by law for state employees. Expenses of the commission shall be approved by the chairman and 1 other member of the commission designated by the commission and shall then be paid in the same manner as other state expenses are paid.

16.713 Quorum; majority required for final action; effect of vacancy; conducting business at public meeting; notice.

Sec. 3. (1) A majority of the members of the commission constitutes a quorum. A majority of the members of the commission is required for any final action by the commission. A vacancy in the commission shall not impair the right of the remaining members to exercise the powers of the commission.

(2) The business which the commission may perform shall be conducted at a public meeting of the commission held in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

16.714 Investigation; primary duty of commission.

Sec. 4. The commission shall investigate problems common to Indian residents of this state. The primary duty of the commission shall be to assist tribal governments, Indian organizations and individuals with problems of education, employment, civil rights, health, housing, treaty rights and any other right or service due Indians of this state.

16.715 Duties generally.

Sec. 5. The commission shall:

(a) Appoint an executive director who shall serve as secretary to the commission and carry on the administrative and ministerial functions of the commission when it is not in session and who shall act in such other capacities as the commission directs.

(b) Approve employees required to carry out assigned responsibilities in accordance with civil service regulations and within limitations provided by law and prescribe their duties.

(c) Request the services of all state and local governmental departments and agencies to assure that Indian citizens have access to decision-making bodies, the policies of which affect the Indian population in any area.

(d) Actively consult with representatives of those federal agencies and departments having control over Indian affairs.

(e) Recommend to the legislature such legislation that will serve the interests of Indian residents in this state.

(f) Cooperate with such agencies that will aid in effectuating the purposes of this act.

(g) Apply for and accept grants and gifts from a governmental or private source.

(h) Submit a full written report of its activities and recommendations each year to the legislature and governor.

16.719 Repealer; transfer of powers, duties, and functions.

Sec. 9. Act No. 300 of the Public Acts of 1965, being sections 400.311 to 400.315 of the Compiled Laws of 1948, is repealed. The statutory authority, powers, duties, functions, records, personnel, property, unfinished business, unexpended balances of appropriations, allocations of other funds used, held, employed, available, or to be made available in connection with such powers, duties and functions authorized for the implementation of Act No. 300 of the Public Acts of 1965 are transferred to the executive office and shall be assigned to the Indian affairs commission created by this act.

INDIAN HOUSING AUTHORITY
Act 220 of 1979

AN ACT to provide for the establishment of Indian housing authorities on Indian reservations in this state; and to prescribe the powers and duties of an Indian housing authority.

The People of the State of Michigan enact:

125.1551 Definitions.

Sec. 1. As used in this act:

(a) "Authority" means an Indian housing authority created pursuant to section 2.

(b) "Indian reservation" means an Indian community which has land held in trust for the Indian community by the federal or state government, or a local unit of government, or which owns the land in its own name.

(c) "Reservation governor" means the chairperson or president of the elected governing council of an Indian reservation.

125.1552 Indian housing authority; creation; appointment, qualifications, and terms of members; vacancy; election of officers; commissioner as secretary and treasurer.

Sec. 2. (1) Each Indian reservation in this state may create an Indian housing authority. Each authority shall have 5 commissioners appointed by the reservation governor, with the advice and consent of the tribal council of the reservation for which the authority is created. Not less than 4 commissioners, including the chairperson, shall be members of the tribe of the respective reservation. The holding of any tribal office shall not bar appointment of a tribal member to the authority of the member's reservation.

(2) The term of a member appointed, except to fill a vacancy occurring other than by expiration of term, shall be 4 years from the expiration of the term of the member's predecessor. However, the terms of the members first appointed shall be as follows: 1 shall be appointed for 1 year, 1 for 2 years, 1 for 3 years, and 2 for 4 years. A vacancy in the office of an appointed member occurring other than by expiration of term shall be filled in the same manner as the original appointment for the balance of the term.

(3) Each authority shall elect a chairperson, a vice-chairperson, a secretary, and a treasurer from among the commissioners. A commissioner may hold the positions of both secretary and treasurer.

125.1553 Conducting business at public meeting; notice; availability of writings to public.

Sec. 3. (1) The business which an authority may perform shall be conducted at a public meeting of the authority held in compliance with Act No. 267 of the Public Acts of 1976, as amended, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976, as amended.

(2) A writing prepared, owned, used, in the possession of, or retained by an authority in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public Acts of 1976, as amended, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

125.1554 Indian housing authority; powers and duties.

Sec. 4. An authority shall have all of the following powers and duties:

(a) To purchase, lease, sell, exchange, transfer, assign, and mortgage real or personal property or any interest in the property, or acquire real or personal property by gift or bequest. The authority also may clear and improve property, engage in or contract for the design, construction, alteration, improvement, extension, or repair of a house or housing project under the authority's jurisdiction.

(b) To lease, operate, and maintain, or provide for the leasing, operation, and maintenance of a housing project.

(c) To provide for water, sewage, drainage, recreational, community, and educational facilities which the authority considers a necessary part of a housing project.

(d) To provide for streets, sidewalks, bicycle paths, or any other type of thoroughfare which the authority considers necessary for the transportation needs of the inhabitants of a housing project.

(e) To arrange for financing of housing projects and to enter into grants or contracts for the implementation of the activities described in this section.

125.1555 Facilities, services, and financial aid; agreement with state.

Sec. 5. The state may provide facilities, services, and financial aid, by loan, grant, or appropriation, to an authority. In addition, the state may enter into an agreement with an authority for the purposes of implementing this act.

211.9 Personal property exempt from taxation.

Sec. 9. The following personal property is exempt from taxation:

(a) The personal property of charitable, educational, and scientific institutions incorporated under the laws of this state. This exemption does not apply to secret or fraternal societies, but the personal property of all charitable homes of the societies and nonprofit corporations that own and operate facilities for the aged and chronically ill in which the net income from the operation of the corporations does not inure to the benefit of a person other than the residents is exempt.

(b) The property of all library associations, circulating libraries, libraries of reference, and reading rooms owned or supported by the public and not used for gain.

(c) The property of posts of the grand army of the republic, sons of veterans' unions, and of the women's relief corps connected therewith, of young men's Christian associations, women's Christian temperance union associations, young people's Christian unions, a boy or girl scout or camp fire girls organization, 4-H clubs, and other similar associations.

(d) Pensions receivable from the United States.

(e) The property of Indians who are not citizens.

(f) The personal property owned and used by a householder such as customary furniture, fixtures, provisions, fuel, and other similar equipment, and the wearing apparel including personal jewelry, family pictures, school books, library books of reference, and allied items. Personal property is not exempt under this subdivision if it is used to produce income, if it is held for speculative investment, or if it constitutes an inventory of goods for sale in the regular course of trade.

(g) Household furnishings, provisions, and fuel to the state equalized value of not more than $5,000.00, to each social or professional fraternity, sorority, and student cooperative house recognized by the educational institution at which it is located.

(h) The working tools of a mechanic to the state equalized value of not more than $500.00. "Mechanic", as used in this subdivision, means a person skilled in a trade pertaining to a craft or in the construction or repair of machinery if the person's employment by others is dependent on his or her furnishing the tools.

(i) Fire engines and other implements used in extinguishing fires owned or used by an organized or independent fire company.

(j) Property actually being used in agricultural operations and the farm implements held for sale or resale by retail servicing dealers for use in agricultural production. As used in this subdivision, "agricultural operations" means farming in all its branches, including cultivation of the soil, growing and harvesting of an agricultural, horticultural, or floricultural commodity, dairying, raising of livestock, bees, fur-bearing animals, or poultry, turf and tree farming, raising and harvesting of fish, and any practices performed by a farmer or on a farm as an incident to, or in conjunction with, farming operations, but excluding retail sales and food processing operations. Property used in agricultural operations includes machinery used to prepare the crop for market operated incidental to a farming operation that does not substantially alter the form, shape, or substance of the crop and is limited to cleaning, cooling, washing, pitting, grading, sizing, sorting, drying, bagging, boxing, crating, and handling if not less than 33% of the volume of the crops processed in the year ending on the applicable tax day or in at least 3 of the immediately preceding 5 years were grown by the farmer in Michigan who is the owner or user of the crop processing machinery.

(k) Personal property to the state equalized value of not more than $500.00 used by a householder in the operation of a business in the householder's dwelling or at 1 other location in the city, township, or village where the householder resides.

(*l*) The products, materials, or goods processed or otherwise and in whatever form, but expressly excepting alcoholic beverages, located in a public warehouse, United States customs port of entry bonded warehouse, dock, or port facility on December 31 of each year, if those products, materials, or goods are designated as in transit to destinations out of state pursuant to the published tariffs of a railroad or common carrier by the filing of the freight bill covering the products, materials, or goods with the agency designated by the tariffs, so as to entitle the shipper to transportation rate privileges. Products in a United States customs port of entry bonded warehouse that arrived from another state or a foreign country, whether awaiting shipment to another state or to a final destination within this state, shall be considered to be in transit and temporarily at rest, and not subject to personal property taxation. To obtain exemption, the owner shall file a sworn statement with, and in the form required by, the assessing officer of the tax district in which the warehouse, dock, or port facility is located, at a time between the tax day, December 31, and before closing of the assessment rolls by the assessing officer, describing the products, materials, or goods, and reporting their cost and value as of December 31 of each year. The status of persons, and products, materials, or goods for which exemption is requested shall be determined as of December 31, which shall be the tax day. The assessment on the basis of average monthly inventory shall not apply in valuing products, materials, or goods for which exemption is requested. Any property located in a public warehouse, dock, or port facility on December 31 of each year, which is exempt from taxation under this subdivision but which is not shipped outside the state pursuant to the particular tariff under which the transportation rate privilege was established, shall be assessed upon the next succeeding or a subsequent assessment roll by the assessing officer and taxed at the same rate of taxation as other taxable properties for the year or years for which the property was exempted, to the owner at the time of the omission, unless the owner or person entitled to possession of the products, materials, or goods is a resident of, or authorized to do business in, this state and files with the assessing officer, with whom statements of taxable

property are required to be filed, a statement under oath that the products, materials, or goods are not for sale or use in this state and will be shipped to a point or points outside this state. If a person, firm, or corporation claims exemption by the filing of a sworn statement, the person, firm, or corporation shall append to the statement of taxable property required to be filed in the next year or, if a statement of taxable property is not filed for the next year, a sworn statement on a form required by the assessing officer shall be filed showing a complete list of the property for which the exemption was claimed with a statement of the manner of shipment and of the point or points to which the products, materials, or goods were shipped from the public warehouse, dock, or port facility and the products, materials, or goods not shipped to a point or points outside this state shall be assessed upon the next succeeding assessment roll, or on a subsequent assessment roll by the assessing officer and taxed at the same rate of taxation as other taxable properties for the year or years for which the property was exempted, to the owner at the time of the omission. The records, accounts, and books of warehouses, docks, or port facilities, individuals, partnerships, corporations, owners, or those in possession of tangible personal property shall be open to and available for inspection, examination, or auditing by assessing officers. A warehouse, dock, or port facility, individual, partnership, corporation, owner, or person in possession of tangible personal property, shall report within 90 days after shipment of products, materials, or goods in transit, for which exemption under this section was claimed or granted, the destination of shipments or parts of shipments and the cost value thereof to the assessing officer. For failure to comply with this requirement, the warehouse, dock, or port facility, individual, partnership, corporation, or owner is subject to a fine of $100.00 for each omission. A person, firm, individual, partnership, corporation, or owner failing to report products, materials, or goods located in a warehouse, dock, or port facility to the assessing officer is subject to a fine of $100.00 and a penalty of 50% of the final amount of taxes found to be assessable for the year on property not reported, the assessable taxes and penalty to be spread on a subsequent assessment roll in the same manner as general taxes on personal property. For the purpose of this subdivision, a public warehouse, dock, or port facility means a warehouse, dock, or port facility owned or operated by a person, firm, or corporation engaged in the business of storing products, materials, or goods for hire for profit who issues a schedule of rates for storage of the products, materials, or goods and who issues warehouse receipts pursuant to Act No. 303 of the Public Acts of 1909, as amended, being sections 443.50 to 443.55 of the Michigan Compiled Laws. A United States customs port of entry bonded warehouse means a warehouse within a classification designated by 19 C.F.R. 19.1 and which is located in a port of entry, as defined by 19 C.F.R. 101.1(m). A portion of a public warehouse, United States customs port of entry bonded warehouse, dock, or port facility leased to a tenant or a portion of any premises owned or leased or operated by a consignor or consignee or an affiliate or subsidiary of the consignor or consignee shall not be considered a public warehouse, dock, or port facility.

(m) Personal property owned by a bank or trust company organized under the laws of this state, national banking association, or incorporated bank holding company as defined in section 2 of the bank holding company act of 1956, chapter 240, 70 Stat. 133, 12 U.S.C. 1841, that controls a bank, national banking association, trust company, or industrial bank subsidiary located in this state. However, buildings owned by a state or national bank, trust company, or incorporated bank holding company and situated upon lands of which

the state or national bank, trust company, or incorporated bank holding company is not the owner of the fee are considered real property and are not exempt from taxation and personal property owned by a state or national bank, trust company, or incorporated bank holding company that is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit is not exempt from taxation.

(n) Farm products processed or otherwise, the ultimate use of which is for human or animal consumption as food, except wine, beer, and other alcoholic beverages regularly placed in storage in a public warehouse, dock, or port facility, while in storage are considered in transit and only temporarily at rest, and are not subject to personal property taxation. The assessing officer is the determining authority as to what constitutes, is defined as, or classified as, farm products as used in this subdivision. The records, accounts, and books of warehouses, docks, or port facilities, individuals, partnerships, corporations, owners, or those in possession of farm products shall be open to and available for inspection, examination, or auditing by assessing officers.

(o) Sugar in solid or liquid form, produced from sugar beets and dried beet pulp and beet molasses, when owned or held by processors.

(p) The personal property of a parent cooperative preschool. As used in this subdivision and section 7z, "parent cooperative preschool" means a nonprofit, nondiscriminatory educational institution maintained as a community service and administered by parents of children currently enrolled in the preschool, that provides an educational and developmental program for children younger than compulsory school age, that provides an educational program for parents, including active participation with children in preschool activities, that is directed by qualified preschool personnel, and that is licensed by the department of social services under Act No. 116 of the Public Acts of 1973, as amended, being sections 722.111 to 722.128 of the Michigan Compiled Laws.

(q) All equipment used exclusively in wood harvesting, but not including portable or stationary sawmills or other equipment used in secondary processing operations. As used in this subdivision, "wood harvesting" means the clearing of land for forest management purposes, the planting of trees, and all forms of cutting or chipping of trees and the loading of them on trucks for removal from the harvest area.

(r) Liquefied petroleum gas tanks located on residential or agricultural property and used to store liquefied petroleum gas for residential or agricultural property use. As used in this subdivision, "liquefied petroleum gas" means that term as defined in section 51 of Act No. 150 of the Public Acts of 1927, being section 207.151 of the Michigan Compiled Laws.

ABORIGINAL RECORDS AND ANTIQUITIES
Act 173 of 1929

AN ACT to protect and preserve, and to regulate the taking of, aboriginal records and antiquities within this state; to preserve abandoned property of historical or recreational value on the bottomlands of the Great Lakes and regulate the salvage of abandoned property of historical or recreational value; to designate and regulate Great Lakes bottomland preserves; to prescribe the powers and duties of certain state agencies; to create a fund; and to prescribe penalties and provide remedies.

The People of the State of Michigan enact:

299.51 Aboriginal records and antiquities; right to explore, survey, excavate, and regulate reserved to state; possessory right or title to abandoned property.

Sec. 1. (1) The state reserves to itself the exclusive right and privilege, except as provided in this act, of exploring, surveying, excavating, and regulating through its authorized officers, agents, and employees, all aboriginal records and other antiquities, including mounds, earthworks, forts, burial and village sites, mines or other relics, and abandoned property of historical or recreational value found upon or within any of the lands owned by or under the control of the state.

(2) The state reserves to itself a possessory right or title superior to that of a finder to abandoned property of historical or recreational value found on the state owned bottomlands of the Great Lakes. This property shall belong to this state with administration and protection jointly vested in the department and the secretary of state.

299.51a Definitions.

Sec. 1a. As used in this act:

(a) "Abandoned property" means an aircraft; a watercraft, including a ship, boat, canoe, skiff, raft, or barge; the rigging, gear, fittings, trappings, and equipment of an aircraft or watercraft; the personal property of the officers, crew, and passengers of an aircraft or watercraft; and the cargo of an aircraft or watercraft which have been deserted, relinquished, cast away, or left behind and for which attempts at reclamation have been abandoned by owners and insurers. Abandoned property also means materials resulting from activities of historic and prehistoric native Americans.

(b) "Bottomlands" means the unpatented lake bottomlands of the Great Lakes.

(c) "Committee" means the underwater salvage and preserve committee created in section 1b.

(d) "Department" means the department of natural resources.

(e) "Great Lakes" means lakes Erie, Huron, Michigan, St. Clair, and Superior.

(f) "Great Lakes bottomlands preserve" means an area located on the bottomlands of the Great Lakes and extending upward to and including the surface of the water, which is delineated and set aside by rule promulgated pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, for special protection of abandoned property of historical value, or ecological, educational, geological, or scenic features or formations having recreational, educational, or scientific value. A preserve may encompass a single object, feature, or formation, or a collection of several objects, features, or formations.

(g) "Historical value" means value relating to, or illustrative of, Michigan history, including the statehood, territorial, colonial, and historic, and prehistoric native American periods.

(h) "Mechanical or other assistance" means all manmade devices, including pry bars, wrenches and other hand or power tools, cutting torches, explosives, winches, flotation bags, lines to surface, extra divers buoyancy devices, and other buoyance devices, used to raise or remove artifacts.

(i) "Recreational value" means value relating to an activity which the public engages in, or may engage in, for recreation or sport, including scuba diving and fishing.

299.51b Underwater salvage and preserve committee; creation; purpose; appointment, qualifications, and terms of members; vacancy; compensation; appointment, term, and duties of chairperson; committee as advisory body; functions of committee; limitation.

Sec. 1b. (1) The underwater salvage and preserve committee is created in the department to provide technical and other advice to the director of the department and the secretary of state with respect to their responsibilities under this act.

(2) The underwater salvage and preserve committee shall consist of 9 members appointed as follows:

(a) Two individuals appointed by the director of the department who have primary responsibility in the department for administering this act.

(b) Two individuals appointed by the secretary of state who have primary responsibility in the department of state for administering this act.

(c) One individual appointed by the director of commerce.

(d) Four individuals appointed by the governor with the advice and consent of the senate from the general public. Two of these individuals shall have experience in recreational scuba diving.

(3) An individual appointed to the committee shall serve for a term of 3 years. A vacancy on the committee shall be filled in the same manner as an original appointment and the term of a member appointed to fill a vacancy shall be for 3 years. Members of the committee shall serve without compensation, except for their regular state salary where applicable.

(4) The chairperson of the committee shall alternate between the representatives from the department and the department of state. The chairperson shall be designated by the director of the department or the secretary of state, whichever is applicable from among his or her representatives on the committee. The chairperson's term shall run for 12 months, from October 1 through September 30. The director of the department shall appoint the first chairperson of the committee for a term ending September 30, 1989. The chairperson shall call meetings as necessary but not less than 4 times per year, set the agenda for meetings, ensure that adequate minutes are taken, and file an annual report of committee proceedings with the head of the departments of state, natural resources, and commerce.

(5) The committee is an advisory body and may perform all of the following functions:

(a) Make recommendations with regard to the creation and boundaries of Great Lakes underwater preserves.

(b) Review applications for underwater salvage permits and make recommendations regarding issuance.

(c) Consider and make recommendations regarding the charging of permit fees and the appropriate use of revenue generated by those fees.

(d) Consider the need for and the content of rules intended to implement this act and make recommendations concerning the promulgation of rules.

(e) Consider and make recommendations concerning appropriate legislation.

(f) Consider and make recommendations concerning program operation.

(6) The committee shall not replace or supersede the responsibility or authority of the secretary of state or the director of the department to carry out their responsibilities under this act.

299.52 Deed; clause reserving to state property and exploration rights in aboriginal antiquities; exceptions; waiver.

Sec. 2. A deed, as provided by this act, given by this state, except state tax deeds for the conveyance of any land owned by the state, shall contain a clause reserving to this state a property right in aboriginal antiquities including mounds, earthworks, forts, burial and village sites, mines, or other relics and also reserving the right to explore and excavate for the aboriginal antiquity by and through this state's authorized agent and employee. This section shall apply only to the sale of tax reverted land. The commission of

natural resources with the approval of the secretary of state may waive this reservation when conveying platted property and when making conveyances under Act No. 193 of the Public Acts of 1911, as amended, being sections 322.481 to 322.484 of the Michigan Compiled Laws.

299.53 Permit for exploration or excavation of aboriginal remain; exception.

Sec. 3. A person, either personally or through an agent or employee, shall not explore or excavate an aboriginal remain covered by this act upon lands owned by the state, except under a permit issued by the director of the department of natural resources with written approval of the secretary of state. A permit shall be issued without charge. This section shall not apply to the Mackinac Island state park commission on lands owned or controlled by the commission.

299.54 Consent of landowner to removal of relics or records of antiquity.

Sec. 4. Without the consent of the land owner, a person shall not remove any relics or records of antiquity such as human or other bones; shells, stone, bone, or copper implements; pottery or shards of pottery, or similar artifacts and objects from the premises where they have been discovered.

299.54a Permit to recover, alter, or destroy abandoned property; recovered property as property of secretary of state; prohibitions as to human body or remains; violation as felony; penalty.

Sec. 4a. (1) Except as provided in section 4b, a person shall not recover, alter, or destroy abandoned property which is in, on, under, or over the bottomlands of the Great Lakes, including those within a Great Lakes bottomlands preserve, unless the person has a permit issued jointly by the secretary of state and the department pursuant to section 4c.

(2) A person who recovers abandoned property without a permit when a permit is required by this act shall transmit the property to the secretary of state and the recovered property shall be the property of the secretary of state.

(3) A person shall not remove, convey, mutilate, or deface a human body or the remains of a human body located on the bottomlands of the Great Lakes.

(4) A person who violates subsection (1) by recovering or destroying abandoned property with a fair market value of $100.00 or more is guilty of a felony, punishable by imprisonment for not more than 2 years, or by a fine of not more than $5,000.00, or both.

299.54b Recovery of abandoned property without permit; report; availability of recovered property for inspection; release of property.

Sec. 4b. (1) A person may recover abandoned property outside a Great Lakes bottomlands preserve without a permit if the abandoned property is not attached to, nor located on, in, or located in the immediate vicinity of and associated with a sunken aircraft or watercraft and if the abandoned property is recoverable by hand without mechanical or other assistance.

(2) A person who recovers abandoned property valued at more than $10.00 without a permit pursuant to subsection (1) shall file a written report within 30 days after removal of the property with the department or the secretary of state if the property has been abandoned for more than 30 years. The written report shall list all recovered property which has been abandoned for more than 30 years and the location of the property at the time of recovery. For a period of 90 days after the report is filed, the person shall make the recovered property available to the department and the secretary of state for inspection at a location in this state. If the secretary of state determines that the recovered property does not have historical value, the secretary of state shall release the property to the person by means of a written instrument.

299.54c Permit; scope; application; filing, form, and contents; additional information or documents; notice of deficient application; failure to respond; approval or disapproval of application; display of property; payment of salvage costs; recovery of cargo outside Great Lakes bottomlands preserves; administrative review; conduct of hearing; combined appeals; joint decision and order; duration of permit; issuance of new permit; transfer or assignment of permit.

Sec. 4c. (1) A permit issued under this section shall authorize a person to recover abandoned property located on, in, or located in the immediate vicinity of and associated with a sunken aircraft or watercraft.

(2) A person shall file an application for a permit with the department on a form prescribed by the department and approved by the secretary of state. The application shall contain all of the following information:

(a) The name and address of the applicant.

(b) The name, if known, of the watercraft or aircraft on or around which recovery operations are to occur and a current photograph or drawing of the watercraft or aircraft, if available.

(c) The location of the abandoned property to be recovered and the depth of water in which it may be found.

(d) A description of each item to be recovered.

(e) The method to be used in recovery operations.

(f) The proposed disposition of the abandoned property recovered, including the location at which it will be available for inspection by the department and the secretary of state.

(g) Other information which the department or the secretary of state considers necessary in evaluating the request for a permit.

(3) An application for a permit shall not be considered complete until all information requested on the application form and any other information requested by the department or the secretary of state has been received by the department. After receipt of an otherwise complete application, the department may request additional information or documents as are determined to be necessary to make a decision to grant or deny a permit. The department, or the secretary of state, shall notify the applicant in writing when the application is deficient.

(4) An applicant notified that an application for a permit may be deficient and returned due to insufficient information under subsection (3) shall, within 20 days after the date the notice is mailed, provide the information. If the applicant fails to respond within the 20-day period, the application shall be denied unless the applicant requests additional time and provides reasonable justification for an extension of time.

(5) The department and the secretary of state shall, with the advice of the committee, approve or disapprove an application for a permit within 30 days after the date a complete application is filed with the department. The department and the secretary of state may approve an application conditionally or unconditionally. A condition to the approval of an application shall be in writing on the face of the permit. The department and the secretary of state may impose such conditions as are considered reasonable and necessary to protect the public trust and general interests, including conditions that accomplish 1 or more of the following:

(a) Protect and preserve the abandoned property to be recovered, and the recreational value of the area in which recovery is being accomplished.

(b) Assure reasonable public access to the abandoned property after recovery.

(c) Are in conformity with rules applying to activities within a Great Lakes bottomlands preserve.

(d) Prohibit injury, harm, and damage to a bottomlands site or abandoned property not authorized for removal during and after salvage operations by the permit holder.

(e) Prohibit or limit the amount of discharge of possible pollutants, such as floating timbers, planking, and other debris, which may emanate from the shipwreck, plane wreck, or salvage equipment.

(f) Require the permit holder to submit a specific removal plan prior to commencing any salvaging activities. Among other matters considered appropriate by either the department or the secretary of state, or both, the removal plan may be required to ensure the safety of those removing or assisting in the removal of the abandoned property and to address how the permit holder proposes to prevent, minimize, or mitigate potential adverse effects upon the abandoned property to be removed, that portion of the abandoned property which is not to be removed, and the surrounding geographic features.

(6) The department shall approve an application for a permit unless the department determines that the abandoned property to be recovered has substantial recreational value in itself or in

conjunction with other abandoned property in its vicinity underwater, or the recovery of abandoned property would not comply with rules applying to a Great Lakes bottomlands preserve.

(7) The secretary of state shall approve the application for a permit unless the secretary of state determines that the abandoned property to be recovered has substantial historical value in itself or in conjunction with other abandoned property in its vicinity. If the property has substantial historical value, the secretary of state, pursuant to subsection (5), may impose a condition to the approval of the application requiring the applicant to turn over recovered property to the secretary of state for the purpose of preserving the property or permitting public access to the property. The secretary of state may authorize the display of the property in a public or private museum or by a local unit of government. In addition to the conditions authorized by subsection (5), the secretary of state may provide for payment of salvage costs in connection with the recovery of the abandoned property.

(8) A person who discovers an abandoned watercraft which is located outside of a Great Lakes bottomlands preserve shall be entitled to recover cargo situated on, in, or associated with the watercraft, if the person applies for a permit pursuant to this section within 90 days after discovering the watercraft. If an application for a permit to recover cargo is not filed within 90 days after a watercraft discovery, subject to subsections (4) and (5) an exclusive cargo recovery permit shall be issued to the first person applying for such a permit. Only 1 permit to recover the same cargo shall be issued and operative at a time. When a watercraft containing cargo is simultaneously discovered by more than 1 person, a permit shall be approved with respect to the first person or persons jointly applying for a permit.

(9) A person aggrieved by a condition contained on a permit or by the denial of an application for a permit may request an administrative review of the condition or the denial by the director of the department or the secretary of state, whichever disapproves the application or imposes the condition. A person shall file the request for review with the department or the secretary of state, whichever is applicable, within 90 days after the permit application is submitted to the department. An administrative hearing conducted pursuant to this subsection shall be conducted under the procedures set forth in chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.271 to 24.287 of the Michigan Compiled Laws. If neither the department or the secretary of state approves the application and an administrative review is requested from both the department and the secretary of state, the appeals shall be combined upon request of the appellant or either the department or the secretary state and a single administrative hearing shall be conducted. The director of the department and the secretary of state shall issue jointly the final decision and order in the case.

(10) A permit issued under this section shall be valid until December 31 of the year in which the application for the permit was filed and is not renewable. If an item designated in a permit for recovery is not recovered, a permit holder may, upon request following the expiration of the permit, be issued a new permit to remove the same abandoned property if the permit holder demonstrates that diligence in attempting recovery was exercised under the previously issued permit.

(11) A permit issued under this section shall not be transferred or assigned unless the assignment is approved in writing by both the department and the secretary of state.

299.54d Recovered abandoned property; report; examination; removal from state; action for recovery; release of property.

Sec. 4d. (1) Within 10 days after recovery of abandoned property, a person with a permit issued pursuant to section 4c shall report the recovery in writing to the department. The person recovering the abandoned property shall give authorized representatives of the department and the secretary of state an opportunity to examine the abandoned property for a period of 90 days after recovery. Recovered abandoned property shall not be removed from this state without written approval of the department and the secretary of state. If the recovered abandoned property is removed from the state without written approval, the attorney general, upon request from the department or the secretary of state, shall bring an action for the recovery of the property.

(2) If the secretary of state determines that the recovered abandoned property does not have historical value, the secretary of state shall release the property to the person holding the permit by means of a written instrument.

299.54e Great Lakes bottomlands preserves; establishment; rules; qualifications; factors; granting permit to recover abandoned artifacts; limitation; intentional sinking of vessel; prohibited use of state money.

Sec. 4e. (1) The department shall establish Great Lakes bottomlands preserves by rule promulgated pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.201 to 24.328 of the Michigan Compiled Laws. A Great Lakes bottomlands preserve shall be established by emergency rule if it is determined by the director of the department that this action is necessary to immediately protect an object or area of historical or recreational value.

(2) A Great Lakes bottomlands preserve may be established whenever a bottomlands area includes a single watercraft of significant historical value, includes 2 or more abandoned watercraft, or contains other features of archaeological, historical, recreational, geological, or environmental significance. Bottomlands areas containing few or no watercraft or other features directly related to the character of a preserve may be excluded from preserves.

(3) In establishing a Great Lakes bottomlands preserve, the department shall consider all of the following factors:

(a) Whether creating the preserve is necessary to protect either abandoned property possessing historical or recreational value, or significant underwater geological or environmental features.

(b) The extent of local public and private support for creation of the preserve.

(c) Whether a preserve development plan has been prepared by a state or local agency.

(d) The extent to which preserve support facilities such as roads, marinas, charter services, hotels, medical hyperbaric facilities, and rescue agencies have been developed in or are planned for the area.

(4) The department and the secretary of state shall not grant a permit to recover abandoned artifacts within a Great Lakes bottomlands preserve except for historical or scientific purposes or when the recovery will not adversely affect the historical, cultural, or recreational integrity of the preserve area as a whole.

(5) An individual Great Lakes bottomlands preserve shall not exceed 400 square miles in area. Great Lakes bottomlands preserves shall be limited in total area to not more than 10% of the Great Lakes bottomlands within this state.

(6) Upon the approval of the committee, not more than 1 vessel associated with great lakes maritime history may be sunk intentionally within a great lakes bottomlands preserve. However, no state money shall be expended to purchase, transport, or sink the vessel.

299.54f Rules generally.

Sec. 4f. (1) The department and the secretary of state, jointly or separately, may promulgate rules pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.328 of the Michigan Compiled Laws, as are necessary to implement this act.

(2) Within each Great Lakes bottomlands preserve, the department and the secretary of state may jointly promulgate rules, pursuant to the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, which govern access to and use of a Great Lakes bottomlands preserve. These rules may regulate or prohibit the alteration, destruction, or removal of abandoned property, features, or formations within a preserve.

299.54g Limitations not imposed by §§ 299.54a to 299.54d.

Sec. 4g. Sections 4a to 4d shall not be considered to impose the following limitations:

(a) A limitation on the right of a person to engage in diving for recreational purposes in and upon the Great Lakes or the bottomlands of the Great Lakes.

(b) A limitation on the right of the department or the secretary of state to recover, or to contract for the recovery of, abandoned property in and upon the bottomlands of the Great Lakes.

(c) A limitation on the right of a person to own either abandoned property recovered before July 2, 1980 or abandoned property released to a person after inspection.

299.54h Suspension or revocation of permit; grounds; hearing; civil action.

Sec. 4h. (1) If the department or the secretary of state finds that the holder of a permit issued pursuant to section 3 or 4c is not in compliance with this act, a rule promulgated under this act, or a provision of or condition in the permit, or has damaged abandoned property or failed to use diligence in attempting to recover property for which a permit was issued, the department or the secretary of state, individually or jointly, may summarily suspend or revoke the permit. If the permit holder requests a hearing within 15 days following the effective date of the suspension or revocation, the department or the secretary of state shall conduct an administrative hearing pursuant to chapter 4 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 of the Michigan Compiled Laws, to consider whether the permit should be reinstated.

(2) The attorney general, on behalf of the department or the secretary of state, individually or jointly, may commence a civil action in circuit court to enforce compliance with this act, to restrain a violation of this act or any action contrary to a decision denying a permit, to enjoin the further removal of artifacts, geological material, or abandoned property, or to order the restoration of an affected area to its prior condition.

299.54i Dangers accepted by participants in sport of scuba diving.

Sec. 4i. Each person who participates in the sport of scuba diving on the Great Lakes bottomlands accepts the dangers which adhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from entanglements in sunken watercraft or aircraft; the condition of sunken watercraft or aircraft; the location of sunken watercraft or aircraft; the failure of the state to fund staff or programs at bottomlands preserves; and the depth of the objects and bottomlands within preserves.

299.55 Violation as misdemeanor; penalty.

Sec. 5. (1) A person who violates section 3 or 4 of this act is guilty of a misdemeanor, and shall be punished by a fine of not more than $100.00 or by imprisonment for not more than 30 days, or both.

(2) A person who violates sections 4a to 4e or a rule promulgated under this act is guilty of a misdemeanor. Unless another penalty is provided in this act, a person convicted of a misdemeanor under this subsection shall be punished by a fine of not more than $500.00 or by imprisonment for not more than 6 months, or both.

299.56 Attaching, proceeding against, or confiscating equipment or apparatus; procedure; disposition of proceeds.

Sec. 6. (1) If a person who violates this act or a rule promulgated under this act uses a watercraft, mechanical or other assistance, scuba gear, sonar equipment, a motor vehicle, or any other equipment or apparatus during the course of committing the violation, the items so used may be attached, proceeded against, and confiscated as prescribed in this act.

(2) To effect confiscation, the law enforcement or conservation officer seizing the property shall file a verified complaint in the circuit court for the county in which the seizure was made or in the circuit court for Ingham county. The complaint shall set forth the kind of property seized, the time and place of the seizure, the reasons for the seizure, and a demand for the property's condemnation and confiscation. Upon the filing of the complaint, an order shall be issued requiring the owner to show cause why the property should not be confiscated. The substance of the complaint shall be stated in the order. The order to show cause shall fix the time for service of the order and for the hearing on the proposed condemnation and confiscation.

(3) The order to show cause shall be served on the owner of the property as soon as possible, but not less than 7 days before the complaint is to be heard. The court, for cause shown, may hear the complaint on shorter notice. If the owner is not known or cannot be found, notice may be served in 1 or more of the following ways:

(a) By posting a copy of the order in 3 public places for 3 consecutive weeks in the county in which the seizure was made and by sending a copy of the order by certified mail to the last known business or residential address of the owner. If the last addresses of the owner are not known, mailing a copy of the order is not required.

(b) By publishing a copy of the order in a newspaper once each week for 3 consecutive weeks in the county where the seizure was made and by sending a copy of the order by registered mail to the last known residential address of the owner. If the last residential address of the owner is not known, mailing a copy of the order is not required.

(c) In such a manner as the court directs.

(4) Upon hearing of the complaint, if the court determines that the property mentioned in the petition was possessed, shipped, or used contrary to law, either by the owner or by a person lawfully in possession of the property under an agreement with the owner, an order shall be made condemning and confiscating the property and directing its sale or other disposal by the director of the department. If the owner signs a property release, a court proceeding shall not be necessary. At the hearing, if the court determines that the property was not possessed, shipped, or used contrary to law, the

court shall order the director of the department to immediately return the property to its owner.

(5) The department shall deposit the proceeds it receives under this section into the state treasury to the credit of the underwater preserve fund created in section 7.

299.57 Underwater preserve fund; creation; sources of revenue; purposes for which money appropriated.

Sec. 7. (1) The underwater preserve fund is created as a separate fund in the state treasury, and it may receive revenue as provided in this act, or revenue from any other source.

(2) Money in the underwater preserve fund shall be appropriated for only the following purposes:

(a) To the secretary of state for the development of maritime archaeology in this state.

(b) To the department of commerce for the promotion of Great Lakes bottomlands preserves.

(c) To the department for the enforcement of this act.

LEASING LAND IN PETOSKEY STATE PARK
Act 51 of 1970

AN ACT to authorize the department of natural resources to lease state parkland within the Petoskey state park.

The People of the State of Michigan enact:

318.221 Petoskey state park; lease, purpose.

Sec. 1. The department of natural resources may lease land in the Petoskey state park to a cooperative nonprofit organization whose purpose is the preservation of Indian culture, arts and crafts.

318.222 Petoskey state park; terms of lease.

Sec. 2. Any lease so made shall contain provisions limiting the purposes for which the land is to be used, and shall contain a provision authorizing the department of natural resources to terminate the lease upon a finding that the land is being used for other purposes or contrary to the intent thereof.

330.1100 Definitions.

Sec. 100. As used in this chapter, unless the context requires otherwise:

(a) "Department" means the department of mental health.

(b) "Director" means the director of the department of mental health.

(c) "Office" means the office of multicultural services created in section 162.

(d) "Multicultural services" means specialized mental health services for multicultural populations such as African-Americans, Hispanics, Native Americans, Asian and Pacific Islanders, and Arab/Chaldean-Americans.

330.1162 Office of multicultural services; creation; appointment of director.

Sec. 162. The office of multicultural services is created within the department. The office shall be headed by a director appointed by the director of the department.

330.1163 Standing committee on multicultural services; appointment of members; purpose.

Sec. 163. A 13-member standing committee on multicultural services shall be appointed by the director of the department to advise the office and the department on matters pertaining to multicultural services.

330.1164 Duties of office.

Sec. 164. The office shall do all of the following:

(a) Assess the mental health needs of multicultural populations in the state.

(b) Recommend to the director of the department treatment methods and programs that are sensitive and relevant to the unique linguistic, cultural, and ethnic characteristics of multicultural populations.

(c) Provide consultation, technical assistance, training programs, and reference materials to agencies and organizations serving multicultural populations.

(d) Promote awareness of multicultural mental health concerns, and encourage, promote, and aid in the establishment of multicultural services.

(e) Disseminate information on available multicultural services.

(f) Provide adequate and effective opportunities for multicultural populations to express their views on departmental policy development and program implementation.

(g) Request adequate funds for multicultural services from the director of the department.

388.1716 American Indian pupils; additional allowance; computation.

Sec. 116. In 1993-94 and each succeeding fiscal year, a district receiving aid under section 21(1) and having American Indian pupils in attendance, who reside within the district and upon a United States government Indian reservation, shall be allowed in addition to the allowances provided by the other sections of this act an amount equal to the number of those pupils in attendance times 1/2 the tuition rate as computed under section 111 and under section 1401 of the school code of 1976, being section 380.1401 of the Michigan Compiled Laws.

WAIVER OF TUITION FOR NORTH AMERICAN INDIANS
Act 174 of 1976

An act to provide free tuition for state resident North American Indians in Michigan public community colleges, public universities, and certain federal tribally controlled community colleges; and to prescribe certain powers and duties of certain state departments, commissions, and agencies.

The People of the State of Michigan enact:

390.1251 Waiver of tuition for North American Indians; qualifications; participation of federal tribally controlled community college; eligibility for reimbursement.

Sec. 1. (1) A Michigan public community college or public university or a federal tribally controlled community college described in subsection (2) shall waive tuition for any North American Indian who qualifies for admission as a full-time, part-time, or summer school student, and is a legal resident of the state for not less than 12 consecutive months.

(2) A federal tribally controlled community college may participate in the tuition waiver program under this act and be eligible for reimbursement under section 2a if it meets all of the following:

(a) Is recognized under the tribally controlled community college assistance act of 1978, Public Law 95-471, 92 Stat. 1325.

(b) Is determined by the department of education to meet the requirements for accreditation by a recognized regional accrediting body.

390.1252 "North American Indian" defined.

Sec. 2. For the purposes of this act, "North American Indian" means a person who is not less than 1/4 quantum blood Indian as certified by the person's tribal association and verified by the Michigan commission on Indian Affairs.

390.1252a Reimbursement of tuition waived; report.

Sec. 2a. The Michigan commission on Indian Affairs shall annually, upon application therefore, reimburse each institution for the total amount of tuition waived during the prior fiscal year under section 1 of this act. The commission shall report to the legislature annually the number of American Indians for whom tuition has been waived at each institution and the total amounts to be paid under this act.

390.1253 Effective date.

Sec. 3. This act shall take effect on August 1, 1976.

MICHIGAN INDIAN DAY
Act 30 of 1974

AN ACT providing for the establishment of Michigan Indian day.

The People of the State of Michigan enact:

435.161 **Michigan Indian day.**

Sec. 1. The fourth Friday in September of each year shall be known as Michigan Indian day. This date is not to be construed as a legal holiday.

436.19d Eligibility for license as specially designated merchant or specially designated distributor; prohibitions; brewer as specially designated merchant; brewery hospitality room; sales or deliveries by wholesaler.

Sec. 19d. (1) A retail vendor licensed under this act to sell for consumption on the premises may apply for a license as a specially designated merchant. A specially designated distributor may apply for a license as a specially designated merchant. Except as provided in section 31(5), a warehouseman, mixed spirit drink manufacturer, wholesaler, outstate seller of beer, outstate seller of wine, outstate seller of mixed spirit drink, or vendor of spirits shall not be licensed as a specially designated merchant or a specially designated distributor or permitted to sell or deliver to the consumer any quantity of alcoholic liquor at retail.

(2) A specially designated distributor or specially designated merchant or any other retailer shall not hold a mixed spirit drink manufacturer, wholesale, warehouse, outstate seller of beer, outstate seller of mixed spirit drink, or outstate seller of wine license.

(3) A brewer, warehouseman, or wholesaler shall not be licensed as a specially designated merchant, except for brewers who manufacture less than 200,000 barrels of beer per year. This subsection shall not affect the operation of a brewery hospitality room.

(4) A wholesaler may sell or deliver beer and alcoholic liquor to hospitals, military establishments, governments of federal Indian reservations, and churches requiring sacramental wines and may sell to the wholesaler's own employees to a limit of 2 cases of 24 12-ounce units or its equivalent of malt beverage per week, or 1 case of 12 1-liter units or its equivalent of wine or mixed spirit drink per week.

STATE PROCUREMENTS FOR MINORITY OWNED AND WOMAN OWNED BUSINESSES
Act 428 of 1980

AN ACT to provide for the designation of state procurements of goods, services, and construction for minority owned and woman owned businesses; to provide powers and duties of the governor; to prescribe powers and duties of certain state departments and agencies; and to provide penalties.

The People of the State of Michigan enact:

450.771 Definitions.

Sec. 1. As used in this act:

(a) "Controlled" means exercising the power to make policy decisions in a business.

(b) "Department" means a principal department of the executive branch of the state government.

(c) "Expenditures" means payments and contracts for goods, services, and construction which may be acquired competitively and are not regulated by separate authority, and, where the department acts as the sole or primary contracting officer and has selective discretion as to the supplier, vendor, or contractor.

(d) "Joint venture" means an agreement that combines 2 or more businesses for specified purposes involving 1 or more minority owned or woman owned businesses and 1 or more businesses other than a minority owned or woman owned business.

(e) "Minority" means a person who is black, hispanic, oriental, eskimo, or an American Indian who is not less than 1/4 quantum Indian blood as certified by the person's tribal association and verified by the Indian affairs commission.

(f) "Minority owned business" means a business enterprise of which more than 50% of the voting shares or interest in the business is owned, controlled, and operated by individuals who are members of a minority and with respect to which more than 50% of the net profit or loss attributable to the business accrues to shareholders who are members of a minority.

(g) "Operated" means the activity of being involved in the day to day management of a business.

(h) "Person" means an individual, sole proprietorship, partnership, association, or corporation.

(i) "Subcontract" means an agreement to share a prime contract between a prime contractor, who is not a minority owned business or a woman owned business, and a minority owned or woman owned business.

(j) "Woman owned business" means a business of which more than 50% of the voting shares or interest in the business is owned, controlled, and operated by women and with respect to which more than 50% of the net profit or loss attributable to the business accrues to the women shareholders.

450.772 Construction, goods, and services procurement policy; minority owned and woman owned businesses; provisions; program changes; portion of prime contract reflecting minority owned or woman owned business participation; bidder requirements; contract award.

Sec. 2. (1) The construction, goods, and services procurement policy for each department shall provide for the following percentage of expenditures to be awarded to minority owned and woman owned businesses by each department except as provided in subsection (6):

(a) For minority owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 116% of the actual expenditures for 1982-83, and this level of effort at not less than 7% of expenditures shall be maintained thereafter.

(b) For woman owned business, the goal for 1980-81 shall be 150% of the actual expenditures for 1979-80, the goal for 1981-82 shall be 200% of the actual expenditures for 1980-81, the goal for 1982-83 shall be 200% of the actual expenditures for 1981-82, the goal for 1983-84 shall be 200% of the actual expenditures for 1982-83, the goal for 1984-85 shall be 140% of the expenditures for 1983-84, and this level of effort at not less than 5% of expenditures shall be maintained thereafter.

(2) If the first year goals are not achieved, the governor shall recommend to the legislature changes in programs to assist minority and woman owned businesses.

(3) Each department, to assist in meeting the construction, goods, and services procurement expenditures percentages set forth in subsection (1), shall include provisions for the accommodation of subcontracts and joint ventures. The provisions shall be established by the governor and shall require a bidder to indicate the extent of minority owned or woman owned business participation.

(4) Only the portion of a prime contract that reflects minority owned or woman owned business participation shall be considered in meeting the requirements of subsection (1).

(5) Minority owned or woman owned businesses shall comply with the same requirements expected of other bidders including, but not limited to, being adequately bonded.

(6) If the bidders for any contract do not include a qualified minority owned and operated or woman owned and operated business, the contract shall be awarded to the lowest bidder otherwise qualified to perform the contract.

450.773 Establishing procurement policy for meeting projected goals; report; staff.

Sec. 3. (1) The governor shall establish a procurement policy for each executive department to implement and establish the method of meeting the projected goals established in section 2.

(2) The governor shall submit a report to the legislature every 3 months during the first year of operation and every 6 months during

succeeding years. The report shall detail the results of the governor's procurement policy including the specific contracts awarded by each department and the type of business engaged in by the person awarded the contract.

(3) Appropriate staff to implement the governor's policy shall be provided by the department of management and budget.

450.774 Certification as minority owned or woman owned business; affidavit; filing.

Sec. 4. A person who wishes to be certified as a minority owned or woman owned business shall complete a sworn affidavit that the person is a minority owned or woman owned business and is prepared to bid on state contracts. All ownership interests in the business shall be specifically identified in the affidavit. The affidavit shall be filed with the governor or a department designated by the governor.

450.775 Violating or conspiring to violate act; fraudulent procurement of contract; felony; penalty; barring violator from obtaining future contracts.

Sec. 5. A person who knowingly violates or conspires to violate this act, or who knowingly and fraudulently procures or attempts to procure a contract with this state as a minority owned or woman owned business is guilty of a felony, punishable by imprisonment for not more than 2 years, or a fine of not less than $5,000.00, or both. A person who violates this act shall be barred from obtaining future contracts with the state.

450.776 Minority owned or woman owned business as prime contractor.

Sec. 6. If a minority owned or woman owned business receives a contract, the minority owned or woman owned business shall be the prime contractor through its duration.

600.2011 Indians; judicial rights and privileges.

Sec. 2011. All Indians are capable of suing and being sued in any of the courts of this state in like manner and with the same effect as other inhabitants thereof, and are entitled to the same judicial rights and privileges.

750.348 Inciting Indians.

Sec. 348. Inciting Indians to violate treaty, etc.--Any person who shall incite, or attempt to incite any Indian nation, tribe, chief or individual to violate any treaty of peace with any other Indian nation or tribe, or with the United States, or to disturb the peace and tranquility existing between any Indian nation or tribe, and any other Indian nation or tribe, or the people of the United States, or who shall incite or attempt to incite any Indian nation, tribe, chief or individual to violate any law of the United States, or of this state, shall be guilty of a felony.

Prior Enactments Pursuant to Michigan Law Revision Commission Recommendations

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

1967 Legislative Session

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

1968 Legislative Session

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

1969 Legislative Session

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

1970 Legislative Session

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

1971 Legislative Session

Subject	Commission Report	Act No.
Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6		

Jurors In Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

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

1973 Legislative Session

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

1974 Legislative Session

Subject	Commission Report	Act No.
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Choice of Forum	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic		

Relations Cases	1972, p. 53	90
Technical Amendments to the Michigan General Corporations Act	1973, p. 37	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to Dead Man's Statute	1972, p. 70	305
Attachment and Collection Fees	1968, p. 22	306
Contribution Among Joint Tortfeasors	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Due Process in Seizure of a Debtor's Property (Elimination of Pre-judgment Garnishment)	1972, p. 7	371

1975 Legislative Session

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

1976 Legislative Session

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

1978 Legislative Session

Subject	Commission Report	Act No.
Juvenile Obscenity	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Company Act	1973, p. 48	63
Elimination of References to Abolished Courts:		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540
j. Charter Townships	1976, p. 74	553
Plats	1976, p. 58	367

Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

1980 Legislative Session

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

1981 Legislative Session

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

1982 Legislative Session

Subject	Commission Report	Act No.
Limited Partnerships	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Interest on Probate Code Judgments	1980, p. 37	412

1983 Legislative Session

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

1984 Legislative Session

Subject	Commission Report	Act No.
Legislative Privilege:		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/Psychiatrist-Patient Privilege	1978, p. 28	362

1986 Legislative Session

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

1987 Legislative Session

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

1988 Legislative Session

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

1990 Legislative Session

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

h. Damage to Property by Floating Lumber	1988, p. 155	224

1991 Legislative Session

Subject	Commission Report	Act No.
Elimination of Reference to Abolished Courts:		
a. Land Contracts	1988, p. 157	140
b. Insurance	1988, p. 156	141
c. Animals	1988, p. 155	142
d. Trains	1986, pp. 153, 155; 1987, p. 80; 1988, p. 152	143
e. Appeals	1985, p. 12	144
f. Crimes	1988, p. 153	145
g. Library Corporations	1988, p. 155	146
h. Oaths	1988, p. 156	147
i. Agricultural Products	1986, p. 134; 1988, p. 151	148
j. Deeds	1988, p. 156	149
k. Corporations	1989, p. 4; 1990, p. 4	150
l. Summer Resort Corporations	1986, p. 154; 1988, p. 155	151
m. Association Land	1986, p. 154; 1988, p. 155	152
n. Burial Grounds	1988, p. 156	153
o. Posters, Signs, and Placecards	1988, p. 157	154
p. Railroad Construction	1988, p. 157; 1988, p. 156	155
q. Work Farms	1988, p. 157	156
r. Recording Duties	1988, p. 154	157
s. Liens	1986, pp. 141, 151, 158; 1988, p. 152	159

1992 Legislative Session

Subject	Commission Report	Act No.
Determination of Death Act	1987, p. 13	90

RICHARD D. McLELLAN

Mr. McLellan is Chairman of the Michigan Law Revision Commission, a position he has filled since 1986, the year following his appointment as a public member of the Commission.

Mr. McLellan is a partner in the 250-lawyer firm of Dykema Gossett, which has offices in Michigan, Chicago, and Washington, D.C. He serves as the head of his firm's Government Policy and Practice Group.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School.

Prior to entering private practice, Mr. McLellan served as an Administrative Assistant to former Governor William G. Milliken. He is a former member of the National Advisory Food and Drug Committee in the United States Department of Health, Education and Welfare. Mr. McLellan served as the Transition Director for Governor John Engler following the 1990 election and as Chairman of the Michigan Corrections Commission. He is presently Secretary and a member of the Michigan Export Development Authority.

Mr. McLellan is also Chairman of the Michigan Chamber of Commerce and is the President of the Library of Michigan Foundation.

His legal practice includes primarily the representation of business interests in matters pertaining to state government.

Mr. McLellan is a member of the Board of Directors of the Mackinac Center for Public Policy, the Michigan International and Trade Coalition of the Cornerstone Foundation and is a Governor of the Cranbrook Institute of Science.

ANTHONY DEREZINSKI

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

Mr. Derezinski practices law with the firm of Raymond & Prokop, P.C., in Southfield, Michigan.

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

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is a member of the Board of Regents of Eastern Michigan University, and is also a judge on the Michigan Military Appeals Tribunal.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezinski Post No. 7729, the International Association of Defense Counsel, the National Health Lawyers' Association, and the National Association of College and University Attorneys.

MAURA D. CORRIGAN

Judge Corrigan is a public member of the Michigan Law Revision Commission and has served since her appointment in November 1991.

Judge Corrigan is a judge on the Michigan Court of Appeals.

She is a graduate of St. Joseph Academy, Cleveland, Ohio; Marygrove College; and the University of Detroit Law School. She is married and has two children.

Prior to her appointment to the Court of Appeals, Judge Corrigan was a shareholder in the law firm of Plunkett & Cooney, P.C. She earlier served as First Assistant United States Attorney for the Eastern District of Michigan, Chief of Appeals in the United States Attorney's Office, Assistant Wayne County Prosecutor, and a law clerk on the Michigan Court of Appeals. She was selected Outstanding Practitioner of Criminal Law by the Federal Bar Association as well as awarded the Director's Award for superior performance as an Assistant United States Attorney by the United States Department of Justice. She has served on numerous professional committees and lectured extensively on law-related matters.

WILLIAM FAUST

Mr. Faust is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1993.

Mr. Faust, a Democrat, is serving his seventh term in the Michigan State Senate. Mr. Faust has represented a portion of western Wayne County for the past twenty-five years.

Former Majority Leader of the Senate, a position he held longer than anyone in Michigan history, Mr. Faust now serves on the Commerce; Energy and Technology; and Corporations and Economic Development Committees.

A former township supervisor, newspaper editor and publisher, Mr. Faust is a graduate of the University of Michigan.

A strong supporter of Michigan libraries, Mr. Faust is widely credited for his leadership in securing the funds necessary to build the Michigan Library and Historical Museum located west of the Capitol in Lansing.

DAVID M. HONIGMAN

Mr. Honigman is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1987.

Mr. Honigman is a Republican State Senator representing the 17th Senatorial District. He was first elected to the Michigan House in November 1984 and served in that body until his election to the Senate in November 1990. He is currently Chairman of the Senate Committees on Labor and on Local Government and Urban Development, and Vice-Chairman of the Senate Education Committee.

He is a graduate of Yale University (with honors) and the University of Michigan Law School. He is married.

Mr. Honigman serves on the Board of Trustees of the Michigan Cancer Foundation and the Alumni Board of Detroit County Day School. He is a member of the Michigan Regional Advisory Board of the Anti-Defamation League of B'nai Brith. He was named one of the Outstanding Young Men in America in 1985 and 1988.

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

MICHAEL E. NYE

Mr. Nye is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1991.

Mr. Nye is a Republican State Representative representing the 58th House District. He was first elected to the Michigan House in November 1982. He is Chairman of the House Judiciary Committee and serves on the House Committees on Labor, Civil Rights and Women's Issues.

He is a graduate of Purdue University and University of Detroit Law School. He is married and has two children.

Mr. Nye was named the 1991 Legislator of the Year by the Michigan Association of Chiefs of Police and the 1990 Michigan Environmental Legislator of the Year by the Michigan Environmental Defense Association.

Mr. Nye has been a leader against Drunk Driving and has received the GLADD award (Government Leader Against Drunk Driving) from the Mothers Against Drunk Drivers.

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

TED WALLACE

Representative Ted Wallace is a legislative member of the Michigan Law Revision Commission and has served on the Commission since April 1993. Representative Wallace is a Democrat from Detroit and has represented the 5th House District since November 1988.

Representative Wallace served in the U.S. Navy during the Vietnam war and is an in-active member of the Michigan National Guard.

He holds a Bachelor of Science Degree in Accounting from Wright State University and a law degree from the University of Michigan Law School. He also took post-graduate classes at the University of Michigan Institute of Public Policy, and post-legal classes at Wayne State Law School.

Representative Wallace is a practicing attorney in the Detroit area and was previously an adjunct professor at Wayne State University and an assembler for the Chrysler Corporation. Representative Wallace has been a tax analyst for the General Motors Corporation and a tax accountant for Arthur Anderson and Company.

He is affiliated with the Michigan Democratic Party, Urban League, T.U.L.C., University of Michigan Alumni Association, and other various legal organizations. He is also a life member of the N.A.A.C.P. and a member of the issues committee of the Michigan State N.A.A.C.P. His past history has included tenure as President of the Democratic Voters League; Vice-President, Young Democrats; Member, Board of Governors Young Democrats; Chairman, Upper Neighborhood City Council; Delegate to the 1972 Black National Convention; and Vice-President, Government Affairs, Greater Dayton Jay-Cees.

Representative Wallace serves as Assistant Majority Floor Leader and is a member of the Appropriations Committee. He serves as Vice-Chair of the Appropriations subcommittee on Mental Health and is a member of the subcommittees on Agriculture, Public Health, Social Services, and State Police.

Wallace is married to the former Bernice Jones and has three children.

ELLIOTT SMITH

Mr. Smith is an ex officio member of the Michigan Law Revision Commission due to his position as the Director of the Legislative Service Bureau, a position he has filled since January 1980.

Mr. Smith has worked with Michigan legislators since 1972 in various capacities, including his work as a Research Analyst for Senator Stanley Rozycki, Administrative Assistant to Senator Anthony Derezinski, and Executive Assistant to Senate Majority Leader William Faust before being named to his current position.

He is a graduate of Michigan State University. He is married and has two children.

KENT D. SYVERUD

Mr. Syverud is Executive Secretary to the Michigan Law Revision Commission, a position he has filled since January, 1993.

Mr. Syverud joined the University of Michigan Law Faculty in 1987 and has taught courses in civil procedure, complex litigation, insurance law, negotiation, settlement, and products liability. He has published articles about liability insurance, settlement of civil litigation, and legal problems of automobile and highway technology.

Mr. Syverud is a graduate of the Georgetown University School of Foreign Service and the Michigan Law School. Following his graduation from Michigan, he served as a law clerk to Judge Louis Oberdorfer of the United States District Court for the District of Columbia and Justice Sandra Day O'Connor of the United States Supreme Court. He is married and has three children.

GARY GULLIVER

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

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

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