Michigan
Law Revision Commission

THIRTY-THIRD ANNUAL REPORT
1998

MICHIGAN
LAW REVISION COMMISSION

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MICHAEL E. NYE
TED WALLACE

Ex Officio Member:

DIANNE M. ODROBINA
Legislative Council Administrator
124 West Allegan, 4th Floor
P.O. Box 30036
Lansing, Michigan 48909-7536

Executive Secretary:

PROF. KEVIN C. KENNEDY
Detroit College of Law at Michigan State University
Law College Building
East Lansing, Michigan 48824

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MICHIGAN LAW REVISION COMMISSION
Thirty-Third Annual Report to the Legislature
for Calendar Year 1998

To the Members of the Michigan Legislature:

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

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

Membership

The legislative members of the Commission during 1998 were Senator Bill Bullard, Jr. of Highland; Senator Gary Peters of Bloomfield Township; Representative Michael Nye of Litchfield; and Representative Ted Wallace of Detroit. As Legislative Council Administrator, Dianne M. Odrobina was the ex-officio member of the Commission. The appointed members of the Commission were Richard McLellan, Anthony Derezinski, Maura Corrigan, and George Ward. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kevin Kennedy of the Detroit College of Law at Michigan State University served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 1998 Commission members and staff are located at the end of this report.

The Commission's Work in 1998

The Commission is charged by statute with the following duties:

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

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

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

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

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

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

7. To issue an annual report.

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

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees related to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States. Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission sometimes found that the subjects treated had been considered by the Michigan Legislature in

recent legislation and, therefore, did not recommend further action. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

In 1998, the Commission studied the five topics listed below. The Commission recommends immediate legislative action on the second and third topics.

The five topics are:

(1) Proposed Government Ethics legislation.

(2) The Impact of the 2000 Decennial Census on Population-Based Statutes.

(3) Recent Court Opinions Suggesting Legislative Action.

(4) The Headlee Amendment.

(5) Proposed Administrative Procedures Act.

Proposals for Legislative Consideration in 1999

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 1998:

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

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

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

(4) Judicial Review of Administrative Action, 1990 Annual Report, page 19.

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

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

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

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

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

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

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

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

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

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

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

(16) Amendments to MCL § 600.2405 to include Paralegal Expenses as an Item of Recoverable Costs in Civil Litigation, 1997 Annual Report, page 139.

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

Current Study Agenda

Topics on the current study agenda of the Commission are:

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

(9) Revisions to Michigan's Administrative Procedures Act and to Procedures for Judicial Review of Agency Action.
(10) The Executive Organization Act of 1965.
(11) Intergovernmental Agreements under the Michigan Constitution, Art III, § 5.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the Detroit College of Law at Michigan State University, East Lansing, Michigan 48824. The Executive Secretary of the Commission is Professor Kevin Kennedy, who was responsible for the publication of this report. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 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 Corrigan
George Ward
Senator Bill Bullard, Jr.
Senator Gary Peters
Representative Michael Nye
Representative Ted Wallace
Dianne M. Odrobina

A RESOLUTION HONORING MAURA D. CORRIGAN

A resolution to commend and thank the Honorable Maura D. Corrigan for her service to the Michigan Law Revision Commission.

Whereas, With her recent election to the Michigan Supreme Court, Maura D. Corrigan is adding another chapter to her distinguished volume of public service in the law. It is most appropriate to express our gratitude for the outstanding contributions she made during her seven years with the Michigan Law Revision Commission; and

Whereas, Maura Corrigan has devoted herself to jurisprudence in a wide variety of demanding responsibilities. A graduate of Marygrove College and the University of Detroit Law School, she has garnered experience in private practice, as an assistant Wayne County prosecutor, and as the chief assistant United States Attorney, the first woman ever to hold that post. In 1992, she began her work on the bench as a member of the Michigan Court of Appeals, which she came to head as the Chief Judge in 1997; and

Whereas, With her wide-ranging legal background, including authorship of scholarly articles, Maura Corrigan has been an important leader with the Michigan Law Revision Commission. Her judicial perspective, as well as her understanding of the relationship between state and federal law, has helped in the development of recommendations to bring needed change to Michigan law. Indeed, with this public body, she has articulated judicial concerns and raised issues that are vital to the quality of justice at all levels in Michigan; now, therefore, be it

Resolved by the membership of the Michigan Law Revision Commission, That we extend this expression of our gratitude to Maura D. Corrigan for her exemplary work with this body. We commend her for her commitment to the law and our state and look forward to her continued contributions as a member of the Michigan Supreme Court.

A RESOLUTION HONORING REPRESENTATIVE MICHAEL E. NYE

A resolution to commend and thank the Honorable Michael E. Nye for his service to the Michigan Law Revision Commission.

Whereas, With his retirement from his responsibilities with the Michigan House of Representatives, Michael Nye is bringing to a close a tenure of great effectiveness in shaping laws and public policies for our people. His talents and energies in the field of law have been notable in his duties as a member of the Michigan Law Revision Commission throughout his eight years of outstanding service; and

Whereas, First elected to the House in 1982, Michael Nye brought with him to Lansing invaluable experiences as an attorney, farmer, veteran, and member of community and agriculture groups. His perspective has been shaped not only by his studies at Purdue University and the Detroit College of Law, but also by the insights he gained in learning how state government policies impact virtually all citizens and businesses; and

Whereas, Highlights of Representative Nye's distinguished lawmaking career include his chairmanship and overall leadership with the House Judiciary Committee, his major contributions to the effort to reshape school financing in this state, and service on both the Sentencing Guidelines Commission and the Trial Court Assessment Commission. With this wealth of knowledge, he has been a valuable member of the Michigan Law Revision Commission. His perspective as a lawmaker has been particularly helpful in developing meaningful recommendations; now, therefore be it

Resolved by the membership of the Michigan Law Revision Commission, That we salute Representative Michael E. Nye as he completes his service to the commission and to the Michigan Legislature. We offer our best wishes and trust that his work with the law will continue to strengthen Michigan in the years to come.

A RESOLUTION HONORING REPRESENTATIVE TED WALLACE

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

Whereas, Over the past several years, during an era of significant change in how our state addresses key components of our judicial system, Ted Wallace has rendered exemplary service through his experience and his insights. In addition to his strong leadership within the House of Representatives, including his work as the chair of the House Judiciary Committee, this distinguished gentleman has served the Michigan Law Revision Commission with effectiveness and vision; and

Whereas, A graduate of Wright State University and the University of Michigan Law School, Ted Wallace is a veteran of service with the Navy during the Vietnam War. First elected to the House of Representatives in 1988, he has been a key participant in debates on many central aspects of the law. He has been especially committed to the protection of individual rights and has been very active through his membership on the landmark Michigan Sentencing Guidelines Commission; and

Whereas, Ted Wallace has served the Michigan Law Revision Commission since 1993. During his tenure, his knowledge of the legislative process has blended well with his understanding of how the law impacts the lives of people far removed from debate in Lansing and has made him a valued contributor to the commission's work; now therefore, be it

Resolved by the membership of the Michigan Law Revision Commission, That we offer this expression of our thanks and respect to Representative Ted Wallace for the dedication he has brought to his work as a lawmaker and as a member of this public body. We are confident that his sense of commitment and justice will long serve our state well.

THE PROPOSED GOVERNMENT ETHICS ACT OF 1999:

A STUDY REPORT TO THE MICHIGAN LAW REVISION COMMISSION

The Michigan Law Revision Commission is currently studying and reviewing government ethics legislation in the State of Michigan. In 1998, the Commission retained the services of Professor Michael Lawrence, Detroit College of Law at Michigan State University, who prepared a report that proposes amending current Michigan legislation on government ethics. His final report to the Commission follows.

The Commission will be studying this proposed legislation in 1999. This project is in its preliminary phase, and the Commission has not taken a position on any of Professor Lawrence's proposals. Some of the issues to be resolved include (1) the type of financial disclosure that should be required, e.g., transactional only or a broader type of disclosure; (2) whether local government civil service employees should be included or excluded from the proposed legislation; (3) whether certain language in the draft Act is so vague that persons might not have reasonable notice that their conduct is proscribed; and (4) whether a "one-size-fits-all" government ethics statute should be enacted akin to the Open Meetings Act and the Freedom of Information Act.

The Commission will not make any recommendations to the Legislature until after interested persons have had an opportunity to review and comment on Professor Lawrence's proposal. Public comments on Professor Lawrence's report are welcome. Interested persons may submit written comments to Professor Kevin Kennedy, the Commission's Executive Secretary.

Final Report to

THE MICHIGAN LAW REVISION COMMISSION

on

THE PROPOSED GOVERNMENT ETHICS ACT OF 1999

Michael A. Lawrence
Professor of Law
Detroit College of Law at Michigan State University

January 29, 1999

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THE PROPOSED MICHIGAN GOVERNMENT ETHICS ACT OF 1999

I. INTRODUCTION

In the Spring of 1998, the Michigan Law Revision Commission ("Commission") initiated a comprehensive review of Michigan ethics laws and commissioned a research project on the topic. This Report conveys the summary findings and conclusions of that research. In its charge, the Commission stated that it is particularly interested in knowing how Michigan's ethics laws compare with those of its sister states, and how Michigan law can be changed (1) to better define what is and is not a conflict of interest, (2) to provide procedures for determining whether a conflict exists, and (3) to prescribe penalties for violations. This Report addresses these and other matters in its fifty state survey of ethics laws, described in Part II, and in its proposed Government Ethics Act of 1999 ("Act"), which would replace the existing Michigan contractual conflicts of interests laws and ethics laws. The proposed Act is set out in Part III and explained in detail in Part IV of this Report.

A. *Overview*

In the past twenty-five years, due in large part to problems exposed by the events of Watergate, the federal government and many states have undertaken to adopt or revise government ethics laws and standards. As noted by the public interest group Common Cause, "relatively few states had comprehensive or effective ethics laws on the books [in the early 1970s]. Today, this is no longer the case. Most states have enacted ethics laws that constrain public officials from using their positions in government for private gain.... On the other hand,

not all ethics laws passed ... were comprehensive.... There is clearly a need to revise and strengthen some state laws."[1] This Report concludes that Michigan is among the states whose ethics laws need to be revised.

Ethics laws in Michigan are inadequate in several key respects. First, they do not elucidate a clearly defined, comprehensive set of conflict-of-interest and revolving-door standards; second, they fail to require even minimal transactional disclosure by public officials and employees of potential conflicts; and third, they do not provide for a strong and independent Ethics Board to enforce the statutes. This ethics "triad" - a clearly defined list of proscribed activities, disclosure, and a strong, independent Ethics Board - is the backbone to an effective ethics law.

The proposed Act fixes these deficiencies. The Act is quite simple in its format and language: Chapter One contains definitions and miscellaneous provisions, Chapter Two is the actual Code of Ethics that sets forth a clearly defined list of proscribed activities, Chapter Three details the penalties for violations of the Act, and Chapter Four contains provisions on how the proposed Act shall be administered by the newly-constituted Ethics Board. Appendix A contains optional language on annual disclosure should the Legislature elect to include an annual disclosure requirement in the legislation, and Appendix B is a comparative table of ethics laws in the fifty states.

It may seem counterintuitive at first glance, but public officials should not fear the adoption of a comprehensive code of ethics - indeed, a comprehensive code of ethics is much

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[1] *A Model Ethics Law for State Government*, Common Cause 1 (1989).

preferable to the alternative, where officials "lack guidance as to what they may and may not do, and consequently too often fall prey to accusations by self-proclaimed ethics 'experts' of unspecified 'unethical' conduct."[2] In short, the advantage to the public official of a clearly-worded, succinct code of ethics is the certainty that it engenders. In the words of one commentator, "bereft of a comprehensive, comprehensible Code and ... an agency to authoritatively interpret ... ethics laws, ... government officials faced with ethical dilemmas search in vain for counsel."[3]

B. Existing Ethics Laws in Michigan and Proposed Changes

Michigan's laws concerning ethics in government can be found primarily under one of the following statutory headings: Conflict of Interest[4], Contracts of Public Servants with Public

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[2] Mark Davies, *Article 18 of New York's General Municipal Law: The State Conflicts of Interest Law for Municipal Officials*, 59 ALB. L. REV. 1321, 1340 (1996).

[3] Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform,* 11 PACE L. REV. 243, 265 (1991). On this point, one feature of this Report's proposed Act is the section allowing government officials and employees to seek the advice of the Ethics Board on those occasions when they have questions. *See infra* Section III, Section 409 (Advisory Opinions).

[4] M.C.L. §§ 15.301-15.310. These sections, created by P.A. 1968, No. 318, Effective September 1, 1968, constitute the implementing legislation for Article 4, §10 of the Michigan Constitution. Article 4, § 10 of the Constitution prohibits contractual conflicts of

Entities,[5] and Standards of Conduct for Public Officers and Employees.[6] There are also a number of context-specific provisions scattered throughout the statutes.[7] The Legislature likely

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interest:

> No member of the legislature nor any state officer shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest.

[5] M.C.L. §§ 15.321-15.328.

[6] M.C.L. §§ 15.341-15.348 [hereinafter "old State Ethics Act"].

[7] *See, e.g.,* M.C.L. §§ 4.411 *et seq.* (Michigan Lobbyist Registration Act); M.C.L. §§ 169.201 *et seq.* (Michigan Campaign Finance Act); M.C.L. §§ 432.201 *et seq.* (Michigan Gaming Control and Revenue Act); M.C.L. §§ 460.1 *et seq.* (Public Service Commission), all of which set out certain reporting and other requirements. *See also* Memorandum for the Michigan Law Revision Commission from Kevin Kennedy, *Public Officials, Conflicts of Interest, and Removal from Office* 15-17 (March 10, 1998) (citing, *e.g.,* "M.C.L. § 38.1540 (members of the municipal employees retirement board and employees of the retirement system are prohibited from having any beneficial interest, direct or indirect, in any investment of the retirement system); M.C.L. § 46.30 (a member of the county board of commissioners is prohibited from having any direct or indirect interest in any contract or other business transaction with the county during the time for which he or she is elected and for one year thereafter unless the contract has been approved by three-fourths of the members of the board); M.C.L. § 49.160 (special prosecuting attorney may be appointed by the Supreme Court, Court of Appeals, or circuit court

if prosecuting attorney is disqualified by reason of conflict of interest); M.C.L. § 125.288(4) (a member of township board of appeals shall disqualify himself or herself from a vote in which the member has a conflict of interest; failure of a member to so disqualify himself or herself from a vote in which the member has a conflict of interest constitutes misconduct in office); M.C.L. § 124.1422(cc) (the state housing development authority may adopt a code of ethics with respect to its employees that requires disclosure of financial interests, defines and precludes conflicts of interest, and establishes reasonable post-employment restrictions for a period of up to one year after an employee terminates employment with the authority); M.C.L. § 247.812 (neither a member of the State Transportation Commission, the director, nor any officer of the department shall be interested directly or indirectly in any contract with the state or any political subdivision thereof which shall cause a substantial conflict of interest); M.C.L. § 259.808(2) (board member of airport authority shall not be interested directly or indirectly in a contract with the board); M.C.L. § 324.21541(11) (a member of the Michigan underground storage tank financial assurance board shall abstain from voting on any matter in which that member has a conflict of interest); M.C.L. § 325.2008 (the health planning council shall adopt bylaws that include procedures for removal and replacement of members and voting procedures which protect against conflicts of interest); M.C.L. § 331.1212(3) (trustees of a municipal health facilities corporation shall be considered public servants subject to M.C.L. §§ 15.321 to 15.330; a board of trustees may establish policies and procedure requiring disclosure of relationships which may give rise to conflicts of interest); M.C.L. § 333.18413 (a registered sanitarian shall not engage in or have any interest in any work, project, or operation prejudicial to his or her professional

interest); M.C.L. § 333.22213 (members of public health commission shall adopt bylaws that include voting procedures that protect against conflicts of interest); M.C.L. § 333.22226(3)(d) (a regional certificate of need review agency shall avoid conflicts of interest in its review of all applications for a certificate of need); M.C.L. § 338.2310 (building inspectors who perform instructional duties for educational purposes and provide contractual inspection and consulting services in construction code enforcement shall not be considered to have a conflict of interest; an inspector shall not be permitted to inspect his or her own work in a governmental subdivision); M.C.L. § 388.1769b (a board member of a school district, intermediate school district, public school academy, or public school academy corporation shall abstain from voting on any contract in which the board member has a conflict of interest); M.C.L. § 400.584(2)(a) (members of the commission for older Michiganians shall not participate in the selection, award, or administration of a contract if, to his or her knowledge, any of the following has a financial interest in that contract: another commission member, a member of a commission member's immediate family, a commission member's partner, or an organization with whom any of these persons is negotiating or has any arrangement concerning prospective employment); M.C.L. § 436.18(1) (a person who holds or whose spouse holds a law enforcement job shall not be issued a liquor license or have an interest, directly or indirectly, in a license); M.C.L. § 456.522a (a cemetery commissioner, or the commissioner's spouse or child, shall not have a financial interest in a cemetery, a supplier of cemetery services or cemetery memorials, or a funeral establishment); M.C.L. § 487.315 (a commissioner, deputy commissioner, or examiner of the bureau of banking shall not be a shareholder, either directly or indirectly, of an institution subject

will choose to retain these context-specific provisions to the extent they supplement and complement the proposed Act. To the extent a particular context-specific provision conflicts with the proposed Act, the Legislature will need to consider amending the provision either to

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to the banking code, an out-of-state bank, national bank, or any affiliate or subsidiary thereof, and shall not borrow money from an institution subject to the act, except for a home mortgage loan); M.C.L. § 487.1511(3) (a licensee under the Michigan Bidco Act has a potential conflict of interest when providing, *inter alia*, financing assistance to a principal shareholder, director, officer, relative, controlling person or affiliate of a principal shareholder of the licensee) M.C.L. § 801.204(1) (a member of the county board of commissioners of a work farm, factory, or shop, or an employee of a work farm, factory, or shop shall not be interested, directly or indirectly, in a contract, purchase, sale for or on account of the work farm, factory or shop).

See also Executive Order No. 1993-2 (Feb. 3, 1993) (members and employees of the Michigan Jobs Commission are subject to M.C.L. §§ 15.301 to 15.321); Executive Reorganization Order No. 1992-5 (June 29, 1992) (the State Child Abuse and Neglect Prevention Board shall develop procedures to assure that grants or transfers made by it to the Department of Social Services are free of any conflict of interest); Executive Orders Nos. 1996-9 and 1996-10 (Nov. 22, 1996) (restrictions on appointments to the Michigan Gaming Control Board and of the Interim Executive Director in order to avoid conflicts of interest); Administrative Order No. 1996-11 of the Michigan Supreme Court (anti-nepotism policy to avoid conflicts of interest in the hiring of relatives as court personnel).").

make it comply with the proposed Act or to note that the specific provision is intended to prevail over the proposed Act.

One of the most curious aspects of Michigan's existing government ethics legislation is the narrow scope of its coverage. For example, while the Conflict of Interest and Contracts With Public Entities statutes cover state executive, legislative and judicial officials/employees (as well as officials/employees of political subdivisions of the state), the old Standards of Conduct provisions cover only the state executive branch. This Report takes the position that any revision of the Standards of Conduct should include all branches of state government, including the state legislative branch, the judiciary and officials/employees of political subdivisions.[8]

As far as they go, however, the existing Standards of Conduct are actually quite comprehensive and simply drafted. The Standards of Conduct proscribe the state executive official or employee from (1) divulging confidential information, (2) representing his or her own opinion as that of the government, (3) unauthorized use of resources, (4) accepting things of value that might tend to influence the public official or employee, (5) using official position for personal gain, (6) holding incompatible offices, and (7) participating in a transaction where there is a conflict of interest.[9]

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[8] This Report takes the position that the establishment of an Ethics Board with investigative authority but with no authority to itself impose penalties (*i.e.*, the Board only *recommends* sanctions to the appropriate authority (*see infra* Part III, Section 407) does not run afoul of Michigan Constitution Art. III, Sec. 2 (the "Separation of Power" provision). *See infra* Part IV, Comments on Section 104.

[9] M.C.L. § 15.342.

Another problem with the Michigan ethics laws is that there are no disclosure requirements, a significant deficiency. This Report advocates a very simple transactional disclosure, since overly-intrusive disclosure requirements - including annual financial disclosure - may have the undesired effect of chilling the willingness of good people to serve in state and local government. Moreover, this Report opts for a system of transactional disclosure in favor of mandatory annual disclosure on the reasoning that annual financial disclosure creates a reporting system that is entirely too cumbersome and expensive to administer. The marginal benefits to be gained by such a system of annual reporting simply do not justify the expense.[10]

This Report's proposed Act is a hybrid of a number of sources. Several government ethics advocacy organizations have proposed model ethics legislation over the last couple decades, some parts of which have been incorporated into this Report's proposal.[11] Significant

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[10] Consistent with this Report's theme that government ethics legislation should be intended to be primarily preventive and not punitive in nature, the proposed disclosure requirements are not onerous in their scope and detail; rather, they are designed to point out specific potential transactional conflicts of interest to the disclosing individual and to the Ethics Board, thus allowing the individual to monitor his or her behavior proactively. *See infra* Part III, Section 210.

Should the Legislature favor instituting a system of annual financial reporting for specified public officials, Appendix A provides sample language for the necessary provisions.

[11] The proposed Ethics Act most closely resembles in form and substance the model legislation provided in Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content*

portions of the proposed Act are modeled after an Act previously passed by the Michigan Legislature and signed into law by the governor in 1975, but which was later struck down by the Michigan Supreme Court for "embracing more than one object."[12] Language from this previous act is quite instructional, since it was considered previously and deemed to be acceptable by the Legislature. Finally, the proposed Act derives substantial guidance from the ethics statutes in a number of Michigan's sister states.

There are sure to be objections to the proposed Act. First, it will require a substantial amount of money to properly administer the Act. Specifically, in order to do its job effectively, the newly-constituted Ethics Board will need considerable resources. As a basis for comparison, the state of Ohio budgeted $660,000 for its six-member Ohio Ethics Commission in 1992, which funded eleven staffmembers, and even then it was considered to be underfunded.[13] The good

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and Commentary, 21 Fordham Urb. L.J. 61 (1993). The Davies model was selected as the basic template for the proposed Act due to its superior clarity and simplicity of organization, despite the fact that it specifically was intended for *local* government. Other major influences include *A Model Law for Campaign Finance, Ethics and Lobbying Regulation*, Council on Governmental Ethics Laws (COGEL)(1995); *Model State Conflict of Interest and Financial Disclosure Law*, National Municipal League (1979); *A Model Ethics Law for State Government*, Common Cause (1989); *State Legislative Ethics*, National Conference of State Legislatures (1976).

[12] In re Advisory Opinion (Being 1975 P.A. 227), 240 N.W.2d 193, 396 Mich. 123 (1976). *See infra* notes 57-60 and accompanying text.

[13] Jack P. Desario and David E. Freel, 30 AKRON LAW REVIEW 129, 133 (1996).

news is that undoubtedly a significant percentage of these resources went to administering Ohio's annual financial reporting[14] - a reporting system *not* required in this Proposed Act. This Report does not attempt to estimate the amount of resources needed to administer the Act. To be sure, the proposed Act gives the newly-constituted Ethics Board heavy responsibilities, but it should not add appreciably to the administrative burden of other governmental entities.

This Report represents the first step in what promises to be a long process of discussion by legislators, executive policymakers, and many others. The experiences of a couple other states in revising ethics laws are instructive: "During the past few years, Ohio's Ethics Laws have been the subject of intense scrutiny, analysis, and political debate.... These reforms...were the product of a long process of debate and compromise...."[15] Similarly, "[f]rom 1990 through 1992, the [New York State Temporary State Commission on Local Government Ethics] ... was charged with enforcing the 1987 Ethics in Government Act, with aiding municipalities in addressing their ethics concerns, and with proposing new ethics legislation."[16] If the experiences

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The Ohio Ethics Commission was authorized for fifteen staff positions, but successive budget cuts reduced that number to the eleven in 1992, the lowest level of staffing since 1977. "The subsequent loss of sufficient staff and resources clearly hampered the efforts of the Commission to perform its obligations - a fact recognized by some newspaper editorials." *Id.* at 134.

[14] Approximately 7,200 individual financial disclosure statements were filed with the Ohio Ethics Commission in 1994. *Id.* at 131. The Ohio Ethics Commission had jurisdiction over an estimated 16,000 public officials and 500,000 public employees as of 1994. *Id.*

[15] Desario and Freel, *supra* note 13 at 129.

[16] Davies, *supra* note 11 at 61.

of these two states are any guide, the process of effecting a wholesale change of the Michigan ethics laws will be a task of substantial magnitude. Bearing in mind that reality, this Report thus seeks merely to get the ball rolling by providing an Ethics Act framework that incorporates certain basic fundamentals, and that will serve as a point-of-departure for the Legislature in its task of establishing a comprehensive, workable Government Ethics Act.[17]

II. FIFTY STATE SURVEY AND COMPARISON OF ETHICS LAWS

This Part of the Report conducts a survey and comparison of ethics laws in the fifty United States. Ethics laws can be divided into two major groups: laws that impose (1) restrictions on certain conduct; and (2) disclosure requirements. To provide a basis for comparison of ethics laws, this survey's methodology reviews each state's ethics laws for eleven different key provisions - seven addressing "restrictions on conduct" (group (1)); and four addressing "disclosure requirements" (group (2)). The Report then constructs four separate state cohorts (consisting of (1) all fifty states; (2) states located in the federal Sixth Circuit; (3) states located in the Midwest; and (4) the ten most heavily populated states), and compares both the existing and proposed Michigan ethics laws against the states in each of those cohorts.

First, regarding the seven "restrictions on conduct" provisions, the survey asks whether the state explicitly restricts:

(1) use of the government position to obtain personal benefits;

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[17] The Ethics Roundtable of the Michigan Municipal League and Mr. David Caylor, retired city attorney of El Paso, Texas and former Chair of the Ethics Section of the International Municipal Lawyers Association, provided many helpful written comments on an earlier draft of this Report.

(2) acceptance of items of value to influence official action;

(3) use or dissemination of confidential information;

(4) post-governmental employment (*i.e.*, revolving door);

(5) representation of private clients before the public entity;

(6) contractual conflicts of interest;

(7) political solicitation of subordinates.

With regard to the four "disclosure" provisions, the survey asks whether the state requires written disclosure of:

(1) real property holdings;

(2) outside income;

(3) gifts;

(4) creditors.

The survey's methodology then assigns values ranging from 1 - 5 to each response, depending on how comprehensive the coverage[18] is of the particular state provision. If there is

[18] "Coverage" refers to the scope of public officials and employees subject to the provision. For example, a provision might only cover paid executive branch public officials, excluding everyone else, including, for example, executive branch public employees, unpaid appointees and officials, all legislative branch public officials and employees, all judicial branch public officials and employees, etc., in which case the provision would be assigned a value of

no coverage at all, the answer is assigned a value of "1"; if the provision excludes three or more classes of public officials or employees, but does cover at least one class, it is assigned a value of "2"; if the provision excludes two classes, it is assigned a value of "3"; if the provision excludes only one class of public officials or employees, it is assigned a value of "4"; and if the provision covers *all* classes of public officials and employees, without exception, it is assigned a value of "5". See Appendix B for a spreadsheet summary of the results of the Survey.[19]

An examination of the data in four cohorts reveals the following information.

(1) Among the 50 states:

(a) applying existing Michigan ethics laws:

• Michigan has the thirty-seventh overall most comprehensive ethics laws.[20]

"2". By contrast, another state's laws might cover *all* public officials and employees, without exception.

[19] It must be noted, however, that while the empirical comparison of ethics laws in the fifty states in this section and Appendix B has its merits, it also has inherent limitations. A spreadsheet such as that shown in Appendix B, while it can effectively show objective data (*e.g.*, in providing a basis of comparison for measuring existing state laws against proposed state laws), it cannot show subjective matters such as accessibility and clarity of drafting - matters with which the Proposed Act excels *vis-a-vis* other states.

[20] When the values for all 11 provisions are averaged, Michigan's average is 2.27. The five states with the most comprehensive ethics laws are Washington (5.00), South Carolina and Alabama (4.91), and Massachusetts and Arizona (4.63). The five states with the least

- Michigan has the twenty-eighth most comprehensive Group 1 "restrictions on conduct" requirements.[21]
- Michigan has the forty-fourth most comprehensive (*i.e.*, the *least* comprehensive) Group 2 "disclosure" requirements.[22]

(b) applying the proposed Michigan Government Ethics Act:

- Michigan would have the fifteenth overall most comprehensive ethics laws.[23]
- Michigan would have *the most* comprehensive Group 1 "restrictions on conduct" requirements.[24]
- Michigan would have the thirty-eighth most comprehensive Group 2

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comprehensive ethics laws are North Carolina (1.18), Vermont (1.55), South Dakota and Maine (1.64), and New Hampshire (1.73).

[21] Michigan's average for the seven Group 1 provisions is 3.00.

[22] Indeed, Michigan is one of only six states with *zero* "financial disclosure" requirements. The other states are Georgia, Idaho, Indiana, North Carolina, and Wyoming.

Some other general observations about the entire survey:

- 22 states either had no gift disclosure, or required only one group to disclose.
- 13 states excluded unpaid volunteers from most requirements.
- 23 had no (or minimal) bar on political solicitation of employees.
- 27 states had no (or minimal) requirements to disclose creditors.
- 34 states require comprehensive disclosure of outside income.

[23] When the values for all 11 provisions are averaged, Michigan's average applying the proposed Act would be 3.91.

[24] Michigan's average would be 5.00 for those seven Group 1 provisions. Six other states (Arizona, Massachusetts, Rhode Island, South Carolina, Texas, and Washington) also have a 5.00 average for the seven "restrictions on conduct" provisions. *See* Appendix A.

"disclosure" requirements.[25]

(2) Among the *four* Sixth Circuit states (Michigan, Ohio, Kentucky, and Tennessee):

(a) applying existing Michigan ethics laws:

- Michigan has the third (of four) overall most comprehensive ethics laws.[26]
- Michigan has the first (of four) most comprehensive Group 1 "restrictions on conduct" requirements.[27]
- Michigan has the fourth (of four) most comprehensive Group 2 "disclosure" requirements.[28]

(b) applying the proposed Michigan Government Ethics Act:

- Michigan would have the first (of four) overall most comprehensive ethics laws.[29]

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[25] Under the proposed Act, Michigan has values of "1" on the first two "disclosure" provisions (disclosure of real property and of outside income), "5" on the third (disclosure of gifts), and "1" on the fourth (disclosure of creditors). The proposed Act does not require disclosure of real property, unrelated outside income, and creditors on the belief that such a requirement approaches the line of overintrusiveness. The Report's position is that transactional disclosure is more than adequate (Appendix A provides sample language for annual disclosure if the legislature disagrees with this assessment).

[26] The overall averages for all eleven provisions are: Kentucky (3.27), Ohio (3.09), Michigan (2.27), Tennessee (1.91).

[27] The averages for the seven Group 1 provisions are: Michigan (3.0), Kentucky (2.71), Ohio (2.0), Tennessee (1.85).

[28] The averages for the four Group 2 provisions are: Ohio (5.00), Kentucky (4.25), Tennessee (2.00), Michigan (1.00).

[29] Under the proposed Act, Michigan's overall average for all eleven provisions

- Michigan would have the first (of four) most comprehensive Group 1 "restrictions on conduct" requirements.[30]
- Michigan would have the third (of four) most comprehensive Group 2 "disclosure" requirements.[31]

(3) Among the *seven* Midwestern states (Michigan, Ohio, Indiana, Illinois, Wisconsin, Minnesota, Iowa):

(a) applying existing Michigan ethics laws:

- Michigan has the sixth (of seven) overall most comprehensive ethics laws.[32]
- Michigan has the third (of seven) most comprehensive Group 1 "restrictions on conduct" requirements.[33]
- Michigan has the sixth (of seven) most comprehensive Group 2 "disclosure" requirements.[34]

(b) applying the proposed Michigan Government Ethics Act:

- Michigan would have the second (of seven) overall most comprehensive ethics laws.[35]

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would be 3.91, as compared to 3.27 for Kentucky, 3.09 for Ohio, and 1.91 for Tennessee.

[30] Under the proposed Act, Michigan's average for the seven Group 1 provisions is 5.0, as compared to 2.71 for Kentucky, 2.0 for Ohio, and 1.85 for Tennessee.

[31] Under the proposed Act, Michigan's average for the four Group 2 provisions is 2.00, as compared to 5.00 for Ohio, 4.25 for Kentucky, and 2.00 for Tennessee.

[32] The overall averages for all eleven provisions are: Wisconsin (4.45), Illinois (3.64), Iowa (3.36), Ohio (3.09), Minnesota (2.36), Michigan (2.27), Indiana (2.09).

[33] The averages for the seven Group 1 provisions are: Wisconsin (4.14), Iowa (3.86), Michigan (3.00), Illinois (2.86), Indiana (2.71), Ohio (2.00), Minnesota (1.86).

[34] The averages for the four Group 2 provisions are: Wisconsin (5.00), Illinois (5.00), Ohio (5.00), Minnesota (3.25), Iowa (2.50), Indiana (1.00), Michigan (1.00).

[35] Under the proposed Act, Michigan's overall average for all eleven provisions is

- Michigan would have the first (of seven) most comprehensive Group 1 "restrictions on conduct" requirements.[36]
- Michigan would have the sixth (of seven) most comprehensive Group 2 "disclosure" requirements.[37]

(4) Among the *ten* most populous states (California, New York, Texas, Pennsylvania, Illinois, Ohio, Michigan, New Jersey, North Carolina):[38]

(a) applying existing Michigan ethics laws:

- Michigan has the eighth (of ten) overall most comprehensive ethics laws.[39]
- Michigan has the third (of ten) most comprehensive Group 1 "restrictions

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3.91, as compared to 4.45 for Wisconsin, 3.64 for Illinois, 3.36 for Iowa, 3.09 for Ohio, 2.36 for Minnesota, and 2.09 for Indiana.

[36] Under the proposed Act, Michigan's average for the seven Group 1 provisions is 5.00, as compared to 4.14 for Wisconsin, 3.86 for Iowa, 2.86 for Illinois, 2.71 for Indiana, 2.00 for Ohio, and 1.86 for Minnesota.

[37] Under the proposed Act, Michigan's average for the four Group 2 provisions is 2.00, as compared to 5.00 for Wisconsin, Illinois and Ohio, 3.25 for Minnesota, 2.50 for Iowa, and 1.00 for Indiana.

[38] The ten largest states in order of population (1990 census) are California (29.8 million), New York (18 million), Texas (17 million), Florida (12.9 million), Illinois (11.9 million), Pennsylvania (11.9 million), Ohio (10.8 million), Michigan (9.3 million), New Jersey (7.7 million), and North Carolina (6.6 million).

[39] The overall averages for all eleven provisions are: Florida (4.27), Texas (4.27), Illinois (3.64), New Jersey (3.18), Ohio (3.09), California (2.82), New York (2.64), Michigan (2.27), Pennsylvania (2.27), North Carolina (1.18).

on conduct" requirements.[40]

- Michigan has the ninth (of ten) most comprehensive Group 2 "financial" requirements.[41]

(b) applying the proposed Michigan Government Ethics Act:

- Michigan would have the third (of ten) overall most comprehensive ethics laws.[42]
- Michigan would have the first (of ten) most comprehensive Group 1 "restrictions on conduct" requirements.[43]
- Michigan would have the ninth (of ten) most comprehensive Group II "disclosure" requirements.[44]

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[40] The averages for the seven Group 1 provisions are: Texas (5.00), Florida (4.43), Michigan (3.00), Illinois (2.86), New Jersey (2.86), California (2.14), Ohio (2.00), New York (1.86), Pennsylvania (1.71), North Carolina (1.29).

[41] The averages for the four Group 2 provisions are: Illinois (5.00), Ohio (5.00), California (4.00), Florida (4.00), New York (4.00), New Jersey (3.75), Pennsylvania (3.25), Texas (3.00), Michigan (1.00), North Carolina (1.00).

[42] Under the proposed Act, Michigan's overall average for all eleven provisions is 3.91, as compared to 4.27 for Florida and Texas, 3.64 for Illinois, 3.18 for New Jersey, 3.09 for Ohio, 2.82 for California, 2.64 for New York, 2.27 for Pennsylvania, and 1.18 for North Carolina.

[43] Under the proposed Act, Michigan's average for the seven Group 1 provisions is 5.00, as compared to 5.00 for Texas, 4.43 for Florida, 2.86 for Illinois and New Jersey, 2.14 for California, 2.00 for Ohio, 1.86 for New York, 1.71 for Pennsylvania, and 1.29 for North Carolina.

[44] Under the proposed Act, Michigan's average for the four Group 2 provisions is 2.00, as compared to 5.00 for Illinois and Ohio, 4.00 for California, Florida and New York, 3.75

In sum, these data make the convincing case that the enactment of the proposed Government Ethics Act would bring Michigan into a leadership posture *vis-a-vis* its sister states in several respects. With regard to the Group I "restrictions on conduct" requirements, under the proposed Act Michigan is at the top of the list of those states setting high standards for its public officials and employees. At the same time, with regard to the Group II "'disclosure" requirements, the proposed Act is rigorous in its requirement that public officials and employees disclose conflicts and receipt of items of value on a transactional basis, but does *not* require annual disclosure of real property holdings and outside income. As practiced in some states, annual disclosure of real property and outside income is extremely detailed and often overly intrusive. This is an important point, for the proposed Act is sensitive to the possibility that overly aggressive ethics provisions (particularly the annual disclosure requirements) might have a tendency to alienate and drive some individuals away from public service. The proposed Act hence attempts to strike the proper balance between setting objective, high standards for all public officials and employees on one hand, and not making the disclosure requirements of the Act unrealistically strict on the other.

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for New Jersey, 3.25 for Pennsylvania, 3.00 for Texas, and 1.00 for North Carolina.

III. DRAFT LANGUAGE OF THE PROPOSED GOVERNMENT ETHICS ACT OF 1999[45]

AN ACT to establish high standards of ethical conduct for public officials and public employees of the State of Michigan and its political subdivisions; to afford public officials and public employees of the State of Michigan and its political subdivisions clear guidance on such standards; to promote public confidence in the integrity of the governance and administration of the State of Michigan and its political subdivisions and their agencies and administrative offices; to facilitate consideration of potential ethical problems before they arise, minimize unwarranted suspicion, and enhance the accountability of government to the people by requiring public disclosure by public officials and public employees of relevant transactions; to specify penalties for violations; and to provide for the fair and effective administration of this law through the establishment of a state Ethics Board.

This Act shall be known by and may be cited as the "Michigan Government Ethics Act."

CHAPTER ONE. DEFINITIONS; GENERAL PROVISIONS.

Section 101. Definitions.

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[45] As noted above (*see* note 11), the draft language and section-by-section explanation of the draft language (Parts III and IV) of this Report draws particularly heavily from the model ethics law devised by the New York State Temporary Commission on Local Government Ethics, as set forth in Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 Fordham Urb. L.J. 61 (1993). A good portion of the draft language and explanation of Parts III and IV of this Report is taken verbatim from the model act as set out in that article. This Report does not attribute each verbatim use of the model act's language within this Parts III and IV, because to do so would detract from the presentation of the proposed Act by overrunning it with footnotes. The author wishes to give proper attribution to Mark Davies and the New York Commission on Local Government Ethics for its work.

For the purposes of this Act:

(1). "Anything of value" includes any gift, financial benefit, or other thing that is pecuniary or compensatory in value to a person, and also includes but is not limited to, any valuable act, advance, award, contract, compensation, contribution, deposit, emolument, employment, favor, fee, forbearance, fringe benefit, gratuity, honorarium, loan, offer, payment, perquisite, privilege, promise, reward, remuneration, service, subscription, or the promise that any of these things will be conferred in the future, if such thing or act of value is conferred or performed without the lawful exchange of consideration which is at least equal in value to the thing or act conferred or performed. For purposes of this definition, the following items do *not* constitute "anything of value":

(a) payment by the governmental entity of salaries, compensation or employee benefits; or payment by an employer or business other than the governmental entity of salaries, compensation, employee benefits or pursuant to a contract, when the payment is unrelated to a public official or public official or public employee's status as a public official or public employee and is not made for the purpose of influencing, directly or indirectly, the vote, official action or decision of a public official or public employee; or

(b) fees, expenses, or income, including those resulting from outside employment, which are permitted and reported in accordance with the policies of the governmental entity; or

(c) authorized reimbursement of actual and necessary expenses; or

(d) admission, regardless of value, to events to which public official or public employees are invited in their official, representative capacities as public officials or public employees; or

(e) campaign or political contributions which are made and reported in accordance with state law; or

(f) hospitality extended for a purpose unrelated to the official business of the governmental entity; or

(g) reasonable hosting, including travel and expenses, entertainment, meals or refreshments furnished in connection with public events, appearances or ceremonies related to official governmental entity business, if furnished by the sponsor of such public event; or in connection with speaking engagements, teaching or rendering other public assistance to an organization or another governmental entity (this provision (g) applies only if the govermental entity does not also pay the person for the same activity); or

(h) reasonable gratuities given by a group in appreciation for a public official or public employee speaking or making any presentation before that group; or

(i) awards publicly presented in recognition of public service; or

(j) gifts or other tokens of recognition presented by representatives of governmental entities or political subdivisions who are acting in their official capacities; or

(k) anything of value, regardless of the value, when the thing of value is offered to

the governmental entity, is accepted on behalf of the governmental entity, and is to remain the property of the governmental entity; or

(l) commercially reasonable loans made in the ordinary course of the lender's business in accordance with prevailing rates and terms, and which do not discriminate against or in favor of an individual who is a public official or public employee because of such individual's status as a public official or public employee; or

(m) complimentary copies of trade publications; or

(n) any unsolicited benefit conferred by any one person or business if the economic value totals less than $100 per calendar year, and if there is no express or implied understanding or agreement that a vote, official action or decision of a public official or public employee will be influenced; or

(o) reasonable compensation for a published work which did not involve the use of the governmental entity's time, equipment, facilities, supplies, staff or other resources, if the payment is arranged or paid by the publisher of the work; or

(p) reasonable compensation or a published work which did involve the use of the governmental entity's time, equipment, facilities, supplies, staff or other resources, if the payment of the compensation to the public official or public employee is lawfully authorized by a representative of the governmental entity who is empowered to authorize such compensation; or

(q) anything of value, if the payment, gift, or other transfer of value is unrelated to and does not arise from the recipient's holding or having held a public position, and if the activity or occasion for which it is given does not involve the use of the governmental entity's time, equipment, facilities, supplies, staff or other resources in any manner or degree which is not available to the general public; or

(r) anything of value received as a devise, bequest or inheritance; or

(s) a gift received from a relative, or spouse's relative, within the third degree of consanguinity.

(2). "Associated," when used with reference to an outside employer or business, means receiving compensation or having an ownership interest as provided in the definition of "outside employer or business" in this Act.

(3). "Confidential Information" means that information deemed to be privileged or confidential by regulation or practice of the unit of government with which the public official or employee is affiliated.

(4). "Customer or client" means (a) any person to whom a public official or public employee has supplied goods or services during the previous twelve months having a value greater than $1,000 in the aggregate, or (b) any person to whom a public official's or public employee's outside employer or business has supplied goods or services during the previous twelve months having, in the aggregate, a value greater than $1,000, but only if the official or employee knows the outside employer or business supplied the goods or services.

(5). "Ethics Board" means the Ethics Board established pursuant to Section 401 of this proposed Act.

(6). "Gift" and "financial benefit" fall within the definition for "anything of value" as defined within this Act.

(7). "Governmental Entity" includes both the State and its Political Subdivisions.

(8). "Immediate family" means a spouse, child, grandchild, brother, sister, parent, or grandparent of the public official or public employee, or a person claimed as a dependent on the public official's or public employee's latest individual state income tax return.

(9). "Matter" means, unless the context of this Act indicates otherwise, any act or potential act in which the discretionary decision of a public body, official or employee may result in anything of value to a person.

(10). "Ministerial act" means an action performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the act.

(11). "Outside employer or business" means:

(a) any activity, other than service to the governmental entity, from which the public official or public employee receives compensation for services rendered or goods sold or produced;

(b) any entity, other than the governmental entity, of which the public official or public employee is a member, official, director, or employee and from which he or she receives compensation for services rendered or goods sold or produced; or

(c) any entity in which the public official or public employee has an ownership interest, except a corporation of which the public official or public employee owns less than ten percent of the outstanding stock.

For purposes of this definition, "compensation" shall not include reimbursement for necessary expenses, including travel expenses.

(12). "Person" shall include both individuals and entities.

(13). "Political subdivision" includes all public bodies corporate within but not including the state, including all agencies thereof or any non-incorporated body within the state of whatever nature, including all agencies thereof, or any court, department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of the State, a City, Village, Township, or County.

(14). "Public employee" means an individual employed by a governmental entity.

(15). "Public official" means an elected or appointed individual in the executive branch of the state government or political subdivision thereof, an elected or appointed individual in the state legislative branch or political subdivision thereof, or an elected or appointed official in the judicial branch of the state government or a political subdivision thereof; any elected or appointed member of a board of education; and an elected or appointed member of a governing body of a state institution of higher education. The definition applies whether the individual is paid or unpaid, and applies without limitation to all members of any office, administration, agency, board, bureau, council, commission, committee, department, or division of the state government or political subdivision thereof which possesses any sort of final decisionmaking authority. For purposes of this definition, "public officer" means the same as "public official."

(16). "Subordinate" of a public official or public employee shall mean another public official, or public employee or other employee over whose activities he or she has direction,

supervision, or control.

Section 102. Effects on Other Laws.

This proposed Act repeals and replaces Act No. 318 of the Public Acts of 1968, M.C.L. §§ 15.301-15.310 (Conflict of Interest); Act No. 317 of the Public Acts of 1968, M.C.L. §§ 15.321-15.330 (Contracts of Public Servants With Public Entities); and Act No. 196 of the Public Acts of 1973, M.C.L. §§ 15.341-15.348 (Standards of Conduct for Public Officers and Employees).

Section 103. Effective Date.

This Act shall take effect on January 1, 2001.

Section 104. Constitutionality

Pursuant to article 3, section 8 of the Michigan Constitution, the state supreme court shall rule on the constitutionality of this act before January 1, 2001.

Section 105. Preemption; Coordination With Ethics Ordinances of Political Subdivisions.

(1) Cities, Villages, Townships, and Counties should have the opportunity to exercise the primary role in establishing and enforcing ethics regulations for local public officials and public employees.

(2) A City, Village, Township, or County may adopt a local ethics ordinance that includes the substance of Section 101, Chapter Two, and Chapter Three of this proposed Act. To have effect, any such proposed local ethics ordinance must be approved by the Ethics Board pursuant to this Section. If the local governmental entity does not have an ethics ordinance that has been approved by the Ethics Board, public officials and employees within that local governmental entity will be subject to the proposed Act.

(3) To be approved under this Section, a local ethics ordinance must create a local ethics oversight board, which will perform functions similar to those performed by the proposed Act's Ethics Board. The ethics ordinance should be vest ample authority in the ethics oversight board to enforce the ordinance, much as the proposed Act's Chapter Four vests such authority in the Ethics Board. Such authority should include, at a minimum, the power to collect and review transactional disclosure statements; the power to investigate alleged ethics violations; the power to impose or recommend sanctions; the power to issue advisory opinions; and the power to engage in training and education efforts.

(4) A local ethics ordinance created under this Section may be more restrictive than the proposed Act.

(5) Prior to the adoption, or as soon as possible following the adoption of a local ethics ordinance, the City, Village, Township, or County shall submit to the Ethics Board a copy of the ordinance that it determines meets the requirements of this Section. If the local governmental entity has an existing ordinance that it contends is at least as restrictive as the proposed Act, that ordinance may be submitted to the Ethics Board at any time. The Ethics Board, in consultation with the Ethics Subcommittee of the Michigan Municipal League, shall review ethics ordinances submitted under this Section to assure their adequacy. If the Ethics Board finds that an ordinance is not in compliance with this Section, the Ethics Board, in consultation with the Ethics Subcommittee of the Michigan Municipal League, shall work with the local governmental entity to bring the ordinance into compliance and inform the entity of the failure to comply and in what ways the submitted ordinance is deficient. Unless the local governmental entity receives notice within 90 days of submittal that the ordinance they submit to the Ethics Board under this subsection is not in compliance, the ordinance shall be considered to be approved by the Ethics Board.

(6) A City, Village, Township, or County may adopt, submit to the Ethics Board, and obtain approval of an ethics ordinance based on the proposed Act or an equivalent ordinance as provided in this Section by [date]. If a City, Village, Township, or County does not have an approved ordinance by [date], the proposed Act shall apply to that local governmental entity. Notwithstanding any other provision of this Section, a City, Village, Township, or County may adopt an ethics ordinance at any time, and upon the approval of the Ethics Board, that ordinance shall take the place of the proposed Act.

(7) The Ethics Board, in consultation with the Ethics Subcommittee of the Michigan Municipal League, shall assist Cities, Villages, Townships, and Counties in developing ordinances that meet the requirements of this Section.

Section 106. Miscellaneous provisions.

(1). No existing right or remedy shall be lost, impaired, or affected by reason of this proposed Act.

(2). If any provision of this proposed Act is held by a court of competent jurisdiction to be invalid, that decision shall not affect the validity and effectiveness of the remaining provisions of this Act.

CHAPTER TWO. CODE OF ETHICS

Section 201. Misuse of Office.

(1) A public official or public employee shall not use that person's public office, or take or fail to take any action, in order to obtain anything of value, except as allowed by law, for himself or herself or any other person or entity.

(2) A person who knowingly violates Section 201 is guilty of a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both, and any additional penalties as specified in Chapter Three of this proposed Act.

Section 202. Prohibition on Accepting Anything of Value

(1) A public official or public employee shall not solicit nor accept anything of value in connection with his or her official responsibilities.

(2) A person shall not offer or give to a public official or public employee or any of the following persons anything of value in connection with the official's or employee's official responsibilities:

(a) a member of the public official's or employee's immediate family;

(b) an outside employer or business or trust with which the public official or employee is associated;

(c) a customer or client of the public official or employee.

(3) A person who knowingly violates Section 202 is guilty of either a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment of not more than 90 days, or both; or a felony in the case of bribery, punishable by a fine of not more than $5,000, or imprisonment in the state prison of not more than 10 years, or both; and any additional penalties as specified in Chapter Three of the proposed Act.

Section 203. Representation.

(1) A state public official or employee shall not represent for compensation any other person in any matter that person has before the unit of state government with which the official or employee is directly affiliated.

(2) A public official or employee of a political subdivision with a population of 25,000 or more shall not represent for compensation any other person in any matter that person has before the political subdivision.

(3) A public official or employee of a political subdivision with population of less than 25,000 may not represent for compensation any other person in a matter that person has before the political subdivision, unless the legislative body of the political subdivision approves, by formal resolution, of the representation.

(4) A person who knowingly violates Section 203 is guilty of a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both, and any additional penalties as specified in Chapter Three of this proposed Act.

Section 204. Confidential information.

Public officials and public employees and former public officials and public employees shall not disclose any confidential information or use it primarily to further anyone's personal interests, except to the extent permitted by law.

A person who knowingly violates Section 204 is subject to the provisions of Chapter Three of this proposed Act.

Section 205. Political solicitation.

A public official or public employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the official or employee, unless that subordinate is a political appointee, to participate in an election campaign or contribute to a political committee.

A person who knowingly violates Section 205 is subject to the provisions of Chapter Three of the proposed Act.

Section 206. Prohibited Contracts.

(1) A public official or public employee, a member of that individual's immediate family, or outside employer or business with which the individual is associated shall not enter into a contract valued at $1,500.00 or more with the governmental body with which the public official or employee is affiliated unless the contract is awarded through an open and public competitive process which includes prior public notice and subsequent availability for public inspection of the proposals considered and the contract awarded.

(2) Any public official or public employee who has or later acquires an interest in any actual or proposed contract with the government body with whom the public official or public employee is affiliated shall publicly disclose the nature and extent of that interest as required by Section 210 (Transactional Disclosure) of the proposed Act.

(3) **Voidability of contract.** A contract or agreement which is executed in violation of this section or the constitutional provisions that it implements shall be voidable only if the person who entered into the contract or took assignment thereof had actual knowledge of the prohibited conflict. In the case of a person other than an individual, the actual knowledge must be that of an individual or body finally approving the contract.

A contract involving prohibited conflict of interest under this section shall be voidable only by a decree of a court of proper jurisdiction. Any such decree shall provide for the reimbursement of any person for the reasonable value of moneys, goods, material, labor, or services furnished under the contract, to the extent that the state has benefitted thereby. This provision shall not prohibit the parties from arriving at an amicable settlement.

(4) A person who knowingly violates any portion of Section 206 is guilty of a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both; or a felony, punishable by a fine of not more than $5,000, or imprisonment in

the state prison of not more than 10 years, or both; and any additional penalties as specified in Chapter Three of the proposed Act.

Section 207. Revolving door.

(1) A former public official shall not appear or practice before the government body with which he or she was affiliated, except on his or her own behalf, or receive compensation for working on any matter before that government body, for a period of one year after the termination of his official service. The restriction does not apply where the former public official performed only ministerial acts on the relevant subject matter while working for the government body. For purposes of this Section only, the restriction does not apply to former public officials who served the government body in an unpaid capacity.

(2) A person who knowingly violates Section 207 is guilty of a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both; and any additional penalties as specified in Chapter Three of the proposed Act.

Section 208. Inducement of Violations of the Code of Ethics.

(1). No person, whether or not a public official or public employee, shall induce or attempt to induce a public official or public employee to violate any of the provisions of this Chapter.

(2). Any person, whether or not a public official or employee, who intentionally or knowingly violates any provision of this Chapter shall be subject to being enjoined from entering into any contract with the state or political subdivision, as the case may be, for a period not to exceed two years.

(3). Nothing in this section shall be construed to prohibit any person from receiving a service or benefit, or from using a facility, which is generally available to the public, provided the person does so in the same manner or degree which is available to the general public.

(4). Under this section, a corporation, partnership, or other entity shall not be held vicariously liable for the actions of an employee unless the employee acted in the execution of company policy or custom.

(5). A person who knowingly violates Section 208 is guilty of either a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment of not more than 90 days, or both; or a felony, punishable by a fine of not more than $5,000, or imprisonment in the state prison of not more than 10 years, or both, and any additional penalties as specified in Chapter Three of the proposed Act.

Section 209. Recusal.

(1) A public official or public employee shall promptly recuse himself or herself from

acting formally or informally on a matter before the state or political subdivision with which he or she is affiliated when he or she knows that acting on the matter, or failing to act on the matter, may result in a violation of this Chapter Two of the proposed Act.

(2) Pursuant to Section 210 of the proposed Act, when a public official or public employee is required to recuse himself or herself from acting (or refraining from acting) on a matter, he or she shall file a transactional disclosure statement with the Ethics Board.

(3) A person who knowingly violates Section 209 is guilty of a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both, and any additional penalties as specified in Chapter Three of the proposed Act.

Section 210. Transactional Disclosure.

(1) Whenever a public official or public employee is required to recuse himself or herself under Section 209 of this proposed Act, he or she

(a) shall immediately refrain from participating further in the matter,

(b) shall promptly inform his or her superior, if any, and

(c) shall promptly file with the Ethics Board a signed statement disclosing the reason for recusal.

(2) A person who knowingly violates Section 210 is subject to the Provisions of Chapter Three of the proposed Act.

Section 211. Exclusion for lawful action.

The provisions of this Chapter shall not prohibit or require conduct specifically authorized by statute, rule, regulation, or Constitution of the State of Michigan or of the United States.

CHAPTER THREE. PENALTIES; INJUNCTIVE RELIEF.

Section 301. Disciplinary action.

Any public official or public employee who engages in any action that violates any provision of this proposed Act may be warned or reprimanded or suspended or removed from office or employment, or be subject to any other sanction authorized by law or collective bargaining agreement, by the appointing authority or person or body authorized by law to impose such sanctions. A warning, reprimand, suspension, removal, or other authorized sanction may be imposed in addition to any other penalty contained in this proposed Act or in any other provision of law.

Section 302. Civil fine.

Any public official or public employee who violates any provision of this proposed Act may be subject to a civil fine of up to $1,500 for each violation, in addition to any other penalty contained in any other provision of law or in this proposed Act, other than a civil forfeiture pursuant to Section 304 of this chapter. This civil fine shall be imposed by a court of appropriate jurisdiction or the appointing authority or person or body authorized by law to impose such sanctions.

Section 303. Damages.

Any person, whether or not a public official or employee, who violates any provision of this proposed Act shall be liable in damages to the governmental entity for any losses or increased costs incurred by the governmental entity as a result of the violation. Such damages may be imposed by a court of appropriate jurisdiction in addition to any other penalty contained in any other provision of law or in this Act, other than a civil forfeiture pursuant to Section 304 of this chapter.

Section 304. Civil forfeiture.

To the extent allowed by law, any person, whether or not a public official or employee, who intentionally or knowingly violates any provision of this proposed Act may be subject to a civil forfeiture to the governmental entity of a sum equal to three times the value of any financial benefit he or she received as a result of the conduct that constituted the violation. A civil forfeiture may be imposed by a court of appropriate jurisdiction in addition to any other penalty contained in any other provision of law or in this Act, other than a civil fine pursuant to Section 302 or damages pursuant to Section 303 of this chapter.

Section 305. Criminal Sanctions.

To the extent allowed by law, any person, whether or not a public official or employee, who violates a provision of this Act which specifies a criminal penalty for such violation, shall be subject to criminal prosecution.

Section 306. Injunctive Relief.

Any person, whether or not a public official or employee, who violates any provision of this proposed Act may be subject to an action or special proceeding, as appropriate, in a court of proper jurisdiction for injunctive relief to enjoin that person from violating this Act or to compel that person to comply with the provisions of the Act.

CHAPTER FOUR. ADMINISTRATIVE PROVISIONS.

Section 401. Ethics Board: Establishment; Qualifications of Members; Appointment of Members; Term of Office.

(1). The Board of Ethics is created as an autonomous entity.

(2). The Board of Ethics shall consist of 7 members appointed by the governor as follows:

(a) One member from a list of at least 3 individuals submitted by the majority party of the senate.

(b) One member from a list of at least 3 individuals submitted by the minority party of the senate.

(c) One member from a list of at least 3 individuals submitted by the majority party of the house of representatives.

(d) One member from a list of at least 3 individuals submitted by the minority party of the house of representatives.

(e) One member from a list compiled by the governor.

(f) Two members from a list compiled by the Ethics Subcommittee of the Michigan Municipal League.

(3). The terms shall expire on March 31 of the year in which the terms are designated to expire. A member of the Board shall serve for an initial term of 4 years, or until the member's successor is appointed and qualified except that of those members first appointed:

(a) The 2 members appointed pursuant to subsection (2)(f) shall serve for 4 years. Their initial terms shall constitute full terms and will expire on March 31, 2005 [assuming the proposed Act goes into effect in the year 2001].

(b) The 2 members appointed pursuant to subsection (2)(c) and (d) shall serve initial terms of 2 years. Their initial terms shall expire on March 31, 2003.

(c) The 3 members appointed pursuant to subsection (2)(a),(b), and (e) shall serve initial terms of 3 years. Their initial terms shall expire on March 31, 2004.

(4). An individual shall not serve more than 2 full 4-year terms on the Board.

(5). A vacancy occurring other than by the expiration of a term of office shall be filled for the unexpired term of that office. A vacancy occurring on the Board shall be filled within 30 days in the manner in which that position was originally filled.

(6). The Board shall elect a chairperson and a vice-chairperson. The vice-chairperson shall act as chairperson in the absence of the chairperson or if the office of the chairperson becomes vacant. A meeting may be called by the chair or by a majority of the Board.

(7). Four members of the Board constitute a quorum and the concurrence of at least 4 members is required for any action or recommendation of the Board. The votes shall be by a record roll call. Notice of the meetings of the Board shall be made public.

(8). The attorney general and state personnel director shall serve ex officio without the right to vote.

(9). Members of the Board shall serve without compensation but shall be reimbursed for

their actual and necessary expenses incurred in the performance of their duties.

(10). With the consent of the civil service commission, the state personnel director shall provide clerical or administrative assistance from the department of civil service as the Board may, from time to time, request.

(11). For purposes of this section, time served on the currently existing Board of Ethics formed pursuant to M.C.L. § 15.344 shall not count toward time served on the Board of Ethics formed pursuant to Section 401 of this proposed Act.

Section 402. Prohibited conduct by, and restrictions on, member of Ethics Board.

A member of the Ethics Board shall not, while a member of the Board:

(1). Hold elective public office or elective political party office.

(2). Accept appointment to or become a candidate for public office or elective political party office.

(3). Be employed as or act as a lobbyist.

(4). Participate in any election campaign. An Ethics Board member may, however, make campaign contributions.

Section 403. Ethics Board: Removal of Members.

An Ethics Board member may be removed from office by the governor pursuant to Art. V, § 10 of the Michigan Constitution, after written notice and opportunity for reply. Additional grounds for removal shall be failure to meet the qualifications and restrictions set forth in sections 401 and 402 of this proposed Act or for other violation of this Act.

Section 404. Ethics Board: Jurisdiction, Powers, and Duties.

(1). The Ethics Board may only act with respect to the public officials and public employees covered by this Act.

(2). The termination of a public official's or employee's term of office or employment with the governmental entity shall not affect the jurisdiction of the Ethics Board with respect to the requirements imposed on him or her by this Act.

(3). The Ethics Board shall have the following powers and duties:

(a) To promulgate rules pursuant to Act No. 306 of the Public Act of 1969, as amended (M.C.L. §§ 24.201, 24.315), to carry out the provisions of this Act, and to govern its own procedures.

(b) To appoint hearing officials, an executive director, if necessary, and such other staff as are necessary to carry out its duties under this Act, and to delegate authority to the executive director, if any, to act in the name of the Board between meetings of the Board, provided that the delegation is in writing and the specific powers to be delegated are enumerated

and further provided that the Board shall not delegate the power to determine violations, recommend disciplinary action, impose any civil fine, refer any matter to a prosecutor, initiate an action for injunction, or render any advisory opinion. An executive director shall observe the restrictions of an Ethics Board member as specified in Section 402 of this Act.

(c) To review and approve, pursuant to Section 105 of this Act and in consultation with the Ethics Subcommittee of the Michigan Municipal League, alternative ethics ordinances of political subdivisions.

(d) To carry out, as it sees fit, examinations of certain disclosure statements filed pursuant to Section 210, and such records and other documents which substantiate the information therein for compliance with the provisions of this act.

(e) To review, index, maintain on file, and dispose of sworn complaints and to make notifications and conduct investigations pursuant to Sections 406 and 407 of this Chapter;

(f) To conduct hearings, recommend disciplinary action, assess penalties, make referrals, and initiate appropriate actions and proceedings pursuant to Section 407;

(g) To grant waivers pursuant to Section 408;

(h) To render, index, and maintain on file advisory opinions pursuant to Section 409; and to prepare and publish nonconfidential special reports and technical studies to further the purposes of this Act. In the issuance of advisory opinions, investigative reports and recommendations, and other reports, the Board shall be advised as to legal matters by the attorney general;

(i) To provide training and education to public officials and employees pursuant to Section 412;

(j) To prepare an annual report and recommend changes to this proposed Act pursuant to section 413;

(k) To provide for public inspection of certain records pursuant to section 414; and

(l) To select provisions of this Act, special reports and technical studies for reproduction and distribution pursuant to Section 415.

(4). When a recommendation to an appropriate authority is made by the Ethics Board which affects a classified employee (ie, civil service), the authority shall initiate appropriate proceedings in accordance with such recommendation and pursuant to the rules of the appropriate civil service commission.

(5). The Board of Ethics shall preserve all statements, reports, records, and other documents relating to Board of Ethics activities, including documents filed with the Board, for a period of 5 years. After 5 years the statements, reports, records and other documents shall be destroyed.

Section 405. Review of Disclosure Statements.

The Ethics Board shall review transactional disclosure statements filed pursuant to Section 210 of the proposed Act as necessary to carry out the requirements of this proposed Act.

Section 406. Investigations.

(1). Upon receipt of a sworn complaint alleging a violation of this proposed Act, or upon determining on its own initiative that a violation of this Act may exist, the Ethics Board shall have the power and duty to conduct any investigation necessary to carry out the provisions of this Act. In conducting any such investigation, the Ethics Board may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records which it may deem relevant and material.

(2). If it is determined by a majority vote of the Board that there is reason to believe that the Act was violated, the Board shall initiate appropriate investigative proceedings to determine whether a violation occurred. The Board shall mail a notice of the investigation and the nature of the alleged violation to a person under investigation within 5 days after the decision to undertake an investigation is made. Every 60 days thereafter until the matter is terminated, the Board shall mail to the complainant and to the alleged violator notice of the action taken to date by the Board together with the reasons for the action or nonaction.

(3). Except as otherwise required by law, the Board's actions and the records relative to an investigation shall be confidential until the Board makes a final determination under this Section.

(4). Proceedings of the Board in conducting investigations shall be in accordance with Act No. 306 of the Public Acts of 1969, as amended, and shall be by closed session except that the session or hearing shall be open if the alleged violator requests an open session or hearing, and except as required otherwise by the Michigan Open Meetings Act (M.C.L. §§ 15.261-15.275).

(5). All governmental entities shall cooperate with the Board in the conduct of its investigations.

(6). When the Ethics Board concludes its investigative proceedings it shall determine if this Act was violated. If the Board determines that the Act was not violated the records and actions relative to the investigation and determination shall remain confidential unless the person investigated requests in writing that the records and actions be made public. If the Board determines that the Act was violated, the Board shall make a recommendation of sanction to the appropriate authority designated in Section 407.

Section 407. Hearings; Assessment of Penalties; Injunctive Relief.

(1). **Disciplinary action.**

In its discretion, after a hearing providing for due process procedural requirements and subject to any applicable provisions of law and collective bargaining agreements, the Ethics Board may recommend appropriate disciplinary action pursuant to Section 301 of this proposed Act. The recommendation of the Ethics Board shall be made to the appointing authority or person or body authorized by law to impose or recommend such sanctions. For purposes of this Act, the appointing authority or person or body authorized by law to impose or recommend

sanctions for various individuals are as follows:

(a) In the case of an appointed official or employee, the appointing authority with supervisory responsibility for the person whose activities were investigated.

(b) In the case of a legislator, the special committee of the legislature on ethics created pursuant to Section 410 of this Act.

(c) In the case of a judge, the judicial tenure commission, as required under Art. VI, § 30 of the Michigan Constitution.

(d) In the case of the attorney general or secretary of state, the governor.

(e) In the case of the governor or lieutenant governor, the legislature.

The Board shall conduct and complete the hearing with reasonable promptness, unless in its discretion the Board refers the matter to the authority or person or body authorized by law to impose disciplinary action or unless the Board refers the matter to the appropriate prosecutor. If such a referral is made, the Board may adjourn the matter pending determination by the authority, person, body, or prosecutor.

(2). **Civil fine.**

In its discretion and after a hearing providing for due process procedural requirements, the Ethics Board, pursuant to Section 302 of this Act and to the extent allowed by law, may recommend that a civil fine, not to exceed $1,500 for each violation, be imposed upon a public official or employee found by the Board to have violated this Act. The recommendation of the Ethics Board shall be made to the appointing authority or person or body authorized by law to impose or recommend such sanctions. The Board shall conduct and complete the hearing with reasonable promptness. The civil fine shall be payable to the governmental unit with whom the public official or employee is affiliated.

(3). **Damages.**

The state or the political subdivision with which the public official or employee is affiliated, or the Ethics Board on behalf of the state or political subdivision, may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction to obtain damages, as provided in subsection 303 of this Act.

(4). **Civil forfeiture.**

The state or the political subdivision with which the public official or employee is affiliated, or the Ethics Board on behalf of the state or political subdivision, may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction to obtain civil forfeiture, as provided in Section 304 of this Act.

(5). **Prosecutions.**

As provided in Section 305 of this Act, the Ethics Board may refer to the appropriate prosecutor possible criminal violations of this Act. Nothing contained in this Act shall be construed to restrict the authority of the appropriate prosecutor to prosecute a violation of this Act or of any other law. The appropriate prosecutor for all state public officials and employees is the attorney general alone.

(6). **Injunctive relief.**

(a).The Ethics Board, the state, or the political subdivision with which the public official or employee is affiliated, may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin a violation of this Act or to compel compliance with the provisions of this Act, as provided in Section 306 of this Act.

(b). Any resident, official, or employee of the state or a political subdivision thereof may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin a public official or employee from violating this Act or to compel a public official or employee to comply with the provisions of this Act, as provided in Section 306 of this Act.

(c). No action or special proceeding shall be prosecuted or maintained pursuant to subsection (6)(b), unless (i) the plaintiff or petitioner shall have filed with the Ethics Board a sworn complaint alleging the violation by the official or employee, (ii) it shall appear by and as an allegation in the complaint or petition filed with the court that at least six months have elapsed since the filing of the complaint with the Ethics Board and that the Ethics Board has failed to file a determination in the matter, and (iii) the action or special proceeding shall be commenced within ten months after the filing of the complaint with the Ethics Board.

Section 408. Waivers.

(1). Upon written application and upon a showing of compelling need by the applicant, the Ethics Board may in exceptional circumstances grant the applicant a waiver of any of the provisions of this Act.

(2). Waivers may only be granted at an open session after public notice in the official newspaper designated by the state or political subdivision thereof, for the publication of laws, notices, and other matters required by law to be published, that such waiver is being considered. Waivers shall be in writing and shall state the grounds upon which they are granted. Within 10 days after granting a waiver, the Ethics Board shall publish a notice in the official newspaper setting forth the name of the person requesting the waiver and a general description of the nature of the waiver. All applications, decisions, and other records and proceedings relating to waivers shall be indexed and maintained on file by the Ethics Board.

Section 409. Advisory Opinions.

(1). Upon the written request of any public official or employee, the Ethics Board may render a written advisory opinion with respect to the interpretation or application of this proposed Act. Any other person may similarly request an advisory opinion but only with respect to whether his or her own action might violate a provision of this Act.

(2). Advisory opinions and requests for advisory opinions shall be indexed and maintained on file by the Ethics Board.

(3). Any person who has submitted to the Ethics Board a written request for an advisory opinion may bring and maintain a civil action by right against the Board to compel it to issue the advisory opinion. The complaint shall clearly identify the matters or proceedings before the Board that are involved. No action shall be prosecuted or maintained pursuant to this section unless (a) it shall appear by and as an allegation in the petition or complaint that at least six months have elapsed since the filing of the request and that the Ethics Board has failed to file any determination in the matter, and (b) the action is commenced within ten months after the submission of the request for the advisory opinion.

(4). An advisory opinion rendered by the Ethics Board, until and unless amended or revoked, shall be binding upon the Ethics Board in any subsequent proceeding concerning the person who requested the opinion and who acted in good faith, unless he or she omitted or misstated a material fact. The opinion may also be relied upon by the person, and may be introduced and used as a defense, in any civil action brought by the Ethics Board or the state or political subdivision thereof.

Section 410. Special Committee of Legislature on Ethics.

(1). There is created a special committee of the legislature on Ethics to consist of 3 members to the senate and 3 members of the house of representatives, at least 1 of whom from each house shall be a member of the minority party, to be appointed in the same manner as standing committees of the senate and the house. The members of the special committee shall serve without compensation, but shall be entitled to actual and necessary expenses while on the business of the committee. The special committee may establish, by majority vote, its rules and procedures.

(2). The special committee shall act upon a recommendation made by the Ethics Board pursuant to section 407 of this Act. Specifically, the special committee shall conduct such further investigation it deems necessary and issue a report and recommendation to the appropriate house of the legislature.

Section 411. Judicial Review.

Any person aggrieved by a decision of the Ethics Board may seek judicial review and relief in a court of appropriate jurisdiction.

Section 412. Training and Education.

The Ethics Board shall:

(1) through the secretary of state and county clerks and other necessary means, make information concerning this Act available to public officials and employees of the state of Michigan and of all political subdivisions thereof, to the public, and to persons interested in doing business with the state or with any political subdivision, and

(2) together with the secretary of state and county clerks, develop educational materials and an educational program for public officials and employees of the state and its political subdivisions on the provisions of the proposed Act.

Section 413. Annual Reports; Review of Ethics Laws.

(1). The Ethics Board shall prepare and submit an annual report to the governor, who will then disseminate the report, summarizing the activities of the Board. The report may also recommend changes to the text or administration of the proposed Act.

(2). The Ethics Board shall periodically review the Act and the Board's rules, regulations, and administrative procedures to determine whether they promote integrity, public confidence, and participation in state and local government and whether they set forth clear and enforceable common sense standards of conduct.

Section 414. Public Inspection of Records; Public Access to Meetings.

(1). The only records of the Ethics Board which shall be available for public inspection are those whose disclosure is required by law.

(2). No meeting or proceeding of the Ethics Board concerning misconduct, nonfeasance, or neglect in office by a public official or employee shall be open to the public, except upon the request of the official or employee or as required by law.

Section 415. Distribution and Posting: Act; Special Reports; Technical Studies

(1). Within 90 days after the effective date of this Act, and thereafter as appropriate, the Ethics Board shall transmit to the secretary of state and county clerks, in a suitable form, copies of those provisions of this Act which the Ethics Board deems necessary for posting and distribution. Within ten days after receipt of those copies, the secretary of state and county clerks shall:

(a) cause the copies to be posted conspicuously in every public building under the jurisdiction of the state and its political subdivisions covered by this proposed Act;

(b) cause the copies to be distributed to every public official and employee of the state and political subdivision, and made readily available to the public.

(2). Every public official or employee elected or appointed thereafter shall be furnished a copy of those provisions within ten days after entering upon the duties of his or her position.

(3). Failure of the secretary of state or county clerks to comply with the provisions of this section or failure of any public official or employee to receive a copy of the provisions of this act shall have no effect on the duty of compliance with this Act or on the enforcement of its provisions.

(4). From time to time the Ethics Board shall transmit to the secretary of state and county clerks, in a form suitable for distribution, copies of special reports and technical studies relating to this Act and its administration.

IV. SECTION-BY-SECTION EXPLANATION OF THE DRAFT LANGUAGE[46]

A. *Preamble.*

The point of ethics laws for state and local officials is to improve both the perception and the reality of integrity in government and to encourage, not discourage, citizens from participating in that government. This proposed Act seeks to fulfill those goals.

Other Michigan State statutes, such as the Civil Service Acts of the state and of its political subdivisions, regulate ethics in certain aspects of state and local government.[47] Longstanding Michigan common law addresses the scope of the obligations owed by public officials to the entity they serve.[48] The Attorney General's Office has also written a number of

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[46] *See supra* note 45.

[47] This proposed Act applies to civil servants, but only to the extent it does not supercede the State Civil Service Act or the Civil Service Acts of any political subdivisions. *See, e.g.,* M.C.L. § 38.401 *et seq.*; M.C.L. § 38.451 *et seq.*; M.C.L. § 38.501 *et seq.*; M.C.L. § 51.351 *et seq.*

[48] *See, e.g.,* People v. Township of Overyssel, 11 Mich. 222, 225 (1863)(stating that at common law public servants are agents who owe a fiduciary duty to the public entity that they serve); Woodward v. City of Wakefield, 236 Mich. 417, 420; 210 N.W. 322,323 (1926)("it is the policy of the law to keep municipal officials far enough removed from temptation as to insure the exercise of their unselfish interest in behalf of he municipality"); Abrahamson v. Wendell, 72 Mich. App. 80, 83, 249 N.W.2d 302, 304 (1976) ("decisionmakers ... must seek to avoid even the appearance of impropriety").

opinions interpreting the State's existing conflict of interest statutes[49] and public officials'

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[49] *See* Memorandum for the Michigan Law Revision Commission from Kevin Kennedy, *Public Officials, Conflicts of Interest, and Removal from Office* 9-13 (March 10, 1998) (citing, *e.g.*, "1977-1978 Mich. Op. Att'y Gen. 265, 1977-1978 Mich. OAG No. 5243 (a retired city employee who receives a pension from the city may serve as a member of the city council, but if a change in the retirement plan is before the council, the retiree must disclose this interest, abstain from voting, and the change must meet the approval of 2/3 of the full membership without the vote of the retiree)"). *See also* 1979-1980 Mich. Op. Att'y Gen. 44, 1979-1980 Mich. OAG No. 5442; 1979-1980 Mich. Op. Att'y Gen. 162, 1979-1980 Mich. OAG No. 5489; 1979-1980 Mich. Op. Att'y Gen. 719, 1979-1980 Mich. OAG No. 5682; 1979-1980 Mich. Op. Att'y Gen. 732, 1979-1980 Mich. OAG No. 5689; 1979-1980 Mich. Op. Att'y Gen. 688, 1979-1980 Mich. OAG No. 5681; 1979-1980 Mich. Op. Att'y Gen. 703, 1979-1980 Mich. OAG No. 5685; 1979-1980 Mich. Op. Att'y Gen. 1088, 1979-1980 Mich. OAG No. 5819; 1981-1982 Mich. Op. Att'y Gen. 218, 1981-1982 Mich. OAG No. 5916; 1983-1984 Mich. Op. Att'y Gen. 110, 1983-1984 Mich. OAG No. 6151;1983-1984 Mich. Op. Att'y Gen. 238, 1983-1984 Mich. OAG No. 6206; 1987-1988 Mich. Op. Att'y Gen. 197, 1987-1988 Mich. OAG No. 6468; 1989-1990 Mich. Op. Att'y Gen. 27, 1989-1990 Mich. OAG No. 6563; 1989-1990 Mich. Op. Att'y Gen. 80, 1989-1990 Mich. OAG No. 6615; 1991-1992 Mich. Op. Att'y Gen. 149, 1991-1992 Mich. OAG No. 6751;1991-1992 Mich. Op. Att'y Gen. 190, 1991-1992 Mich. OAG No. 6736; 1994 Mich. OAG No. 6802; 1995 Mich. OAG No. 6858.

common law fiduciary duty.[50]

The proposed Act presented in this Report primarily addresses conflicts between the public and private interests of officials and employees. With regard to statutes governing incompatibility of public offices (so-called "Two Hats" provisions), this Report recommends retaining the existing Michigan Incompatible Offices Act.[51] This proposed

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[50] *See* Memorandum for the Michigan Law Revision Commission from Kevin Kennedy, *Public Officials, Conflicts of Interest, and Removal from Office* 15-17 (March 10, 1998) (citing, *e.g.*, "1977-1978 Mich. Op. Att'y Gen. 720, 1977-1978 Mich. OAG No. 5404 (concluding that if a city councilperson's loyalties would be divided by virtue of taking part in a decision whether or not to grant a corporation, of which the councilperson is an employee, tax relief that is otherwise permitted by statute, s/he must abstain from voting on matters which would require choosing between the duties owed); 1981-1982 Mich. Op. Att'y Gen. 439, 1981-1982 Mich. OAG No. 6005 (a member of a city council who is employed by a corporation seeking quasi-judicial action, *e.g.*, a zoning variance, from the city council is in a conflict of interest and may not participate in or vote upon such official action; the rule of necessity may not be applied to permit otherwise disqualified members to participate, or be counted for quorum purposes, in quasi-judicial municipal action)").

[51] M.C.L. §§ 15.181-15.185 ("Incompatible Offices Act").

This Report recommends retaining the existing Incompatible Offices Act due to its succinctness and comprehensiveness. The Incompatible Offices Act prohibits a public official or public employee from holding two or more public offices simultaneously that results in any of

the following with respect to the offices held:

1. The subordination of one public office to another;

2. The supervision of one public office by another; or

3. A breach of duty of public office. M.C.L. § 15.181.

Under the Incompatible Offices Act, "the term 'public officer' means a person who is elected or appointed to (i) an office established under the state constitution of 1963, (ii) a public office of a city, village, township, or county, or (iii) a department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state." *Id.* *See, e.g.,* Detroit Area Agency on Aging v. Office of Services to the Aging, 210 Mich. App. 708, 534 N.W.2d 229 (1974)(vacation of one office will solve a public official's dilemma of two incompatible offices; that is not necessarily the case in conflict of interest situations); Wayne County Prosecutor v. Kinney, 184 Mich. App. 681, 458 N.W.2d 674 (1990)(occupation of the offices of city council member and paid volunteer firefighter violates the Incompatible Offices Act); Contesti v. Attorney General, 164 Mich. App. 271, 416 N.W.2d 410 (1987)(when township's board of trustees and school district are in a contractual relationship, offices of township trustee and school district superintendent are incompatible for purposes of the Incompatible Offices Act).

Moreover, the Michigan Constitution itself prohibits dual office holding by members of the Legislature: "No person holding any office, employment or position under the United States or this state or political subdivision thereof, except notaries public and members of the armed

Act *would* supercede the Two-Hats provision in M.C.L.§ 15.342(6), however.[52]

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forces reserve, may be a member of either house of the legislature." Mich. Const. Art. 4, § 8.

Finally, The Attorney General's Office has developed an extensive body of opinions on compatibility of public office as well. *See* Memorandum for the Michigan Law Revision Commission from Kevin Kennedy, *Public Officials, Conflicts of Interest, and Removal from Office* 22-24 (March 10, 1998) (citing, *e.g.*, "1981-1982 Mich. Op. Att'y Gen. 672, 1981-1982 Mich. OAG No. 6075 (a member of the Legislature is precluded from accepting employment by a community college district)"). *See also* 1983-1984 Mich. Op. Att'y Gen. 354, 1983-1984 Mich. OAG No. 6527; 1979-1980 Mich. Op. Att'y Gen. 339, 1979-1980 Mich. OAG No. 5261; 1981-1982 Mich. Op. Att'y Gen. 185, 1981-1982 Mich. OAG No. 5906; 1983-1984 Mich. Op. Att'y Gen. 73, 1983-1984 Mich. OAG No. 6135;1983-1984 Mich. Op. Att'y Gen. 66, 1983-1984 Mich. OAG No. 6134; 1983-1984 Mich. Op. Att'y Gen. 175, 1983-1984 Mich. OAG No. 6180; 1983-1984 Mich. Op. Att'y Gen.274, 1983-1984 Mich. OAG No. 6214; 1991-1992 Mich. Op. Att'y Gen.76, 1991-1992 Mich. OAG No. 6695; 1991-1992 Mich. Op. Att'y Gen.139, 1991-1992 Mich. OAG No. 6717; 1991-1992 Mich. Op. Att'y Gen.175, 1991-1992 Mich. OAG No. 6730; 1991-1992 Mich. Op. Att'y Gen.193, 1991-1992 Mich. OAG No. 6738;1991-1992 Mich. Op. Att'y Gen.205, 1991-1992 Mich. OAG No. 6743; 1993 OAG No. 6748;1993 OAG No. 6753; 1994 OAG No. 6781; 1994 OAG No. 6794; 1995 OAG No. 6834; 1995 OAG No. 6890; 1996 OAG No. 6913; 1997 OAG No. 6931.

[52] As previously noted, the proposed Act would supercede the entire Act prescribing Standards of Conduct for Public Officers and Employers (*i.e.*, M.C.L. §§ 15.341 - 15.346,

As noted above, an ethics law rests upon a triad of provisions: an understandable and comprehensive Code of Ethics, sensible disclosure, and a reasonable enforcement mechanism. Removal of any of those three legs threatens to topple the entire ethics structure.

Furthermore, an unintelligible ethics law cannot be obeyed or enforced. This Report's proposed Act, therefore, places heavy emphasis upon easily understandable organization, contents, and word usage, particularly in those provisions that directly affect the activities of officials. An ethics law *must* be user friendly. Otherwise, it fails in its essential purpose of providing guidance to officials and confidence to citizens.

For that reason, this draft legislation is divided into two parts. The first part (Chapters 1-3) contains the provisions directly concerning the conduct of public officials and public employees. The second part (Chapter Four) contains the provisions for administering the ethics

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sometimes referred to as the "Code of Ethics" (M.C.L. § 15.342a states, "This act is intended as a code of ethics for public officers and employees [of the executive branch]....")). Specifically with regard to the Two-Hats provision, M.C.L. §15.342(6) states that "Except as provided in section 2a, a public officer or employee shall not engage in or accept employment for a private or public interest when that employment is incompatible or in conflict with the officer's or employee's official duties, or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties." The existence of this additional language beyond M.C.L. § 15.181 *et seq.* regarding dual office holding is redundant and serves only to complicate matters. This Report thus suggests that M.C.L. § 15.181 et seq. alone should govern the matter of potential incompatibility of office.

law. Except for attorneys and Ethics Board members, public officials and employees would not often have occasion to consult the second part; the provisions of concern to officials and employees are therefore grouped into the first three chapters of the proposed Act.

B. *Chapter One: "Definitions; General Provisions"*

Section 101. Definitions.

The definitions in this Act are kept to a minimum and do not add to the official's duties imposed by the plain meaning of the Code of Ethics. However, in light of the fact that some violations involve potential criminal penalties, it is important to provide ample detail to assure that public officials and employees understand what sorts of behavior are covered by the proposed Act.

101(1). The proposed Act includes a relatively objective enumeration of what is and is not included in the definition of "anything of value." Where the potential for criminal prosecution is involved, it seems wise to make foreseeable exemptions explicit rather than rely solely on the common sense and good judgment of prosecutors to refrain from prosecuting technical violations. The objective standard is provided as opposed to a subjective standard, which might provide the alternative definition of "anything of value" as:

anything, regardless of its monetary value, perceived or intended by either the one who offers it or the one to whom it is offered to be sufficient in value to influence a public official or public employee in the performance or non-performance of an official action.

A major problem with this subjective standard is the difficulty of proving a person's state of mind. By contrast, the objective standard provided in Section 101(1) is preferable from a simplicity standpoint and because it is easier to prove than the more subjective standard. An alternative objective definition is included in, for example, one model act (COGEL § 204.01)[53]:

(a) A pecuniary item, including money, or a bank bill or note.

(b) A promissory note, bill of exchange, order, draft, warrant, check, or bond given for the payment of money.

(c)A contract, agreement, promise, or other obligation for an advance, conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money.

(d) A stock, bond, note, or other investment interest in an entity.

(e) A fee or honorarium.

(f) A receipt given for the payment of money or other property.

(g) A gift, tangible good, chattel, or an interest in a gift, tangible good, or chattel.

(h) A loan or forgiveness of indebtedness.

(i) A work of art, antique, or collectible.

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53 *See supra* note 11.

(j) An automobile or other means of personal transportation.

(k) Real property or an interest in real property, including title to realty, a fee simple or partial interest, present or future, contingent or vested, a leasehold interest, or other beneficial interest in realty.

(l) A right in action.

(m) A rebate or discount in the price of anything of value unless the rebate or discount is made in the ordinary course of business to a member of the public without regard to that person's status as a public official or public employee, or the sale or trade of something for reasonable compensation that would ordinarily not be available to a member of the public.

(n) A promise or offer of employment.

(o) Reimbursement or payment for travel expenses from nongovernmental individuals or entities, except for reimbursement/payments from non-profit organizations.

(p) Any of the items listed in items (a)-(o) as they relate to a trust; or

(q) Any other financial benefit or thing of value that is pecuniary or compensatory in value to a person.

101(4). An employee of a large corporation may not know many of the customers or clients of his or her employer and should not be penalized for that understandable ignorance. For that reason, the "knows" language is included in the definition.

101(14). The definition for public employee (as well as that for public official) is virtually identical to the definition of that term in 1975 P.A. 227, which was an ethics act passed

by the legislature and signed by the governor in 1975, only to be struck down by the Michigan Supreme Court for "embracing more than one object."[54]

The definition also tracks the definition for "public employee" under the Incompatible Offices Act,[55] as does the definition for "public official."

The question can be raised whether the definition for "public employee" is too broad; *i.e.*, is it really necessary to subject employees with little decisionmaking authority to the strictures of the proposed Act? This Report concludes that it makes more sense to define "public employee" broadly, lest any potential violations fall through the cracks. In actual practice, such employees with little decisionmaking authority will seldom be confronted with ethics act issues.

101(15). The definition for "public official" includes unpaid as well as paid officials. Especially at the municipal level it is the unpaid officials, such as zoning and planning board members, who often wield the greatest power. This proposed Act regulates not only executive and legislative officials and employees but also judicial officials and employees.

Section 102. Effects on Other Laws.

In repealing these three statutory sections and replacing them with one consolidated section, the proposed Act simplifies and clarifies the ethics rules in Michigan.

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[54] *See infra* notes 57-60 and accompanying text.

[55] M.C.L. §§ 15.181 - 15.185. *See supra* note 51 and accompanying text.

One matter which must be addressed is whether the proposed Act might "embrace more than one object"[56] in violation of the Michigan Constitution. The Michigan Supreme Court applied the "one object" constitutional provision in striking down an earlier piece of ethics legislation enacted by the legislature in 1975.[57] That legislation

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[56] "No law shall embrace more than one object, which shall be expressed in its title." Mich. Const. Art. 4, § 24.

[57] *See* In re Request for Advisory Opinion, 240 N.W.2d 193, 396 Mich. 123 (1976). In this Advisory Opinion the court was responding to the first of ten questions posed to it by the House of Representatives concerning the Constitutionality of 1975 P.A. 227.

See also Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10), 242 N.W.2d 3, 396 Mich. 465 (1976) (supplementing its earlier Advisory Opinion on P.A. 227 by addressing questions 2-10 propounded by the House of Representatives). Eight of the nine questions addressed by the court in this supplemental Advisory Opinion are beyond the scope of the proposed Act, and thus irrelevant to this discussion. The one question addressed in the supplemental Advisory Opinion that *would* be relevant to the proposed Act if the Legislature were to decide to require financial disclosure (*see infra* Appendix A) is Certified Question VII, concerning the constitutionality of certain financial disclosure requirements. In its response to this question, the court found unconstitutional certain provisions of Public Act 227 that required a broad range of individuals to conform to a single standard for disclosing certain financial information. The court suggested that while the requirements as enacted were acceptable as to some of the named persons, creation of a broad single class was overbroad and thus in violation

> created [a] political ethics commission as an autonomous entity within the department of state and provided for its composition, powers and duties; provided requirements for the establishment of candidate committees (defining 'candidate' to include an elected officeholder) and provided for the filing of statements or organization and reporting of contributions and expenditures; set maximum limits on expenditures by candidates for certain offices; established a state campaign fund with a diversion of certain taxpayer-designated portions of income tax revenues to the fund for distribution to qualifying gubernatorial candidates; proscribed conflicts of interest; required designated individuals to file financial disclosures for themselves and members of their immediate families; required the registration and reporting of lobbying activities; and provided for the repeal of five existing laws.[58]

In striking down 1975 P.A. No. 227, the court explained that "[s]ome of the concepts sought to be obtained by the enactment have no necessary connection with each other.... For example, the creation of a state campaign fund for gubernatorial candidates is foreign to and

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of the equal protection clause. Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10), 242 N.W.2d at 21. *See infra* Appendix A, notes 77-80 and accompanying text for discussion of the proposed Act's financial disclosure requirements (if elected) in light of the court's analysis in its response to Certified Question VII.

[58] In re Request for Advisory Opinion, 240 N.W.2d at 193 (internal citations omitted).

incongruous with regulation of lobbying activities; the financial disclosure provisions aimed at preventing unethical conduct are foreign to and incongruous with the organization of a campaign committee."[59] Moreover, "the Act specifically repealed five individual and distinct acts. They concerned the licensing and regulation of legislative agents; the corrupt practice section of the general election law; two specific conflict of interest statutes; and an ethics act."[60]

This Report takes the position that the proposed Act does *not* embrace more than one object, and that the legislation is therefore valid. All objects contemplated by the proposed Act relate to one topic and one topic alone: the establishment of a single comprehensive Ethics Act that can be understood by a person of reasonable intelligence who may be called upon to comply with its terms. As noted by the court itself in *In re Request for Advisory Opinion,* "This Court cannot engage in idle speculation as to whether, for instance, the provision relating to ethical conduct and conflict of interest contracts would on their own merits have been adopted by the Legislature, nor those relating campaign contributions and expenditures, nor those establishing the state campaign fund for gubernatorial elections, nor those regulation (sic) lobbyists."[61] This comment, by grouping together the ethics and conflict of interest provisions in the first phrase, suggests that the court considers the separate provisions concerning conflict of interest and ethics as comprising a single object, while it considers the various other campaign finance and lobbying provisions of 1975 P.A. 227 to be separate objects.

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59 *Id.* at 196.

60 *Id.* at 195.

61 *Id.* at 196.

Moreover, the fact that the proposed Act contains a provision repealing existing statutes in addition to proposing new legislation does not bump the Act into the status of "embracing more than one object." In order to streamline and consolidate legislation, any old legislation that addresses the same topics must be repealed. Nor does the mere fact that the proposed Act repeals three individual and distinct acts necessarily suggest it embraces more than one object in violation of Art. 4, § 24. The court recognizes that, in the interests of revision, consolidation and classification of the laws, it sometimes makes sense to repeal two or more separate (though substantively related) acts within a subsequent single act.[62]

In short, the constitutional provision mandating that a law shall not embrace more than one object has never been intended to create a formalistic barrier to the "revis[ion], consolidat[ion] and classif[ication] of the laws with respect to a particular object."[63] The

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[62] The fact that the adoption of a comprehensive Ethics Act requires the repeal of three individual acts is also proof of the disorganization of current Michigan law - *i.e.*, similar subjects are dealt with in three different statutory sections.

In any event, if the Legislature *is* concerned that in this case including the repeal of the three sets of statutes with the proposed Act pushes the legislation into "embracing more than one object", it would be an easy enough matter to separate the repeals into one or more separate bills.

[63] In re Request for Advisory Opinion, 240 N.W.2d at 195. As noted long ago by Justice Cooley,

> The history and purpose of this constitutional provision are ... well understood....
>
> The practice of bringing together into one bill subjects diverse in their nature, and

Michigan Supreme Court has suggested elsewhere that legislation amounting to establishment of a code, or unified law, does not violate Art. 4, § 24 of the Constitution.[64] Because the Act proposed in this Report essentially creates a new "code of ethics", it does not "embrace more than one object" and is hence constitutional.

Section 104. Constitutionality

The Michigan Constitution allows the legislature to ask the state Supreme Court for an advisory opinion on the constitutionality of a particular piece of legislation on "solemn occasions." In light of the nature of this proposed Act in making wholesale changes to how government ethics laws are structured and monitored, it might be well to seek an advisory opinion from the court.

> having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state.

People ex rel. Drake v. Mahaney, 13 Mich. 481, 494-95 (1865).

Surely the proposed Act is not the sort of bill described by Justice Cooley in this passage; rather, the Act embraces the single object of creating a single ethics act that can be understood and applied by the very people whom it would affect.

[64] Advisory Opinion re Constitutionality of 1972 P.A. No. 294, 389 Mich. 441, 208 N.W.2d 469 (1973).

The proposed Act potentially affects, for example, the following Michigan constitutional provisions: Art. III, § 2 (Separation of Powers - under the Act the Ethics Board would have the power to investigate and make recommendations for (but not itself impose) penalties for legislative and judicial officers) (issue is whether it is constitutional to create an "autonomous" entity (proposed Act § 401) that has authority across the various branches); Art. IV, § 7 (Qualification for legislative office) and Art. IV § 16 (Each house of legislature is the "sole judge of qualifications" of its members) (issue is same as above; also whether the proposed Act's § 513 Special Committee of Legislature on Ethics is in proper compliance with these provisions); Art. IV, § 10 (prohibits "substantial" conflict of interest by legislators and state officers - issue is whether the proposed Act's provisions constitute sufficiently "substantial" conflicts (especially in light of the specified *de minimis* amounts in the proposed Act Sections 101 and 206), and if not, whether the constitution in fact allows the Legislature to prohibit less than "substantial" conflicts); Art. V, § 10 (Governor's ground for removal or suspension of officers - issue is whether the proposed Act's Section 403 exceeds the restrictions of this constitutional provision by specifying certain additional grounds for removal); Art. VI, § 30 (Judicial Tenure Commission - issue is whether the proposed Act's Sections 406 and 407 procedures allowing the Ethics Board to investigate and make recommendations concerning judges comply with this constitutional provision); Art. XI, § 7 (Impeachment of civil officers - issue is whether the proposed Act's provisions for removal of legislators from office comply with this constitutional provision).

See also supra notes 56-60 and accompanying text for a discussion of the Art. 4, § 24 "one object" requirement. It is this Report's considered position that the proposed Act does in fact comply with each of these constitutional provisions.

Section 105. Coordination With Ethics Ordinances of Political Subdivisions.

In recognition of the principle that local governmental entities should have the primary responsibility for establishing and enforcing ethics regulations for local public officials and public employees, this Section gives a City, Village, Township or Township the opportunity to "opt-out" of the proposed Act, so long as this local governmental entity enacts an ethics ordinance of its own that meets with the approval of the Ethics Board. To pass muster, a local ordinance must include the substance of Section 101 and Chapters Two and Three of the proposed Act, and must create an ethics oversight board that would perform functions similar to those performed by the Ethics Board under Chapter Four of the proposed Act.

Under this Section the Ethics Board is required to perform its ordinance review and approval function in consultation with the Ethics Subcommittee of the Michigan Municipal League.

Section 106. Miscellaneous provisions.

Section 106(2) emphasizes the fact that if one or more of the provisions of the proposed Act are struck down by the Michigan Supreme Court, the remaining provisions are still effective.

A Code of Ethics is the heart and soul of any ethics law. The Code must be easy for lay persons to understand and apply because, as noted above, its primary purpose is to provide guidance to officials and citizens.

The provisions of the Code of Ethics must be read together with the definitions in section 101.

Section 201. Misuse of Office.

Section 201 is modeled upon 1975 P.A. 227 § 169.121(3)[65] and several model acts, including COGEL §§ 204, 210 and Davies § 100(1).[66]

This provision prohibits a public official from misusing public office. Sometimes *in*action personally benefits an official or his or her close associates - for example, when a code enforcement official fails to cite his or her brother for a zoning violation. For that reason, the provision also prohibits the official from refraining from acting. In either case, the official must recuse himself or herself pursuant to Section 209.

This section does *not* prohibit the public official or public employee from receiving governmental entity services or benefits, or use of governmental entity facilities, that are

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65 *See supra* notes 57-60 and accompanying text.

66 *See supra* note 11.

generally available on the same terms and conditions to residents or a class of residents in the state or local community. An official or employee should be able to receive from the governmental entity the same services and benefits as any other resident, provided that the official does not receive any preferential treatment. Nor does this section prohibit a public official or public employee from performing ministerial acts. The village clerk may, for example, issue a fishing license to her brother.

The penalty provision (subsection 201(2)) is modeled upon a similar provision in 1975 P.A. 227 § 169.121(3), which was enacted by the legislature and signed into law by the governor but struck down by the Michigan Supreme Court for encompassing more than one object.[67]

An alternative to specifying penalties within each individual Section of the Code of Ethics would provide a general "Penalty" provision which might state, for example: **"Section 212. Penalties.** A person who knowingly violates any provision in this Chapter is subject to the provisions of Chapter Three of the proposed Act."

This proposed Act opts to include the penalty provision within each independent Section in order to remove any doubt about what the penalty is for each particular violation.

Section 202. Prohibition on Accepting Anything of Value

Section 202, which is modeled upon several model acts (including COGEL § 216; Davies § 100(3)) and 1975 P.A. 227 § 169.121(1),(2), very simply prohibits acceptance of anything of

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[67] *See supra* notes 57-60 and accompanying text.

value in connection with official responsibilities. The simplicity of this provision should provide clear direction to public officials and employees on the matter of gifts and other items accepted in connection with their jobs.

Section 202(2) applies to private citizens and entities. Under current Michigan law, absent outright bribery (M.C.L. §§ 750.117, 750.121), the occasional dishonest private citizen or company that induces a governmental entity official to violate ethics laws runs no risk of penalty. For example, hoping to keep a village's business, a bank might give a personal loan to the village treasurer at a below-market interest rate. Quite possibly, the official will lose his or her job as a result, however, absent outright bribery, the bank will lose nothing. The proposed Act takes the position that private citizens, vendors, developers, and providers must take some responsibility for public officials and public employees complying with ethics laws.

Subsection 101(1) excludes from the definition of "anything of value" a number of items.

The penalty provision (subsection 202(3)) provides that violation of this section results in either a misdemeanor or felony, allowing the Ethics Board a measure of discretion to consider the severity of the violation. The relevant Michigan bribery statutes (M.C.L. §§ 750.117, 750.118, 750.121) provide that such violations constitute a felony, as did 1975 P.A.227 (§§ 169.121, 169.178). The Legislature may wish to follow the lead of these other statutes and mandate that a public official or employ who violates this Section is automatically guilty of a felony; however, it is the position of the proposed Act that it would be desirable to leave greater flexibility with the Board of Ethics to consider the circumstances of each particular case in determining what sanction it will recommend.

Section 203. Representation.

Section 203 distinguishes between the state and political subdivisions with a population of 25,000 or more on one hand, and political subdivisions with population of less than 25,000 on the other, by providing that officials or employees of the latter *may* represent another person before the political subdivision as long as the local legislature gives its approval of the representation by formal resolution. This exception provides for the unique circumstances and limited resources that sometimes exist in smaller communities.

If the Legislature decides that it does not wish to include such an exception, it should be noted that if the provision creates a particular hardship, under Section 408 the Ethics Board retains the flexibility to grant a waiver of this or any other provision of the proposed Act. On balance, however, the proposed Act takes the position that the local legislature in these smaller communities should have the de-centralized authority to determine for itself if it wishes to allow a local public official or employee to represent another person before the political subdivision.

This subsection is not intended to prevent representation of constituents by elected officials without compensation in matters of public advocacy. After all, elected officials are elected to serve their constituents. Thus, for example, when a resident complains to a town board member that the town highway department blocks the resident's driveway with snow, the board member must be able to pursue that complaint with the proper town authorities.

In addition to the limited exceptions for local representation, the proposed Act's exclusion for actions authorized by state or federal law (Section 211) would permit an official to represent or assist persons in an official capacity. *See also supra* comments to Section 201 regarding the receipt of state or local services or benefits generally available to residents of the

state or local jurisdiction and, in matters of public advocacy, the representation of constituents by elected officials without compensation.

The bar on representation does not prohibit an official from participating in the fee that his or her business associate receives from such appearances or representation.

The penalty provision (subsection 203(4)) is modeled upon model acts and a similar provision in 1975 P.A. 227 § 1975 PA 227 §§ 169.125(3), 169.175.[68] The parallel "representation" provision in that Act (1975 PA 227 § 169.125(3)) actually specifies that such representation is a felony, punishable by a fine of not more than $10,000, or imprisonment for not more than 3 years (or both) - a penalty that this Report considers too harsh.

Section 204. Confidential Information.

This provision applies to *all* confidential information (as defined or recognized in practice by the unit of government with which the public official or employee is affiliated), however acquired, and prohibits use of confidential information *primarily* to further anyone's personal interests. Public officials may (and must) use confidential information to further the public's interest, but in doing so, they often coincidentally further someone else's personal interests. Confidential information may be disclosed as permitted by law (Section 211), including the state whistleblower law.[69]

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[68] *See supra* notes 57-60 and accompanying text.

[69] Whistle-Blowers' Protection Act, M.C.L. § 361 *et seq.*

The Legislature may wish to provide explicitly that the penalty for violation of Section 204 is a misdemeanor (punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both, and any additional penalties specified in Chapter Three) if it determines that breach of confidentiality rises to the level of a crime.

Section 205. Political Solicitation.

The Code of Ethics bars political solicitation of subordinates by an official, except when the subordinate is a political appointee.

Section 205 does not restrict voluntary political contributions or political activity by any official. The section merely prohibits an official from putting the political bite on a subordinate.

Section 206. Prohibited Contracts.

This section supercedes and incorporates many elements of M.C.L. §§ 15.301-310 (Conflict of Interest) and M.C.L. 15.321-15.330 (Contracts of Public Servants with Public Entities), and incorporates parts of 1975 P.A. 227 (§169.123) and certain model acts (including Davies § 104; COGEL § 218).

As structured, this section is sympathetic to the unique circumstances in many small, rural communities, where members of the legislative body, or other elected or appointed officials, may well own the only hardware store, gas station, or snow plowing service in the area. If the section were to bar such contracts outright, the political subdivision would need either to ignore the prohibition against contracts with political subdivision officials or obtain the goods

and services at a significantly higher price from distant vendors. Under this section, the public official or public employee *is* able to contract with the political subdivision as long as the proper process requirements of subsection 206(1) and disclosure requirements of subsection 206(2) are observed. The $1,500 *de minimis* requirement is imposed in part to comply with the constitutional requirement of Art. IV, § 10 that prohibits "substantial" conflicts of interest by legislators and state officers. Also with regard to the $1,500 threshold, the Legislature may wish to provide an escalator clause based on the Consumer Price Index or some other measure.

The Legislature may wish to exempt from the requirements of this section those contracts otherwise covered by Section 206 where the public official has not been involved in such a way as to raise ethical questions. Possible language to this effect in subsection 206(1) would state: "This section does not apply to a contract when the public official or public employee does not solicit the contract, does not take part in the negotiations for or in the approval of the contract or an amendment thereto, and does not in any way represent either party in the transaction." This language was included in 1975 P.A. 227 § 169.123.

Section 206, following the evident intent of section 10 of article 4 of the constitution of 1963, is aimed at preventing public officials and public employees from engaging in certain activities under circumstances creating a substantial conflict of interest, but is not intended to penalize innocent contractors. Thus, under subsection 206(3), contracts are voidable, not void. The voidability provision models a similar provision in 1975 P.A. 227 § 169.123. The requirement in this subsection that only a court of proper jurisdiction may decree a contract voidable provides further protection to innocents.

The penalty provision (subsection 206(4)), which draws from several sources, including Davies § 104, specifies that a violation constitutes a misdemeanor or, for especially egregious violations, a felony. Interestingly, 1975 P.A. 227 § 169.123 did not specify what penalties would apply if a public official or employee entered into a prohibited contract.

Section 207. Revolving Door.

Section 207 applies only to those former officials who served in a paid capacity, on the reasoning that unpaid volunteers should not be penalized for their previous public service.

This revolving door provision restricts only the former official; it does not restrict his or her business associates. Thus, for example, a former mayor may not work on matters for or before his or her municipality for one year, but all of the mayor's colleagues in his or her new firm could. Consistent with the Section 203 "Representation" provision, Section 207 does not prohibit the former official from profiting from his or her associates' business with the government body with which he or she was affiliated during that one year.

A business whose owner and sole employee is a former official would be effectively barred for one year from appearing before the governmental entity on behalf of customers or clients. However, if this or any other bar included in Section 207 creates a particular hardship, the Ethics Board could grant a waiver under Section 408.

Moreover, Section 207 only restricts appearances by the former official on behalf of customers or clients. The official may appear on his or her own behalf, for example, to seek a zoning variance for his or her own home.

Finally, Section 207 only applies to officials or employees with some discretionary authority. Employees who perform only ministerial actions are not subject to those restrictions.

The penalty provision (subsection 207(2)) is modeled upon a similar provision in 1975 P.A. 227 § 169.125(4).

Section 208. Inducement of Violations of the Government Code of Ethics.

Like Section 202 of this Chapter, Section 208 applies to public officials/employees and private citizens alike. *See* comments to Section 202.

Under Section 208(2), anyone who intentionally or knowingly violates a provision of the Government Ethics Act's Code of Ethics (*i.e.,* Chapter Two), including a private business that induces a public official or employee to violate the Code of Ethics, may be enjoined from doing business with the state or political subdivision for a period not to exceed two years. That penalty would be imposed by the court in a proceeding initiated by the governing body of the governmental entity or the Ethics Board, as specified in Section 407(6).

Section 208(4) is included to address a likely concern of the business community that an entire corporation may be penalized for the illicit and unauthorized acts of an individual employee in one division or corporate subsidiary.

Section 209. Recusal.

This provision requires that the official entirely refrain from participating in the matter. Mere abstention from voting on the matter is not sufficient. Because recusal involves a conflict of interest, the public official should file a transactional disclosure form under Section 210. This requirement is largely for the protection of the public official or employee as a means of officially documenting the individual's compliance with ethics standards.

Section 210. Transactional Disclosure.

As noted by the Michigan Supreme Court,

> "disclosure assists in preserving the integrity of the political process. It is legitimate for the Legislature to provide a means for effectively investigating possible conflicts of interest. Disclosure requirements promote integrity, fairness and public confidence in government as well as providing the citizens with information concerning an officeholder's integrity and fitness for office."[70]

Transactional disclosure provides pinpoint disclosure when a conflict actually arises and should constitute an important focus of disclosure. As structured, Section 210 requires prompt disclosure anytime the public official or employee is required to recuse himself or herself under Section 209. Failure to so disclose subjects the individual to the penalties and sanctions of Chapter Three of this proposed Act.

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[70] Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10), 396 Mich. 465, 505-506, 22 N.W.2d 3, 19-20 (1976).

The transactional disclosure requirement of Section 210 serves the desired goal of "provid[ing] a means of indicating to officials, the public, and the press where potential conflicts may arise,"[71] and of helping to foster a climate of mutual trust between public officials and those whom they serve. After all,

> "ethics in government is not merely the absence of corruption but the presence of trust.... Ethics laws and enforcement efforts aimed solely at deterring corruption fail to apprehend that simple truth. Indeed, they foster the notion, unjustified in fact, that public officials are inherently dishonest. Such a policy not only fails to achieve its narrow goal of combating corruption but also destroys trust in municipal officials and thus ultimately undermines both the perception and reality of integrity in government. The purpose of ethics laws lies not in the promulgation of rules nor in the amassing of information nor even in the punishment of wrongdoers, but rather in the creation of a more ethical government, in perception and in fact....
> In the end, the touchstone of integrity in government, and the ultimate test of the [ethics legislation's] success, reside in the willingness of good citizens to serve in state and local government. Laws and agencies that chill that willingness to serve do far more harm than good. When, however, good citizens clamor to join the ranks of state and local officials, the ethical health of the state and local communities run strong."[72]

Section 211. Exclusion for lawful action.

This Section highlights the fact that the proposed Act's Code of Ethics (*i.e.*, Chapter Two) does not require or prohibit conduct specifically authorized by the constitutions and laws of the State of Michigan or of the United States.

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[71] Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform,* 11 PACE L. REV. 243, 264 (1991).

[72] *Id.* at 266-67.

E. Chapter Three: "Penalties; Injunctive Relief"

This chapter, combined with the penalty provisions included within the individual sections of Chapter Two, provides clear penalties for violations of the proposed Act. One of the major problems with the existing Michigan ethics laws is that penalties for violations are unclear and inconsistent. For example, under M.C.L. § 15.308, a violation by a state official of the "Conflict of Interest" provisions (M.C.L. §§ 15.301-15.310) results in "appropriate disciplinary action by the governor if he is an administrative officer of the state or if he be a judicial officer of the state, then by the governor on a concurrent resolution adopted by 2/3 of the members elected to and serving in each house of the legislature." The statute gives no direction or definition for what might be "appropriate disciplinary action", creating a situation of unacceptable ambiguity. M.C.L. § 15.327 provides that "any person violating the provisions of this act [*i.e.*, Contracts of Public Servants With Public Entities (M.C.L. §§ 15.321-15.330)] is guilty of a misdemeanor." Finally, with regard to violations of Standards of Conduct [Imposed] for Public Officers and Employees (M.C.L. §§ 15.341-15.348), M.C.L. § 15.345(1)(a) provides that an executive board of ethics shall "make recommendations concerning individual cases to the appointing authority with supervisory responsibility for the person whose activities have been investigated," and M.C.L. § 15.345(4) requires that when the board makes a recommendation to the board of ethics concerning an unclassified employee or appointee,[73] "the appointing authority shall take

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[73] When the board's recommendation affects a classified employee (*i.e.*, a civil servant), M.C.L. § 15.345(3) requires that the appointing authority proceed in accordance with

appropriate disciplinary action which may include dismissal." Once again, there is no discussion in the statute of what might be "appropriate disciplinary action," which creates uncertainty and ambiguity.

By contrast, this proposed Act provides an appropriate range of penalties for ethical improprieties.

Under the proposed Act, the Ethics Board only recommends disciplinary action, civil fines, damages, or civil forfeiture under Sections 401, 402, 403, and 404 to the appointing authority or other person or body authorized to recommend or impose sanctions, in conjunction with a court of appropriate jurisdiction, where necessary.

Section 301. Disciplinary action.

In conjunction with Section 407(1), under Section 301 the appointing authority or person or body authorized by law to take disciplinary action (specified in Section 407(1)) may reprimand, remove or suspend a public official or employee either upon the recommendation of the Ethics Board or upon its own initiative.

Section 302. Civil Fine.

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the recommendation and the rules of the civil service commission.

Section 302 operates in conjunction with Section 407(2). Under Section 302, the Ethics Board may recommend that the appointing authority or person or body authorized by law assess a maximum civil fine of $1,500 against a public official or employee. This sum will normally be sufficient; however, under Section 303 the official may be assessed damages, by a court of appropriate jurisdiction, in addition to the civil fine. To avoid unfairness, the Act precludes imposition of both a civil fine and a civil forfeiture under Section 304.

Section 303. Damages.

Section 303 operates in conjunction with Section 407(3). Under Section 303 persons other than public officials and employees may be assessed damages by a court of appropriate jurisdiction for violations of, for example, Section 202(2) or Section 208. Public officials and employees may be assessed damages under Section 303 either together with or instead of any civil fines imposed under Section 302. Section 303 recognizes the government's right to obtain damages from an individual whose unlawful acts have resulted in loss to the public fisc. To avoid unfairness, the Act precludes imposition of both damages and civil forfeiture under Section 304.

Section 304. Civil Forfeiture.

Section 304 operates in conjunction with Section 407(4), which provides that either the Ethics Board or the government may seek civil forfeiture of up to three times the amount the

person violating the Act benefitted financially from the violation. Like Section 303, Section 304 applies to government officials/employees and other persons as well. It is envisioned that Section 304 would be utilized for especially egregious violations of the proposed Act.

Section 305. Criminal Sanctions.

Section 305 operates in conjunction with Section 407(5), as well as all other provisions in this proposed Act in which the specified penalty is a misdemeanor and/or felony, in providing that a person in violation of the proposed Act may be prosecuted for that violation, with the caveat (in Section 407(5)) that only the attorney general may prosecute state officials and employees.

Section 306. Injunctive Relief.

Section 306 operates in conjunction with Section 407(6) in providing that a person violating this proposed Act may be subject to an action or special proceeding in the appropriate court in order to enjoin the violation or to compel compliance with the Act. As specified in Section 407(6), an action or special proceeding may be initiated by either the Ethics Board, the state, the political subdivision with which the person is affiliated, or any resident, official or employee of the state with proper standing.

F. Chapter Four. "Administrative Provisions"

Chapter Four contains the provisions for administering the proposed Government Ethics Act. Generally, only those persons charged with administering the law will need to consult Chapter Four.

Section 401. Ethics Board: Establishment; Qualifications of Members; Appointment of Members; Term of Office.

This section is based in part on 1975 P.A. 227 § 169.31, and is also substantively quite similar to existing M.C.L. § 15.344 (which would be repealed under this proposed Act), the section that specifies details about the executive board of ethics formed under legislation titled "Standards of Conduct for Public Officers and Employers."

The terms of office of members are staggered to provide continuity in the work and philosophy of the board. Terms of office are sufficiently long to ensure the members acquire expertise but not so long as to discourage persons from serving on the board. In addition, so that Ethics Board members do not become entrenched on the board, the Act contains a term limitation.

Section 401(10) comes directly from existing M.C.L.§ 344(3), which allows the Ethics Board to request, and the state personnel director to provide, with the consent of the civil service commission, clerical or administrative assistance from the ranks of civil service workers.

Section 402. Prohibited conduct by, and restrictions on, member of Ethics Board.

Section 402 is based upon 1975 P.A. 227 § 169.33.

This Section prohibits certain conduct by a member of the Ethics Board during the time that individual sits on the Board. This provision is designed to strengthen both the perception and the reality of a nonpartisan Board of Ethics. Some state statutes and model acts prohibit the conduct for some specified time before or after the time of the member's service on the Board, but it is the position of this proposed Act that such a requirement is too restrictive.

Section 403. Ethics Board: Removal of Members

An Ethics Member may be removed by the governor, pursuant to Art. V, § 10 of the Michigan Constitution.

Section 404. Ethics Board; Jurisdiction, Powers and Duties

This Section is based largely upon 1975 P.A. 227 § 169.35.

The Ethics Board may appoint an executive secretary pursuant to subsection 404(3)(b) to assist it in accomplishing its duties.

The requirement in subsection 404(3)(i) that the Board will be advised on legal matters by the attorney general is modeled after existing M.C.L. § 15.345.

Classified state and local government civil service are folded into the proposed Act to the extent that the Ethics Board may conduct investigations and then recommend sanctions (if any) to the individual civil service commission to act upon in accordance with the rules of the civil

service commission. This is similar to the approach taken under the existing statutes governing Standards of Conduct for Public Officers and Employees ("Powers and Duties of the Board" section (M.C.L. § 15.345(3) and (4)).

Section 405. Review of Disclosure Statements.

Section 405 requires the Ethics Board to review disclosure statements as it sees fit.

Section 406. Investigations.

This Section is modeled largely on 1975 P.A. 227 § 169.38, and sets out the Ethics Board's powers and duties of investigation. It also contains key procedural protections both for the person charged with violating the Act and the complainant (if any). For example, Section 406(2) requires the Board to give notice to the subject of an investigation within 5 days after the Board decides to investigate that individual, and to inform the individual (and the complainant) of the progress of the investigation every 60 days thereafter until the investigation is terminated. In order to protect the privacy of the individual being investigated, Sections 406(3), 406(4) and 406(6) require that the Board's records and proceedings related to the investigation be kept closed to the extent allowed by law, unless the person being investigated requests that the records and actions be made public.

Section 407. Recommendations of Ethics Board to Appropriate Authorities; Action by Authority

Section 407(1) provides that the Ethics Board itself has no authority to actually take disciplinary action; rather, the Board issues a recommendation to the person or body authorized to take (or to recommend) the disciplinary action.

Section 407(2) provides that the Ethics Board may issue a recommendation that the authorized person or body impose (or recommend) a civil fine. There are two schools of thought regarding the imposition of fines. One, the Ethics Board itself is vested with the power to impose penalties, if allowed under constitutional separation of power issues; and two, the Board makes recommendations to an appropriate authority, which reviews the Board's recommendation and then either dismisses the matter or itself imposes penalties. The advantage of the first model is that by vesting the power to impose fines in a neutral outside Ethics Board, chances are slight that there would be even the perception of "cronyism" attached to its proceedings and recommendations. On the other hand, it is possible that the authority will have perspectives and insights on particular matters that the Ethics Board may not, and it would seem proper to allow the authority to bring those perspectives to bear in some way. However, there is a constitutional question whether an independent Ethics Board is itself able under Art. III, § 2 to impose penalties upon officials and employees of separate branches of governmental entities. (*See supra* comment to Section 104.) Due to these separation of powers issues, the proposed Act opts instead to provide that the Ethics Board investigate and merely *recommend* a particular sanction - a role for the Board that is more certain to survive constitutional scrutiny. This approach is

consistent with 1975 P.A. 227 § 169.135, which was enacted by the legislature and signed into law by the governor, but was struck down by the Michigan Supreme Court as contemplating more than one object.[74]

Section 407(3) provides that either the Ethics Board or the state, or the political subdivision of the state with which the alleged violator is affiliated, may initiate an action to obtain damages pursuant to Section 303.

Section 407(4) provides that either the Ethics Board or the state, or the political subdivision of the state with which the alleged violator is affiliated, may initiate an action to obtain civil forfeiture pursuant to Section 304.

Section 407(5) provides that the Ethics Board may refer information about violations of the Proposed Act to the appropriate prosecutor with recommended criminal penalties, as specified by Section 305 and various other provisions of the proposed Act, and specifies that the appropriate prosecutor for state officials and employees is the attorney general.

Section 407(6) provides that any one of several entities may initiate an action or special proceeding in a court of appropriate jurisdiction to seek injunctive relief to enjoin a violation or to compel compliance with the proposed Act, as provided in Section 306. Subsection 407(6)(a) provides that the Ethics Board or the state, or the political subdivision of the state with which the alleged violator is affiliated, may initiate the proceedings; while subsection 407(6)(b) provides that, subject to the restrictions of subsection 407(6)(c), any resident, official, or employee of the state or political subdivision may initiate the proceedings. Because allegations of unethical

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[74] *See supra* notes 55-58 and accompanying text.

conduct raise sensitive questions that cannot be left unresolved, subsection 407(6)(c) addresses the failure of the Ethics Board to act on a matter before it, and acknowledges the right of a citizen or official, within limitations, to seek the aid of the court in compelling an official to comply with ethics laws or in determining what obligations those laws impose where the Ethics Board has failed to act. This subsection does *not* give the citizen or official a right to seek to enjoin the Ethics Board itself. Subsection 407(6)(c) requires the plaintiff or petitioner first to submit a sworn complaint to the Ethics Board and then to wait until at least six months have elapsed since the filing of the complaint, but no longer than ten months after the filing of the complaint with the Ethics Board, before initiating an action in court. This "exhaustion of administrative remedies" requirement is necessitated by the excessive cost the state might otherwise incur as a result of repeated lawsuits. The fact that subsection 407(6)(c) gives the plaintiff or petitioner the right to initiate a proceeding does not relieve that person of the usual requirements that he or she have standing to sue in the particular instance.

Section 408. Waivers.

While a provision for waivers of ethics provisions is dangerous because it opens the door to the wholesale gutting of ethics laws, encourages political pressure on the Ethics Board by various individuals and groups within the community, and leads to charges of partiality, all of which undercut the perception of the Ethics Board as an impartial, nonpartisan body of high integrity, the provision is necessary to allow the board flexibility to accommodate the inevitable special circumstances that arise.

To minimize the risks, Section 408 sets a high standard for granting a waiver ("compelling need" and "exceptional circumstances"), requires that notice of the waiver application and any waiver granted be published in the state's or political subdivision's official newspaper, and requires that any consideration of a waiver occur at an open session.

Section 409. Advisory Opinions.

To avoid burdening the Ethics Board with requests for advisory opinions, this proposed Act permits a private citizen to request an advisory opinion only as to the permissibility of his or her own conduct. Any public official, on the other hand, may request an advisory opinion with respect to his own, a subordinate's, a superior's, or even a colleague's conduct.

This section addresses formal advisory opinions. The Ethics Board remains free at any time to answer questions of anyone with respect to the proposed Act.

Recognizing that persons requesting advisory opinions need quick answers to their ethics questions, Section 409 acknowledges the right of a person to seek judicial assistance in compelling the Ethics Board to respond to a request for an advisory opinion or in answering the question posed, once six months have elapsed, but no more than ten months have passed, since submission of the request to the board. An official against whom a complaint has been made, or who is otherwise under investigation by the Ethics Board, may immediately request an advisory opinion as to the propriety of his or her conduct and, if that opinion is not forthcoming within six months, may proceed under section 409.

Much of the language in Section 409(3) concerning civil action to compel performance of duties by the Ethics Board comes from 1975 P.A. 227 § 169.46, which was previously enacted by the legislature and signed by the governor, only to be overturned by the Michigan Supreme Court for encompassing more than one object.[75]

Section 410. Special Committee of the Legislature on Ethics.

This section is similar to existing M.C.L. § 15.307, except that it does not give the committee of the legislature authority to issue advisory opinions (this function remains with the Ethics Board under Section 409).

Section 411. Judicial Review.

As noted in the comments to Section 407(6), the fact that Section 411 gives the plaintiff or petitioner the right to seek judicial review and relief does not relieve that person of the usual requirements that he or she have standing to sue in the particular instance.

Section 412. Training and Education.

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[75] *See supra* notes 57-60 and accompanying text.

Educating officials and the public on the new ethics laws will be among the most important functions of an Ethics Board, but the task will require significant resources.

Section 413. Annual Reports; Review of Ethics Laws.

The Board has the power and the responsibility to revisit the ethics laws and to propose changes as needed to improve their administration.

Section 414. Public Inspection of Records; Public Access to Meetings.

Any Ethics Board inquiry, including inquiries into complaints that later prove meritless, may compromise an official's career. For that reason, the proposed Act permits the Ethics Board to disclose only those records for which disclosure is mandated by the state Freedom of Information Law (M.C.L. 15.231-15.246). That law provides that an agency may deny access to certain records.

Similarly, the proposed Act does not allow an Ethics Board to open its meetings to the public, except as required by the state Open Meetings Law or if requested by the target of the investigation. The Open Meetings Law provides that a public body may "meet in a closed session" to discuss "the dismissal, suspension, or disciplining of, or to hear complaints or charges brought against, or to consider periodic personnel evaluation of, a public official, employee, staff member, or individual agent, if the named person requests a closed hearing." M.C.L. §

15.268(a). The Act presumes that the person under investigation desires a closed hearing, and as a result makes such executive sessions mandatory.

Section 415. Distribution and Posting: Act; Special Reports; Technical Studies

Failure to post or distribute does not affect the enforcement of those laws or the duty of officials to comply with them.

This proposed Act permits the Ethics Board to select provisions of the Act for distribution and posting. For example, the Board of Ethics may decide that only the Code of Ethics itself (Chapter 2 of the Act) should be *posted* but that Chapters 2-3 should be *distributed* to the state and local public officials and employees.

APPENDIX A:

Sample Annual Disclosure Provisions (if elected)

If the Legislature were to decide to require annual disclosure of certain personal assets (*i.e.*, real property holdings and outside income), the following provides possible language for such provisions. A separate chapter could be created for the annual disclosure. This Report recommends against the adoption of an annual disclosure requirement on the reasoning that the administrative expense and burden of such a requirement far outweigh any benefits gained. Moreover, such annual disclosure requirement, though much less onerous than the requirements in some other states, can have the tendency to chill the willingness of good people to serve in state and local government.[76]

CHAPTER FIVE: ANNUAL DISCLOSURE

Section 501. Annual Disclosure

(1). **Public officials and employees required to file.**

(a) The following public officials and public employees shall file statements of the information required by subsection 501(4) with the secretary of state:

(1) An individual holding state elective office.

(2) A justice or judge.

(3) A member of a state board or commission provided by the Michigan Constitution of 1973.

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[76] *See, e.g.*, Mark Davies, *Keeping the Faith: A Model Local Ethics Law - Content and Commentary*, 21 Ford. Urb. L.J. 61, 95 (1993) (opining that "officials strenuously object to disclosing their finances,"and stating that onerous New York state financial disclosure requirements "have already caused the resignation of over 200 officials around the state").

(4) A member of a state board or commission which examines or licenses a business, trade or profession or which determines rates for or otherwise regulates a business and a member of a state commission which appoints a director of a principal department of state government.

(5) An appointed member of a governing board of a state institution of higher education.

(6) An elected or appointed member of a governing board of a community or junior college.

(7) A member of a county board of commissioners, and other elected county executives and auditors.

(8) A chief executive or administrative official of a county.

(9) A prosecuting attorney.

(10) A county clerk, county treasurer, county drain commissioner, and register of deeds.

(11) The state commissioner of public works.

(12) A state employee of the executive branch, who is exempted or excepted from civil service, and who serves in a non-clerical, policy-making capacity.

(13) Additional individuals as determined from time to time by the Board of Ethics.

(b) The following public officials and public employees shall file statements of the information required by subsection 501(4) with the clerk of the county in which the individual works:

(1) A mayor of a city, a city manager, a city administrator, a village president.

(2) A member of a city council, village council, town council, common council, and any other local elected official.

(3) A paid member of a land use planning commission or zoning commission, or land use/zoning authority of a state, region, county, township, village, or city.

(4) An unpaid member of a land use planning commission/authority or zoning commission/authority.

(5) A township trustee and a township supervisor.

(6) A city, village, or township clerk.

(7) A city, village, or township treasurer.

(8) A member of a school board.

(9) A school superintendent.

(10) A member of an economic development authority.

(11) Additional individuals as determined from time to time by the Board of Ethics.

(c) Upon the request of the Ethics Board the Secretary of State or clerk of the county shall provide to the Board copies of the statements filed pursuant to Sections 501(a) and (b).

Comment on Section 501(1). Public Officials and Employees Required to File.:

Grossly intrusive financial disclosure requirements have rightly given annual disclosure a bad reputation. The difficulty in drafting an annual disclosure provision is in determining where to draw lines. Specifically, which public officials and officials should be required to file? Of those, which should be required to file the complete report, and which will be allowed to file the abridged report? What information should be included in the annual report? All of these are difficult questions, and should be considered carefully by the legislature if it elects to include an annual disclosure requirement.

In the interest of clarity, Section 501(1) sets forth job categories in considerable detail, but in the interest of succinctness does not list each individual job title. The job titles are those that were listed in 1975 P.A. 227, some of which no longer exist or were re-titled. The list would need to be culled before passage of any legislation. Included in the categories specified in section 501(1) would be, among others, the following "state officials" who are covered under the current Michigan Conflict of Interest statute (M.C.L.§ 15.303): "person[s] occupying one of the following offices established by the constitution: governor; lieutenant governor; secretary of state; state treasurer; attorney general; auditor general; superintendent of public instruction; member of the state board of education; regent of the University of Michigan; trustee of Michigan State University; governor of Wayne State University; member of a board of control of one of the other institutions of higher education named in section 4 of article 8 of the constitution or established by law as therein provided; president of each of the foregoing universities and institutions of higher learning; member of the state board for public community and junior colleges; member of the supreme court; member of the court of appeals; member of the state highway commission; director of the state highway commission; member of the liquor control

commission; member of the board of state canvassers; member of the commission on legislative apportionment; member of the civil service commission; state personnel director; or member of the civil rights commission; together with his principal deputy who by law under specified circumstances, may exercise independently some or all of the sovereign powers of his principal whenever the deputy is actually exercising such powers."

Other than those state employees of the executive branch who have policy-making authority, public employees are *not* required to file annual reports.

Because individual circumstances may vary or change from time to time, sections 501(1)(a)(13) and 501(1)(b)(11) give the board of ethics the authority to add to or subtract from the list of individuals who must provide annual disclosure.

(2) **Time for Filing.**

An individual specified in subsections (1)(a) and (1)(b) shall file his or her annual disclosure statement of information required in Section 501(4) with the secretary of state or county clerk, respectively:

(a) Within 60 days after becoming subject to the requirements of subsection 501;

(b) No later than May 1 of each year thereafter, to cover the period during the previous calendar year in which the individual held a position specified in subsection 501(1).

Comment on Section 501(2). Time for Filing.

The specified date of May 1 should provide adequate time for an official to file.

(3). **Notice; Right to Cure.**

(a) Within 30 days after the filing due date specified in subsection 501(2), the secretary of state or county clerk shall give written notice to an individual who has failed to file

or has filed a deficient annual disclosure statement that failure to submit an acceptable statement within 30 days will subject the individual to penalties specified in subsection 501(6) of this Act.

(b) Within 30 days of receiving from the secretary of state or the county clerk a transactional disclosure statement or annual disclosure statement that it subsequently determines to be a deficient, the Board of Ethics shall give written notice to the individual who filed the deficient statement that failure to submit an acceptable statement within 30 days will subject the individual to penalties specified in subsection 501(6) of this Act.

(c) Upon notice from the secretary of state or county clerk of failure to file an acceptable annual statement, an individual required to file a statement under Section 501(1) shall have a right to submit the required statement within 30 days without penalty.

Comments on Section 501(3). Notice; Right to Cure.:

Some persons fear that an annual statement requirement may trap officials who simply forget to file an amendment when, for example, they sell real property they own. Accordingly, Section 501(3) provides a cure period of thirty days to any official who has failed to file an annual disclosure statement. Such a cure period provides some protection for officials who inadvertently fail to file or disclose. While there is a danger that such an opportunity to cure undermines the effectiveness of the annual disclosure requirement and imposes unnecessary administrative burdens on the Ethics Board, the proposed Act takes the position that, on balance, notions of basic fairness require that officials should be afforded this right to cure.

This right to cure comes at a cost, however, in the sense that it places a significant administrative burden on the secretary of state and county clerks to send letters to all officials who have failed to file by the due date or who have filed deficient statements. If the Legislature wishes to reduce the administrative burden to the secretary of state and the county clerks, it could simply delete Section 501(3).

(4). **Contents of annual disclosure statement.**

The following interests in subsections 501(4)(a), (b), (c) shall be listed by all persons required to file an annual disclosure statement under subsection 501(1). For purposes of this Section, the interest of a spouse or any other party shall be considered to be the same as the interest of the person making the statement if the interest is *constructively controlled* by the person making the statement:

(a) the description, including the nature, location, and size of all real property in the state, the fair market value of which exceeds $1,000.00, in which a financial interest was held during the preceding calendar year; and, if the property was transferred during the year, the name and the address of the person furnishing or receiving consideration in exchange for that real property.

(b) The name, address and nature of any outside employer or business from which income in excess of $1,000 was derived during the preceding calendar year.

(c) Any information not previously reported under Section 210 regarding a matter in which the filer is required to recuse himself or herself under Section 209.

The following interests shall also be listed by persons listed in subsections 501(1)(a)(1)-(8), (10)-(11), and (13), and subsections 501(1)(b)(1)-(3), (5)-(7), (9), (10)-(11).

(d) The name, address, and nature of business or practice of any person from whom anything of value, as defined in Section 101 of this proposed Act, was received during the preceding calendar year.

Comments on Section 501(4). Contents of Annual Disclosure Statement.:

By requiring financial disclosure of the required interests by the person making the statement and of the spouse or any other party *only* if the interest is constructively controlled by the person making the statement, Section 501(4) addresses the concerns of the Michigan Supreme Court in *Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10).*[77] In that opinion, the court held that language requiring individuals to file information "for themselves and what they know or have reason to know about members of their immediate families" is unconstitutionally vague, explaining that "as the statute imposes criminal penalties for violations, due process requires that the statute provide adequate notice to a person of

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[77] 396 Mich. 465, 507, 242 N.W.2d 3, 20 (1976).

ordinary intelligence of conduct that is illegal.... We believe that the quoted language lacks the specificity required to alert individuals to the responsibility imposed upon them to discover the information required to be disclosed. While we [support the position]...that immediate family were included in the disclosure provisions in order to prevent the individual from circumventing the disclosure provisions by transferring an interest held that individual to a member of his immediate family, we believe the same result may be accomplished with more precise language."[78] Section 501(4) provides such precise language.

As for the information required to be provided, Section 501(4) adopts the substance of the requirements contained in a previous attempt by the Michigan legislature to update ethics laws, 1975 P.A. 227 § 160.132(1).[79] The Michigan Supreme Court determined that these requirements survive constitutional scrutiny:

> [The information required is] sufficiently narrow and necessary to the accomplishment of the state interest. [They] contain certain threshold limits. Small amounts of income, debt, real estate and gifts need not be disclosed. Even when the threshold limits are reached the exact numerical amounts or values need not be disclosed to the public.... There are also broad exceptions to the required disclosure of creditors. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from a relative within the third degree of consanguinity, and land contracts that have been properly recorded with the county clerk or the register of deeds need not be included.[80]

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78 *Id.*

79 *See supra* notes 57-60 and accompanying text.

80 Advisory Opinion on Constitutionality of 1975 P.A. 227 (Questions 2-10), 396 Mich. 465, 506-507, 242 N.W.2d 3, 20 (1976).

Indeed, Section 501(4) is not as onerous as the similar provision in 1975 P.A. 227, for Section 501(4) does not require disclosure of "the original amount and the amount outstanding, the terms of repayment, and the security given for each debt required to be reported,"[81] nor does it require disclosure of additional information concerning businesses "of which the filer or a member of the filer's immediate family was a partner or held more than a 10% equity interest in that preceding calendar year,"[82] nor does it require information about creditors.[83] As an additional check, the Board of Ethics may, under Section 408, grant waivers from filing or from disclosing certain information on the annual disclosure statement in the rare instances in which such filing or disclosure may prove overly intrusive.

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[81] 1975 P.A. 227 § 169.132(1)(e).

[82] 1975 P.A. 227 § 169.132(2).

[83] (If the Legislature *does* wish to require selected individuals to disclose information on creditors, the proposed Act would suggest the following language be added to Section 501(4):

> (e) The name and address of each creditor to whom the value of $1,000.00 or more was owed by the filer. Accounts payable, debts arising out of retail installment transactions or from loans made by financial institutions in the ordinary course of business, loans from immediate family, and land contracts that have properly recorded with the county clerk or the register of deeds need not be included.

Another objection the Michigan Supreme Court had to 1975 P.A. 227 was that it required the same degree of annual financial disclosure of *all* listed individuals, regardless of the level of responsibility and discretion possessed by each. The court concluded that the creation of this single class amounted to "an arbitrary, capricious, and unreasonable grouping and, therefore, a violation of the equal protection clause.... As we conclude that the classification is overbroad, the entire statutory scheme ... for disclosure by public officials must fall."[84]

If elected, the annual disclosure requirements of the proposed Act (Section 501) addresses this concern in four ways. First, Subsection 501(4) draws its classifications more narrowly - *i.e.*, it requires differing levels of disclosure for filers with differing levels of responsibility and discretion. Specifically, not all filers are required to disclose information about "anything of value" they received during the preceding year - only those filers who might be particularly susceptible to inappropriate gratuities were included. Second, as noted above, the quantity of information required to be disclosed even by filers who might be "particularly susceptible" is considerably less than that which was required of *all* filers under 1975 P.A. 227. Third, the only public *employees* required to file are those employees of the state executive branch who have nonclerical decisionmaking authority (subsection 501(1)(a)(12)), and even then those employees are responsible only for the reduced filing. And fourth, the proposed Act provides a "small

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[84] *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2-10)*, 396 Mich. 465, 508-09, 242 N.W.2d 3, 21 (1976).

community exemption" in Section 501(7), whereby officials of a community satisfying specified criteria need not comply with the Section 501 annual disclosure requirements.[85]

These minimal requirements suffice because many conflicts of interest arise either with respect to the official's real property ("May I vote to make the land adjoining my brother's home a park?"), information of which is required in subsection 501(4)(a), or with respect to the official's non-municipal business or employment, information of which is required in subsection 501(4)(b). Moreover, any problem that might be created by the minimal reporting requirements are minimized by the fact that the Ethics Board has the authority to subpoena additional information from the filer if necessary (Section 4069(l)).

(5). **Public Inspection**

The secretary of state and clerks of the counties shall make the annual statements filed under Section 501 available for public inspection during regular office hours. On request of the Ethics Board, the secretary of state and clerks of the counties shall provide to the Board copies of the statements filed pursuant to this Act .

Comments on Section 501(5). Public Inspection.:

The public inspection requirement is important to the function of fostering public trust in government, by demonstrating that public officials have "nothing to hide." The public inspection requirement of Section 501(5) is modeled upon 1975 P.A. 227 § 169.131(6).

If the Legislature wishes to provide additional protections to filers against potential abuse resulting from this provision, it could add an additional paragraph requiring any person who

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[85] This small community exemption is modeled on 1975 PA 227 § 169.131(8).

wishes to view the statements to fill out a form, which would then be forwarded to the filer.[86] Possible language for such a paragraph might read:

> Each person examining a statement must first fill out a form prepared by the Secretary of State identifying the examiner by name, occupation, address and telephone number, and listing the date of examination and reason for examination. The Secretary of State shall supply such forms to the county clerks annually and replenish such forms upon request. The Secretary of State or county clerk shall promptly notify each person required to file a statement under this Act of each instance of an examination of his or her statement by sending a duplicate original of the identification form filled out by the person examining the statement.

(6). **Penalty**

(a) Any person required to file an annual disclosure statement under Section 501 who willfully files a false or incomplete statement or who fails to file a statement within the time prescribed after an opportunity to cure, as provided in subsection 501(3)(c), shall be guilty of a misdemeanor, punishable by a fine of not more than $1,000, or imprisonment for not more than 90 days, or both; and shall be subject to any additional penalties specified in Chapter Three of this proposed Act.

(b) If the notice of failure to file a disclosure statement as required in subsection 501(3)(a) is not given by the Secretary of State or the county clerk, no penalties or forfeiture shall result if a statement is filed within 30 days of actual notice of the failure to file.

Comments on Section 501(6). Penalty.:

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[86] This is the approach taken by the Illinois disclosure statute (Ill. Laws 4A-106).

Subsection 501(6)(b) provides some protection to the person who has failed to timely file a satisfactory statement in the event the secretary of state or the county clerk has not sent the "notice of failure to file" in a timely fashion.

Another consideration is how far the proposed Act should go in specifying sanctions in the event of noncompliance with the annual disclosure requirement. The Act opts merely to state that those not filing or filing deficient statements will be subject to specified penalties and forfeiture. A more aggressive alternative, used by some model acts and states, might provide that the attorney general or state's attorney for the county for which the filing is required to bring an action against any person who has filed a deficient statement or who has failed to file within 30 days of the secretary of state's or county clerk's actual notice of the failure to file an adequate statement.

(7). **Small Community Exemption.**

Section 501 does not apply to an individual listed in subsection 501(1)(b) of a city, village, or township which does not employ more than two full-time employees and does not maintain a regular office, if the legislative body of the city, village, or township approves this exemption by ordinance or resolution and delivers the ordinance or resolution to the board of ethics. "Regular office" means an office open to the public at specified prearranged times for at least 20 hours a week.

Comments on Section 501(7). Small Community Exemption.:

Section 501(7) exempts officials of very small communities from the annual disclosure requirements, if they so elect.

Section 502. Designation of Public Officials and Employees Required to File Annual Disclosure Statements.

(1). Within 90 days after the effective date of this Act, and by the end of the month of March each year thereafter, the secretary of state shall:

(a) Cause to be filed with the Ethics Board a list of the names and titles of all public officials and employees who are required to file annual disclosure statements pursuant to Section 501(1)(a) of this Act; and

(b) Notify in writing all such officials and employees of their obligation to file an annual disclosure statement pursuant to section 501(1)(a).

(2). Within 90 days after the effective date of this Act, and by the end of the month of March each year thereafter, all county clerks shall:

(a) Cause to be filed with the Ethics Board a list of the names and titles of all public officials and employees within the county who are required to file annual disclosure statements pursuant to Section 501(1)(b) of this Act; and

(b) Notify all such officials and employees of their obligation to file an annual disclosure statement pursuant to Section 501(1)(b).

(3). Within 60 days after the effective date of this Act, and by the end of the month of February each year thereafter, all municipal, village, and township clerks shall cause to be filed with the clerk of the county in which the municipality, village, or township is located the names, titles, and addresses of the public officials and employees from the municipality, village, or township who are required to file annual disclosure statements with the county clerk pursuant to section 501(1)(b).

Comments on Section 502. Designation of Public Officials and Employees Required to File Annual Disclosure Statements

It becomes quickly apparent in reviewing the annual disclosure provisions of the proposed Government Ethics Act (*i.e.,* Sections 501, 502) that administering such a system will require substantial added tasks and the cooperation of many officials at all levels of state and local government. With the decentralization envisioned by these provisions, there would be the

inevitable mixed quality of compliance and cooperation. The Ethics Board will not have as much control over the process. That said, arguably the sanctions provided for in the Act for violations and noncompliance, combined with selective direct oversight by the Board from time to time in a certain percentage of counties, will assure reasonable quality. An alternative, which would add substantially to the Ethics Board's own administrative burden (and hence, its expenses), would involve having all persons required to file under Section 501 file directly with the Ethics Board, instead of with the secretary of state and individual county clerks. This is the approach adopted in Ohio.

Section 502 requires the state and each political subdivision to identify affirmatively which public officials and employees are required to file annual disclosure statements under Section 501 of the proposed Act. Section 502 sets up a stepped system, whereby under Section 502(3) the municipal, village and township clerks are first required, by the end of February each year, to assemble and forward to the county clerk the names, titles, and addresses of persons within their respective jurisdictions who are required to file annual disclosure statements with the county clerk pursuant to Section 501(1)(b). Thereafter, under Section 502(2) the county clerks are required, by the end of March each year, to do two things: (i) assemble and forward to the Ethics Board the names and titles of all persons who are required to file statements with the county clerk pursuant to Section 501(1)(b); and (ii) notify all such persons of their responsibility to file. Section 502(1) is the parallel provision for the secretary of state, whereby by the end of March each year the secretary of state is required to: (i) assemble and forward to the Ethics Board the names and titles of all persons who are required to file statements with the secretary of state pursuant to Section 501(1)(a); and (ii) notify all such persons of their responsibility to file.

As noted above, the disadvantage of requiring the county clerks (rather than municipal clerks) in section 502(2) to forward the names to the Ethics Board and notify the individuals is the fact that this creates a considerable administrative burden for the county clerks in accumulating the names and titles of filers from every political subdivision within the county. Section 502(3) hence requires each municipal clerk to provide the county clerk with names and titles of those individuals in that particular municipality who are required to file.

Section 503. Submission and Maintenance of Disclosure Statements.

(1). The secretary of state and clerks of the counties shall transmit promptly to the Ethics Board those annual disclosure statements requested by the Board pursuant to Section 501(3)(c).

(2). The secretary of state and clerks of the counties shall index and maintain on file for at least seven years all disclosure statements filed pursuant to Section 501.

Comments on Section 502. Submission and Maintenance of Disclosure Statements.:

The Ethics Board has authority to request and receive individual statements as needed from the secretary of state and the individual county clerks, each of whom are responsible for keeping statements on file for a period of seven years.

APPENDIX B

Government Ethics Laws in the United States - Chart 1

LEGEND

5 - Covers all classes of public officials or employees

4 - Covers all except one class of public officials or employees

3 - Covers all except two classes of public officials or employees

2 - Covers all except three or more classes of public officials or employees

1 - No coverage

STATES	Use of position to obtain personal benefits	Acceptance of items to influence official actions	Use of confidential information	Post-governmental employment	Representation of private clients before public entity	Contractual conflicts of interest	Political solicitation of employees	Disclosure of real property	Disclosure of outside income	Disclosure of gifts, etc.	Disclosure of creditors	AVG.
Alabama												4.91
Alaska												4.27
Arizona												4.64
Arkansas												3.73
California												2.82
Colorado												2.91
Connecticut												2.27
Delaware												2.82
Florida												4.27
Georgia												2.45
Hawaii												4.27
Idaho												2.45
Illinois												3.64
Indiana												2.09
Iowa												3.36
Kansas												2.27
Kentucky												3.27
Louisiana												3.27
Maine												1.64
Maryland												4.09
Massachusetts												4.64
Michigan												2.27
Minnesota												2.36
Mississippi												2.91

STATES	Use of position to obtain personal benefits	Acceptance of items to influence official actions	Use of confidential information	Post-governmental employment	Representation of private clients before public entity	Contractual conflicts of interest	Political solicitation of employees	Disclosure of real property	Disclosure of outside income	Disclosure of gifts, etc.	Disclosure of creditors	AVG.
Missouri												3.09
Montana												3.09
Nebraska												2.73
Nevada												4.09
New Hampshire												1.73
New Jersey												3.18
New Mexico												2.00
New York												2.64
North Carolina												1.18
North Dakota												3.91
Ohio												3.09
Oklahoma												3.09
Oregon												4.36
Pennsylvania												2.27
Rhode Island												4.55
South Carolina												4.91
South Dakota												1.64
Tennessee												1.91
Texas												4.27
Utah												2.18
Vermont												1.55
Virginia												3.64
Washington												5.00
West Virginia												3.36
Wisconsin												4.45
Wyoming												1.82
AVERAGE	3.54	3.50	3.28	2.70	3.00	3.44	2.40	3.14	3.78	3.00	2.84	3.15

Michigan After Proposed Act												3.91

APPENDIX B

Government Ethics Laws in the United States - Chart 2

LEGEND

- ✓ All public officers and appointees (see definition sec. 101)
- ✓- All public officers and appointees **except judicial**
- ✓1 All public officials and appointees **except executive**
- ✓2 All public officials and appointees **except legislative**
- ✓2- All public officials and appointees **except legislative and judicial**
- ✓3 All public officials and appointees **except members of state commissions and officers of state agencies**
- ✓4 All public officials and appointees **except voluntary members of boards or commissions**
- 0 None

STATES	Use of position to obtain personal benefits	Acceptance of items to influence official actions	Use of confidential information	Post-governmental employment	Representation of private clients before public entity	Contractual conflicts of interest	Political solicitation of employees	Disclosure of real property	Disclosure of outside income	Disclosure of gifts, etc.	Disclosure of creditors
Alabama	✓	✓	✓	✓	✓	✓	✓1	✓	✓	✓	✓
Alaska	✓-	✓-	✓-	✓-	✓-	✓-	✓-	✓	✓	✓	✓
Arizona	✓	✓	✓	✓	✓	✓	✓	✓3	✓3	✓3	✓3
Arkansas	✓	✓3-	✓	✓	Leg only	✓1-	✓3-	0	✓	✓	✓
California	✓4-	✓4-	0	✓3,4-	✓4-	✓4-	0	✓	✓	✓	0
Colorado	✓2-	✓2-	✓2-	✓2-	✓2-	✓2-	✓2-	✓1,3,4	✓3,4	✓3,4	✓3,4
Connecticut	Officers of State Agencies Only							State Elected Officials Only		✓	State Elected Officials Only
Delaware	✓2-	0	✓2-	✓2-	✓2-	✓2-	✓2-	✓3,4	✓3,4	✓3,4	✓3,4
Florida	✓	✓	✓	✓	✓	✓	0	✓	✓	0	✓
Georgia	✓	✓	0	0	✓	✓	0	0	0	0	0
Hawaii	✓	✓	✓	✓	✓	✓	0	✓	✓	0	✓
Idaho	✓	✓	✓	0	0	✓	0	0	0	0	0
Illinois	✓-	✓-	Leg only	See Book	Leg only	✓1	Ofcrs only	✓	✓	✓	✓
Indiana	✓	✓2-	✓2-	✓1,4-	0	✓2-	0	0	0	0	0
Iowa	✓	✓	✓1-	✓1-	✓1-	✓-	✓-	✓-	✓-	0	0
Kansas	0	✓4-	✓2,4-	Off. only	✓4-	✓4-	0	✓4	✓4-	Jud only	0
Kentucky	✓-	0	Elec Off. & Leg only	✓2-	✓-	✓2-	Leg only	✓	✓	✓	Leg only
Louisiana	✓-	✓-	✓-	✓-	✓-	✓-	✓-	Gov't. & State Officials Only			
Maine	0	✓2-	0	0	0	✓2-	0	0	Leg only	Leg only	Leg only
Maryland	✓1,2-	✓-	✓-	✓-	✓-	✓-	✓2-	✓	✓	✓	✓
Massachusetts	✓	✓	✓	✓	✓	✓	✓	✓4	✓4	✓4	✓4

STATES	Use of position to obtain personal benefits	Acceptance of items to influence official actions	Use of confidential information	Post-governmental employment	Representation of private clients before public entity	Contractual conflicts of interest	Political solicitation of employees	Disclosure of real property	Disclosure of outside income	Disclosure of gifts, etc.	Disclosure of creditors
Michigan	✓2	✓-	✓2-	Leg only	✓-	✓-	0	0	0	0	0
Minnesota	0	✓-	0	0	0	✓-	0	✓-	✓-	✓-	0
Mississippi	✓	✓	✓	Leg & State	0	✓	0	0	✓	0	0
Missouri	Officers of State Offices, Agencies or Departments							✓	✓	✓	✓
Montana	✓-	✓-	✓-	✓-	✓-	✓-	✓-	✓4-	0	0	0
Nebraska	Officers of State Offices, Agencies or Departments							✓-	✓-	✓-	✓-
Nevada	✓4	✓4	✓4	✓4	✓4	✓4	0	✓	✓	✓	✓
New Hampshire	0	0	0	0	0	✓3,4-	0	0	✓	-	0
New Jersey	✓1-	✓1-	✓1-	✓1-	✓1-	✓1-	Leg only	✓-	✓-	✓-	✓2-
New Mexico	Officers of State Offices, Agencies or Departments				0	Officers of State Offices, Agencies or Departments		✓1-	✓-	0	0
New York	✓3,4	✓3,4	✓3,4	Off & Leg	Off & Leg	Leg only	0	✓-	✓-	✓-	✓-
North Carolina	0	Off. only	0	0	0	0	Off. only	0	0	0	0
North Dakota	✓	✓	✓	0	0	✓	✓	✓3	✓3	✓3	✓3
Ohio	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓3,4-	✓	✓	✓	✓
Oklahoma	✓	0	✓	0	✓	0	✓	0	✓	✓4	0
Oregon	✓	✓	✓	0	✓	✓	✓	✓3	✓	✓3	✓3
Pennsylvania	✓2,4-	✓2,4-	✓2,4-	Officers & Elected	0	✓2,4-	0	✓-	✓-	0	✓-
Rhode Island	✓	✓	✓	✓	✓	✓	✓1	✓	✓	✓	✓
South Carolina	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓-
South Dakota	✓2,4-	✓2,4-	✓2,4-	✓2,4-	✓2,4-	✓2,4-	0	0	✓3,4-	0	0
Tennessee	Leg. only	✓2-	0	0	0	✓2-	Off & Paid Mem	0	✓	0	0
Texas	✓	✓	✓	✓	✓	✓	✓	✓	✓	0	0
Utah	✓2,4-	✓2,4-	✓4-	0	0	✓3,4-	0	0	✓	✓	0
Vermont	✓2-	✓2-	0	0	0	0	0	0	-	-	0
Virginia	✓	✓	✓	Leg & Off	✓	✓	0	✓1,2	✓1,2	✓1,2	✓1,2
Washington	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
West Virginia	✓	✓	✓	✓2	✓2	0	0	0	✓	0	✓
Wisconsin	✓	✓	✓	✓	✓3,4	✓	0	✓	✓	✓	✓
Wyoming	✓2-	✓2-	✓2-	0	✓2-	0	✓1,2-	0	0	0	0

Michigan After Proposed Act	✓	✓	✓	✓	✓	✓	✓	0	0	✓	0

THE HEADLEE AMENDMENT:

A STUDY REPORT BY

THE MICHIGAN LAW REVISION COMMISSION

DECEMBER 31, 1998

THE HEADLEE AMENDMENT:
A STUDY REPORT BY THE MICHIGAN LAW REVISION COMMISSION

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THE HEADLEE AMENDMENT: A STUDY REPORT BY THE MICHIGAN LAW REVISION COMMISSION*

In 1998, the Michigan Law Revision Commission undertook a study of the operation and impact of the Headlee Amendment.[1] This study report is a restatement of the law of the Headlee Amendment. It summarizes the Amendment's provisions, provides an overview of the statutes enacted by the Legislature since 1978 to implement it, and analyzes the growing body of case law interpreting the Amendment.

EXECUTIVE SUMMARY

Twenty years ago at the general election held on November 7, 1978, Michigan voters ratified the initiative petition, Proposal E, to amend Article IX of the Michigan Constitution. This constitutional amendment, popularly known as the Headlee Amendment, was proposed as part of a nationwide "taxpayer revolt" in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and state level.

The Headlee Amendment has four core provisions:

1. Property taxes, other local taxes, state taxation, and state spending may not exceed the limitations of the Amendment, absent voter approval.

2. The state is prohibited from requiring new or expanded activities by local governments without full state financing.

3. The state is prohibited from reducing the proportion of state spending in the form of state aid to local governments.

4. The state is prohibited from shifting the tax burden to local governments.

Sections 26 through 34 of Article IX expand on Section 25's broad provisions.

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* This report was prepared by Professor Kevin Kennedy, Executive Secretary, Michigan Law Revision Commission.

[1] Article IX, §§ 25-34 of the Michigan Constitution.

First, Section 26 limits the amount of taxes the state may collect in any given fiscal year to 9.49 percent of personal income in Michigan during the preceding calendar year. Section 26 further provides that taxpayers are to receive a refund if revenues exceed the limit by 1 percent or more.

Second, in the event of a fiscal emergency, Section 27 permits a one-year suspension of the Section 26 revenue limit upon the Governor's request and the two-thirds concurrence of the Legislature.

Third, Section 28 prohibits deficit spending.

Fourth, Section 29 prohibits the state from circumventing the taxing and spending limits of Sections 26 and 28 in two respects. Section 29 prohibits the state from reducing the state financed proportion of necessary costs for mandated programs in effect when the Headlee Amendment was ratified. This provision is known as the maintenance-of-support provision. Section 29 further prohibits the state from requiring units of local government to perform new or increased activities since ratification of the Headlee Amendment without appropriating funds to cover the necessary increased costs.

Fifth, Section 30 is a corollary to Section 29. While Section 29 ensures that the proportion of state money paid to local government to cover necessary costs will not decrease from FY 1978-79 levels, Section 30 provides that the percentage of the total state budget earmarked for local government spending will not decline from the FY 1978-79 level.

Sixth, Section 31 has three main requirements: (a) voter approval is required for any new local tax or any increase in the rate of an existing local tax; (b) if the base upon which any existing local tax is expanded, then the rate must be reduced; and (c) if annual property valuations are greater than the annual rate of inflation, then the property tax rate in the local governmental unit must be reduced so that the increased tax levy on existing property is no greater than the rate of inflation.

Seventh, Section 32 gives taxpayers standing to challenge alleged violations of the Headlee Amendment and vests the Court of Appeals with original jurisdiction over such taxpayer suits.

Finally, Section 34 authorizes the Legislature to enact implementing legislation to bring the terms of the Headlee Amendment into effect in Michigan.

The following table summarizes the Headlee Amendment:

Article IX, § 25	Introduction to the Headlee Amendment
Article IX, § 26	State Revenue Limit Capping State Taxes at 9.49 Percent of Residents' Personal Income
Article IX, § 27	Fiscal Emergency Exception
Article IX, § 28	State Spending Limit Prohibiting Deficit Spending
Article IX, § 29	Prohibition Against Unfunded State Mandates to Local Government and Requirement of Maintenance of Support to Local Government
Article IX, § 30	Prohibition Against Reducing the Proportion of Total State Funds Paid to Local Government (41.61 Percent of State Budget)
Article IX, § 31	Prohibition Against New or Increased Local Taxes Without Voter Approval; Property Tax Increases Capped At the Lesser of the Rate of Inflation or the Increase in Property Valuation
Article IX, § 32	Authorization of Taxpayer Suits in the Court of Appeals
Article IX, § 33	Definitions
Article IX, § 34	Authorization to Enact Implementing Legislation

FREQUENTLY ASKED QUESTIONS:

1. What constitutes a state mandate to local government?

The implementing legislation for Section 29 defines the term "state requirement" broadly to mean "a state law which requires a new activity or service or an increased level of activity or service beyond that required of a local unit of government by an existing law." The following cases illustrate the principles of Section 29:

a. The Michigan Supreme Court has held that requirements upon local government imposed under the Michigan Constitution are not a "state requirement" for purposes of Section 29 and unfunded state mandates. For example, the Supreme Court has concluded that general public education, being required under the State Constitution, is not required under state law as that term is used in Section 29. However, special education programs are within the scope of maintenance-of-support provision of Section 29.

b. The State is not required to reimburse a municipality for fire protection for state-owned buildings because municipalities are not required by state law to provide fire protection services. Similarly, because municipalities are not required to provide fire protection under state law, state-mandated overtime compensation to firefighters is outside the scope of Section 29.

c. Because a county is not required to operate a solid waste disposal site, the State is not required to reimburse the county for upgrading a landfill in order to comply with a state environmental law. Similarly, the costs associated with implementing state requirements regarding sewage disposal systems operated by municipalities are not within the scope of Section 29 because sewage disposal is an optional, not a mandatory, activity under state law.

d. The Attorney General has issued an opinion that M.C.L. § 339.2011, requiring units of local government engaged in public works projects to use licensed architects, engineers, and land surveyors where project costs are $15,000 or more, is not within the scope of Section 29 because units of local government are under no state-mandated obligation to engage in public works projects.

e. The Attorney General has issued an opinion that state law requiring county prosecutors to assist the accused in locating and serving witnesses is within the scope of Section 29, as is services to crime victims to be provided by county prosecutors pursuant to the Crime Victim's Rights Act, M.C.L. §§ 780.751 et seq.

2. What costs incurred by local government must the state fund?

Section 29 prohibits the State from reducing the state-financed proportion of the *necessary* costs of any existing activity or service required of units of local government under state law. The Legislature has defined the term "necessary cost" to mean "the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement." It should be noted that while Section 34 of the Headlee Amendment does authorize the Legislature to enact implementing legislation, the Legislature's definitions of constitutional terms are not binding on Michigan courts.

3. If the Legislature underfunds units of local government in violation of Section 29, what is the remedy?

The Michigan Supreme Court held in its 1997 *Durant* decision that the state is liable in damages if it violates Section 29, measured by the amount of underfunding of the state-mandated activities. The damage award must be distributed to the units of local government adversely affected by the underfunding. The units of local government in turn distribute the monies in a manner they deem appropriate, including distributing the funds to local taxpayers. An award of interest on the damage lies within the discretion of the courts. Successful taxpayers are also entitled to an award of attorneys' fees.

4. If the Legislature enacts a tax that benefits local government, is that a "local tax" under the Headlee Amendment?

The Michigan Supreme Court has held that a tax is a state tax if it is styled as a state tax, is structured as a state tax, serves a state purpose, was enacted by the Legislature, is collected by the state, and is distributed by the state. In contrast, the Court added, a tax is a local tax if it is collected by local government, is administered directly by that local entity, and is spent by the local government according to local fiscal policy.

The focus of the Court's analysis is on whether the monies collected are subject to a state appropriation. Less important to the Court is the fact that the beneficiary of the state appropriation is a specific unit of local government.

5. Are user fees and special assessments a "new tax" under the Headlee Amendment?

There is no legislation defining the terms "user fee" or "special assessment." In general, a fee is exchanged for a service rendered or a benefit conferred. A fee is distinguishable from a tax in that a fee provided there is some reasonable relationship between the amount of the fee and the value of the service or benefit.

Special assessments are distinguishable from general property taxes in at least three respects. First, general property taxes are levied on real and tangible personal property, whereas special assessments are levied only on real property. Second, general property taxes are levied across the board within the assessing jurisdiction to defray the costs of government in general, whereas special assessments are levied only within a special assessment district which is comprised of the land and improvements that are specially benefitted by the public improvements (e.g., streets, sewer line, dams to control lake levels). Third, in theory general property taxes are levied on an ad valorem basis, whereas special assessments are levied on the basis of frontage or land area.

6. If a unit of local government increases its millage rate without voter approval, does it violate the Headlee Amendment?

The Headlee Amendment does not prohibit millage increases without voter approval if the increase is within "the rate authorized by law" or "the maximum authorized rate." For example, if a unit of local government was authorized by the voters to assess 18 mills before adoption of the Headlee Amendment, but it had only levied 16 of the 18 mills so authorized, that unit is free to assess the remaining two mills without voter approval.

I. INTRODUCTION.

Twenty years ago at the general election held on November 7, 1978, Michigan voters ratified the initiative petition, Proposal E, to amend Article IX of the Michigan Constitution. According to the Michigan Supreme Court, the purpose of this constitutional amendment, popularly known as the Headlee Amendment, was the following:

> Article 9, §§ 25-34 was presented to the voters under the popular term "Headlee Amendment," named after its original proponent, Richard Headlee. It was proposed as part of a nationwide "taxpayer revolt" in which taxpayers were attempting to limit legislative expansion of requirements placed on local government [i.e., unfunded state mandates], to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and state level.[2]

Article IX, § 25 summarizes the four core provisions of the Headlee Amendment:[3]

> 1. Property taxes, other local taxes, state taxation, and state spending may not exceed the limitations of the Amendment, absent voter approval.

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[2] Durant v. State Bd. of Educ., 424 Mich. 364, 378, 381 N.W.2d 662 (1985).

[3] Section 25 provides:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 26 through 34, inclusive, of this Article.

The Michigan Supreme Court has stated that Section 25 "is merely an introduction to the provisions contained in §§ 26-34 and is not an independent statement of rights and duties." Durant v. State Bd. of Educ., 424 Mich. 364, 376 n. 4, 381 N.W.2d 662, 666 n.4 (1986).

2. The state is prohibited from requiring new or expanded activities by local governments without full state financing.

3. The state is prohibited from reducing the proportion of state spending in the form of state aid to local governments.

4. The state is prohibited from shifting the tax burden to local governments.

Sections 26 through 34 of Article IX expand on Section 25's broad provisions.

II. ARTICLE IX, § 26: THE STATE REVENUE LIMIT.

Section 26 limits the amount of taxes the state may impose in any given fiscal year to 9.49 percent of personal income in Michigan during the preceding calendar year. Section 26 provides in full:

> There is hereby established a limit on the total amount of taxes which may be imposed by the legislature in any fiscal year on the taxpayers of this state. This limit shall not be changed without approval of the majority of the qualified electors voting thereon, as provided for in Article 12 of the Constitution. Effective with fiscal year 1979-1980, and for each fiscal year thereafter, the legislature shall not impose taxes of any kind which, together with all other revenues of the state, federal aid excluded, exceed the revenue limit established in this section. The revenue limit shall be equal to the product of the ratio of Total State Revenues in fiscal year 1978-1979 divided by the Personal Income of Michigan in calendar year 1977 multiplied by the Personal Income of Michigan in either the prior calendar year or the average of Personal Income of Michigan in the previous three calendar years, whichever is greater.
>
> For any fiscal year in the event that Total State Revenues exceed the revenue limit established in this section by 1% or more, the excess revenues shall be refunded pro rata based on the liability reported on the Michigan income tax and single business tax (or its successor tax or taxes) annual returns filed following the close of such fiscal year. If the excess is less than 1%, this excess may be transferred to the State Budget Stabilization Fund.
>
> The revenue limitation established in this section shall not apply to taxes imposed for the payment of principal and interest on bonds, approved by the voters and authorized under Section 15 of this Article, and loans to school districts authorized under Section 16 of this Article.
>
> If responsibility for funding a program or programs is transferred from one level of government to another, as a consequence of constitutional amendment, the state revenue and spending limits may be adjusted to accommodate such change, provided that the total revenue authorized for collection by both state and local governments does not exceed that amount which would have been authorized without such change.

A. Definitions.

Section 33 of Article IX defines the terms "Total State Revenues" and "Personal Income of Michigan" as follows:

> "Total State Revenues" includes all general and special revenues, excluding federal aid, as defined in the budget message of the governor for fiscal year 1978-1979. Total State Revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities.
>
> "Personal Income of Michigan" is the total income received by persons in Michigan from all sources, as defined and officially reported by the United States Department of Commerce or its successor agency.

Pursuant to the authority granted under Section 34 of Article IX to enact appropriate implementing legislation, in 1988 the Legislature enacted definitions of "total state revenues" and "personal income of Michigan" that elaborate on the Section 33 definitions. It is important to note that while the Legislature is authorized to enact appropriate implementing legislation, the Legislature's statutory definitions of constitutional terms are not binding on the courts. In some instances, Michigan courts have accepted the Legislature's Headlee Amendment definitions. *See, e.g., Durant v. Dep't of Education*, 129 Mich. App. 517, 342 N.W.2d 591 (1983)(adopting Legislature's definition of "state law"). In other instances, the courts have rejected the Legislature's definitions. *See, e.g., Durant v. State Bd. of Education,* 424 Mich. 364, 381 N.W.2d 662 (1985)(rejecting the Legislature's exclusion from the term "necessary costs" costs recoverable from the federal government).

Turning to the Legislature's Section 26 definitions, M.C.L. § 18.1350a provides:

> As used in sections 26 to 28 of Article IX of the state constitution of 1963:
>
> (a) "Personal income of Michigan" for a calendar year means total annual personal income as officially reported by the United States department of commerce, bureau of economic analysis, in August of the year following the calendar year for which the report is made. Revision of the total annual personal income figure as reported by the bureau of economic analysis after August of the year following the calendar year

for which the report is made shall not cause personal income of Michigan as defined to be revised.

(b) "Total state revenues" means the combined increases in net current assets of the general fund and special revenue funds, except for component units included within the special revenue group for reporting purposes only. For fiscal years beginning after September 30, 1986, total state revenues shall be computed on the basis of generally accepted accounting principles as defined in this act. However, total state revenues shall not include the following:

(i) Financing sources which have previously been counted as revenue, for the purposes of section 26 of Article IX such as, beginning fund balance, expenditure refunds, and residual-equity and operating transfers from within the group of funds.

(ii) Current assets generated from transactions involving fixed assets and long-term obligations in which total net assets do not increase.

(iii) Revenues which are not available for normal public functions of the general fund and special revenue funds.

(iv) Federal aid.

(v) Taxes imposed for the payment of principal and interest on voter-approved bonds and loans to school districts authorized under section 16 of Article IX of the state constitution of 1963.

(vi) Tax credits based on actual tax liabilities or the imputed tax components of rental payments, but not including the amount of any credits not related to actual tax liabilities.

(vii) Refunds or payments of revenues recognized in a prior period.

(viii) The effects of restatements of beginning balances required by changes in generally accepted accounting

principles.

(c) The calculation of total state revenues required by section 350b(3) [M.C.L. § 18.1350b(3)] shall not be adjusted after the filing of the report required by June 30, 1989, unless future changes in generally accepted accounting principles would substantially distort the comparability of the base year and the current and future years. In no event shall intervening years be recalculated.

B. Reporting Requirements.

Before 1986, the revenue limit had not been officially calculated and there was no annual report of compliance with the revenue limit. Some evidence existed that the limit may have been exceeded in FY 1984-85. The upshot was an intensive review by the Governor's Office and the Legislature of the original methodology used to determine the tax limit. This review produced a limit of 9.49 percent, compared to the 10.1 percent limit that had been widely accepted before 1986. The 9.49 percent limit was approved by the Auditor General in 1986.[4] Following this interbranch review, the Legislature enacted a law that not only requires the Director of the Department of Management and Budget to submit a report that calculates the revenue limit on an annual basis, but also requires the Director and the State Treasurer to prepare an annual report that summarizes in detail the State's compliance with the revenue limit.[5]

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[4] *See* HEADLEE BLUE RIBBON COMMISSION, REPORT TO GOVERNOR JOHN ENGLER, at 9 (1994)[hereinafter HEADLEE COMMISSION REPORT].

[5] M.C.L. §§ 18.1350b(3), 18.1350e, 205.30b. The State Budget Director also is required to submit monthly financial reports to the Legislature that state, *inter alia*, the amount of monthly revenue collection by the state. M.C.L. § 18.1386 provides:

(1) The state budget director shall prepare monthly financial reports.

(2) Within 30 days after the end of each month, the state budget director shall transmit copies of the monthly financial report to all the appropriations committee members and the fiscal agencies. The monthly financial report due by November 30 shall be the first monthly financial report to include statements concerning the fiscal year which began on October 1.

(3) Each monthly financial report shall contain the following information:

(a) A statement of actual monthly and year-to-date revenue collections for each operating fund; the general fund/general purpose revenues, school aid

That report is in turn reviewed by the Auditor General who examines the past and present methodology of calculating revenues.

C. Refunds of Excess Revenues.

The second paragraph of Section 26 provides that taxpayers are to receive a refund if tax revenues exceed the limit by 1 percent or more. Legislation was enacted in 1988 that clarifies that refunds are predicated on revenues (not personal income) exceeding the revenue limit by 1 percent. M.C.L. § 18.1350d sets forth the revenue refund procedure:

> (1) The procedures enumerated in this section shall be followed when revenues are required to be refunded pursuant to section 26 of Article IX of the state constitution of 1963.

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fund revenues, and the tax collections dedicated to the transportation funds; including a comparison with prior year amounts, statutory estimates, and the most recent estimates from the executive branch.

(b) A statement of estimated year-end appropriations lapses and overexpenditures for the state general fund by principal department.

(c) A statement projecting the ending state general fund balance for the fiscal year in progress.

(d) A summary of current economic events relevant to the Michigan economy, and a discussion of any economic forecast or current knowledge of revenue collections or expenditure patterns that is the basis for a change in any revenue estimate or expenditure projection.

(e) A statement of estimated and actual total state revenues compared to the revenue limit provided for in section 26 of Article IX of the state constitution of 1963.

(f) A statement of the estimated fiscal year-end balance of state payments to units of local government pursuant to section 30 of Article IX of the state constitution of 1963.

(g) Any other information considered necessary by the state budget director or jointly requested by the chairpersons of the appropriations committees.

(2) For any fiscal year in which total state revenues exceed the revenue limit as provided in section 26 of Article IX of the state constitution of 1963 by 1% or more, the revenues in excess of the revenue limit shall be refunded pro rata based on the liability reported on the state income tax return filed pursuant to section 441 of Act No. 281 of the Public Acts of 1967, being section 206.441 of the Michigan Compiled Laws, and the single business tax return filed pursuant to section 97 of Act No. 228 of the Public Acts of 1975, being section 208.97 of the Michigan Compiled Laws, for the taxpayer's tax year beginning in the fiscal year for which it is determined that the revenue limit has been exceeded.

(3) A refund shall not be required if total state revenues exceed the revenue limit by less than 1%.

(4) If total state revenues exceed the revenue limit by less than 1%, the governor shall recommend to the legislature that the excess be appropriated to the countercyclical budget and economic stabilization fund, or its successor.

(5) A refund required pursuant to this section shall be refunded during the fiscal year beginning on the October 1 following the filing of the report required by section 350e [M.C.L. § 18.1350e] which determines that the limit was exceeded in the prior fiscal year for which the report was filed.

A Headlee Amendment refund was authorized by the Legislature in 1995 in the form of a tax credit equal to 2 percent of the taxpayer's tax liability for the 1995 tax year. *See* M.C.L. § 206.252.

The second paragraph of Section 26 provides further that "[i]f the excess is less than 1%, this excess *may* be transferred to the State Budget Stabilization Fund [italics added]." Although M.C.L. § 18.1350e(4) requires the Governor to recommend that revenues that are less than 1 percent in excess of the limit be placed in the budget stabilization fund, there is no provision in the implementing legislation that requires the Legislature to accept the Governor's recommendation, nor is there any provision for an alternative disposition of such excesses in the event the Legislature does not accept his recommendation. Political pressure presumably would be brought to bear on the Legislature to either accept the Governor's recommendation and deposit the excess in the budget stabilization fund or, in the alternative, refund the excess to taxpayers.

D. Adjustments to the Revenue Limit.

The last paragraph of Section 26 provides for an adjustment of the revenue limit in the event that responsibility for funding a program is transferred from the local to the state level, or vice versa, pursuant to constitutional amendment. In addition, the last paragraph states that the total revenue collected after the change may not exceed the amount authorized before the transfer.[6]

E. Imposition of New State Taxes.

According to the Attorney General, Sections 25 and 26 do not prevent the state from imposing new taxes, so long as the projected revenues therefrom, together with all other state revenues, do not exceed the revenue limit of Section 26. In an opinion issued in 1986, the Attorney General was asked whether the state excise taxes on hotel rooms and liquor (M.C.L. §§ 207.621, 436.141) that are credited to the convention facility development fund violate the Headlee Amendment. Based upon projections for FY 1986, all revenues collected, including those from the subject state excise taxes, would not exceed the Section 26 revenue limit. Therefore, the Attorney General concluded that the state excise taxes do not violate Section 26.[7]

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[6] Although implementing legislation has not been enacted for this paragraph, it has been suggested that implementing legislation be enacted that would eliminate the taxing authority of the transferor agency or unit of government upon a transfer of funding responsibilities via constitutional amendment. *See* HEADLEE COMMISSION REPORT, *supra* note 4, at 12.

[7] *See* 1985-86 Mich. Op. Att'y Gen. 203, 1985-86 Mich. OAG No. 6332 (1986).

III. ARTICLE IX, § 27: THE FISCAL EMERGENCY EXCEPTION.

Section 27 of Article IX is a safety valve in the event of a fiscal emergency. It permits a one-year suspension of the Section 26 revenue limit upon the Governor's request and the two-thirds concurrence of the Legislature. Section 27 provides in full:

> The revenue limit of Section 26 of this Article may be exceeded only if all of the following conditions are met: (1) The governor requests the legislature to declare an emergency; (2) the request is specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which the emergency will be funded; and (3) the legislature thereafter declares an emergency in accordance with the specific of the governor's request by a two-thirds vote of the members elected to and serving in each house. The emergency must be declared in accordance with this section prior to incurring any of the expenses which constitute the emergency request. The revenue limit may be exceeded only during the fiscal year for which the emergency is declared. In no event shall any part of the amount representing a refund under Section 26 of this Article be the subject of an emergency request.

No Section 27 emergency has been declared to date.

IV. ARTICLE IX, § 28: THE STATE EXPENSE LIMIT.

Working hand-in-glove with the Section 26 revenue limit is the Section 28 expense limit. Section 28 prohibits deficit spending and provides in full:

> No expenses of state government shall be incurred in any fiscal year which exceed the sum of the revenue limit established in Sections 26 and 27 of this Article plus federal aid and any surplus from a previous fiscal year.

The Legislature enacted the following implementing legislation for Section 28 entitled, "limitation on expenditures of state government":[8]

> (1) Expenditures of state government which exceed the sum of the following amounts shall not be incurred in any fiscal year:
>
> (i) The revenue limit established in section 350b [M.C.L. § 18.1350b].
>
> (ii) A surplus from a previous year.
>
> (iii) Federal aid.
>
> (iv) Taxes imposed for the payment of principal and interest on bonds, approved by the voters and authorized under section 15 of Article IX of the state constitution of 1963.
>
> (v) Loans to school districts authorized under section 16 of Article IX of the state constitution of 1963.
>
> (vi) The dollar amount of an emergency established pursuant to section 27 of Article IX of the state constitution of 1963.
>
> (vii) Other amounts excluded from the calculation of the revenue limit under the definition established in section 350a [M.C.L. § 18.1350a].
>
> (2) For the purposes of this section, an amount withdrawn from the countercyclical budget and economic stabilization fund created pursuant

[8] M.C.L. § 18.1350c.

to section 351 [M.C.L. § 18.1351] shall be considered a surplus.

Since 1978, the annual state budget has been under the Section 26 revenue limit. Consequently, Section 28 has not been the subject of litigation.

V. ARTICLE IX, § 29: THE MAINTENANCE-OF-SUPPORT CLAUSE.

Having placed a limit on state spending under the terms of Sections 26 and 28, the Headlee Amendment prevents the state from circumventing these limits either by shifting the burden of administering state-mandated programs to units of local government without the requisite funds to carry them out, or by reducing the state's proportion of spending for mandated programs in effect when the Headlee Amendment was ratified. Section 29 of the Headlee Amendment closes these loopholes.[9]

Section 29 of the Headlee Amendment, also known generally as the maintenance-of-support clause, contains two prohibitions on the State. First, the State is prohibited from reducing the state-financed proportion of the necessary costs of any activity or service required under state law of local governmental units prior to the adoption of the Headlee Amendment. Second, the State is prohibited from requiring new activities or services or an increase in new activities or services of units of local government without a state appropriation and disbursement of funds to pay for the increased costs since the adoption of the Headlee Amendment. Section 29 provides:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18 [governing salaries of judges].

Section 29 is thus intended to prevent a reduction below 1979 levels in the proportion of state funding for state-mandated activities and services, and to prevent unfunded state mandates for new or increased activities and services after 1979. A unit of local government that carries out a state-mandated program in 1998 is entitled to receive the same percentage of funding that the state provided for that program on a statewide basis in the base year 1978-79 (this is only applicable, of course, for state-mandated programs in effect in 1978-79). For example, assume that in the base year

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[9] As of 1996, 17 states have enacted unfunded state mandate legislation or ratified constitutional amendments prohibiting unfunded state mandates. *See* Robert M.M. Shaffer, *Unfunded State Mandates and Local Governments,* 64 U. CIN. L. REV. 1057 (1996).

1978-79 the statewide necessary costs to units of local government to carry out state-mandated Program A were $2 million, and that the State funded and disbursed a total of $1 million to units of local government in connection with Program A. The base-year percentage would be 50 percent. Next assume that in 1994-95 (the payout year), the statewide necessary costs to units of local government of Program A were $4 million, but that the State funded and disbursed a total of $1.75 million to units of local government for Program A. The payout-year percentage would be 43.75 percent. The State would have underpaid 6.25 percent (50-43.75), or $250,000 (6.25% x $4 million).

In *Schmidt v. Department of Education*,[10] the Supreme Court filled in one of the gaps in Section 29 of the Headlee Amendment, namely, what is the correct methodology for determining whether the state is meeting its obligation to maintain existing levels of funding to units of local government. The Court had the parties in *Schmidt* brief the three competing methods of determining the state's compliance with Section 29: (1) state-to-state, (2) state-to-local, and (3) local-to-local. As explained by two commentators:

> To illustrate the three competing approaches, assume that when the Headlee Amendment was adopted, state funding in the aggregate to local units for Service X was 50 percent of the aggregate costs of Service X statewide, with state funding to District A for Service A at 40 percent of the total cost of Service X to District A and state funding to District B for Service X at 60 percent of the total cost of Service X to District B. Under the state-to-state method, the state is obliged to continue aggregate funding at 50 percent of aggregate costs, while the costs of providing Service X in particular districts is not determinative. The state-to-local method requires the state to fund both districts at a level of 50 percent of the districts' costs for providing Service X, representing an increase in District A's funding and a decrease in District B's funding. Under the local-to-local method, the state must continue funding each local unit at the level in effect at ratification of Headlee, such that District A's funding is continued at 40 percent of its costs to provide Service X and District B's funding is continued at 60 percent of its costs to provide Service X.[11]

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[10] 441 Mich. 236, 490 N.W.2d 584 (1992).

[11] Michael C. Fayz & Clara G. DeQuick, *Annual Survey of Michigan Law: Constitutional Law*, 40 WAYNE L. REV. 533, 546-47 (1994).

The Court in *Schmidt* adopted the state-to-local approach, observing that the first sentence of Section 29 focuses on a single proportionate obligation by the state measured during the base year, while the second sentence refers to unit and governmental body in the singular. This suggested to the Court that the framers intended that the state's obligation ran to each unit of local government.

In one of *Schmidt*'s progeny, *Mayor of Detroit v. State of Michigan*,[12] the Court of Appeals held that Act 374, abolishing Detroit Recorder's Court and merging it with the Wayne Circuit Court, does not violate Section 29 of the Headlee Amendment. The Court examined the method of funding state trial court operations in 1978 -- the Headlee base year -- with the method required under Act 374. The Court concluded that Act 374 neither mandates new activities for local units vis-a-vis the state in comparison with 1978, nor does it increase the level of activity required of local units. Despite the fact that a particular local unit (i.e., Wayne County) may now be financing activities previously financed by another local unit (i.e., the City of Detroit) does not result in a Headlee violation, according to the Court:

> The Headlee Amendment does not directly address state mandates that result in shifts among local units or reductions in post-1978 state subsidies for particular units; it only guarantees that each local unit will receive the same proportion of state funding provided on a statewide basis in the base year of 1978.[13]

In the Court's view, Act 374 merely continues existing activities, as opposed to mandating new activities or increasing the level of existing activities. The only issue is whether Act 374 reduces the state-financed proportion of the necessary costs of trial court operations to the units at issue from that provided on a statewide basis in 1978. The Court found that in 1978 the only state contribution to trial court operations was financing a portion of judicial salaries, and that the state is still providing at least the same proportion of the total necessary costs of trial court operations to the units at issue as it provided on a statewide basis in 1978.[14]

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[12] 228 Mich. App. 386, 579 N.W.2d 378, aff'd on other grounds sub nom. Judicial Attorneys Ass'n v. State of Michigan, ___ Mich. ___, ___ N.W.2d ___, 1998 WL 901772 (Dec. 28, 1998).

[13] 228 Mich. App. at 405-06, 579 N.W.2d at 386.

[14] *Id.* at 407, 579 N.W.2d at 387.

Finally, in 1995, Wayne County brought an action in the Court of Claims against the State seeking money damages for an alleged violation of the unfunded state mandate provision of Section 29. In *Wayne County Chief Executive v. Engler*, 230 Mich. App. 258, 583 N.W.2d 512 (1998), the Court of Appeals held that (1) money damages are neither a necessary not proper remedy in a suit in which a violation of the second sentence of Section 29 is established; (2) the Court of Claims lacks subject-matter jurisdiction to hear Headlee Amendment claims because money damages are not a remedy available in a suit brought pursuant to the second sentence of Section 29; and (3) because money damages are not an available remedy in a suit brought pursuant to the second sentence of Section 29, neither the one-year limitations period governing Headlee taxpayer suits nor the three-year limitations period governing actions brought in the Court of Claims is applicable.[15]

A. The Implementing Legislation.

The implementing legislation for Section 29 is at M.C.L. §§ 21.231-21.244. It contains the following four provisions.

First, in connection with disbursements of state funds to units of local government, the Department of Management and Budget (DMB) is responsible for administering the disbursement of state funds to units of local government. It publishes guidelines and forms for units of local government when submitting a claim for disbursement.[16] The implementing legislation requires an initial advance disbursement in accordance with a schedule of estimated payments that is adequate to meet state requirements as they fall due. The Governor is required to recommend to the Legislature those amounts which the Governor determines are required to be made to each unit of local government and the total amount of state disbursements required for all units of government. In the event a deficiency arises, the State Budget Director is to prorate the appropriated amounts among the eligible units of local government and is to recommend a supplemental appropriation to the Legislature sufficient to cover the deficiency.[17]

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[15] Wayne County Chief Executive v. Engler, 583 Mich. App. 512, 514, 583 N.W.2d 512, 514 (1998).

[16] M.C.L. § 21.235(5). Procedures that the Department is to follow when disbursing state funds to units of local government, and that units of local government are to follow when making a claim for disbursements, are set out in M.C.L. § 21.238.

[17] M.C.L. § 21.235(1)-(4).

Second, regarding administrative rules promulgated by a state agency that either mandate new activities or services to be performed by units of local government or which increase the level of activity or service beyond that required by existing law, the state agency promulgating the administrative rule must submit a fiscal note to the Joint Committee on Administrative Rules and to the Director of DMB. The fiscal note must estimate the cost of the rule for the first three years of the rule's operation. The Department is to submit a request for an appropriation, if necessary, for all rules approved by JCAR. The Legislature is then to appropriate the amount required as stated in the Department's request.[18]

Third, the Legislature is required to promulgate joint rules that provide a method of identifying whether or not legislation creates a state mandate on units of local government, and that provide a method of estimating the revenue needed to reimburse units of local government.[19] The Legislature has never promulgated these joint rules. Instead, the Senate and House Fiscal Agencies make regular estimates for the Legislature of any costs that proposed legislation will impose on the state and units of local government.[20] In addition, the implementing legislation to Section 29 directs the DMB to submit an annual report to the Legislature that includes the following information:[21]

> (1) [T]he department shall collect and tabulate relative information as to the following:
>
> (a) The state financed proportion of the necessary cost of an existing activity or service required of units of local government by

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[18] M.C.L. § 21.236. As of 1992, 28 states had adopted fiscal note requirements in an effort to raise legislators' awareness of the mandate problem and curb the passage of unfunded mandates. *See* Robert M.M. Shaffer, *Unfunded State Mandates and Local Governments,* 64 U. CIN. L. REV. 1057, 1066 (1996).

[19] M.C.L. § 21.237.

[20] The Senate and House Fiscal Agencies are nonpartisan agencies whose primary mission is the provision of expert assistance to the Michigan Senate and House, respectively, regarding state fiscal issues. Both agencies also provide their respective Houses with detailed projections of estimated state revenues and expenditures. Governing Boards of the Senate and House oversee the operation and procedures of their respective Fiscal Agency. Reports of the Senate and House Fiscal Agencies are available from their websites, <http://www.state.mi.us/sfa> and <http://www.state.mi.us/hfa>.

[21] M.C.L. § 21.241.

existing law.

(b) The nature and scope of each state requirement which shall require a disbursement under section 5.

(c) The nature and scope of each action imposing a potential cost on a local unit of government which is not a state requirement and does not require a disbursement under this act.

(2) The information shall include:

(a) The identity or type of local unit and local unit agency or official to whom the state requirement or required existing activity or service is directed.

(b) The determination of whether or not an identifiable local direct cost is necessitated by state requirement or the required existing activity or service.

(c) The amount of state financial participation, meeting the identifiable local direct cost.

(d) The state agency charged with supervising the state requirement or the required existing activity or service.

(e) A brief description of the purpose of the state requirement or the required existing activity or service, and a citation of its origin in statute, rule, or court order.

Fourth, in order to administratively resolve cases involving disputed facts, the Section 29 implementing legislation creates the Local Government Claims Review Board within DMB.[22] It consists of nine members appointed by the Governor with the advice and consent of the Senate. Each member is appointed for a three-year term. At least four members of the Board must be representatives of local government. The Board's function is set forth in Section 10(4) of the implementing legislation:[23]

[T]he Board shall hear and decide upon disputed claims or upon an

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[22] M.C.L. § 21.240.

[23] M.C.L. § 21.240(4).

appeal by a local unit of government alleging that the local unit of government has not received the proper disbursement from funds appropriated for that purpose.

If the Board approves a claim, a concurrent resolution of the Legislature must be adopted before the claim is paid. Appeals are limited to the following issues:

(a) An appeal alleging that the director has incorrectly reduced payments to a local unit of government pursuant to section 5(4) [M.C.L. § 21.235(4)].

(b) An appeal alleging that the director has incorrectly or improperly reduced the amount of a disbursement when a claim was submitted pursuant to section 8(2) [M.C.L. § 21.238(2)].

(c) An appeal alleging that the local unit of government has not received a proper disbursement of funds appropriated to satisfy the state financed proportion of the necessary costs of an existing activity or service required of a local unit of government by existing law, pursuant to section 12 [M.C.L. § 21.242].

The statute directs the DMB to adopt Board procedures for receiving claims, including a procedure for a hearing on a claim if so requested by a local unit of government.[24] The DMB adopted such procedures in 1987 that can be found in the Michigan Administrative Code, Rules 21.101-21.401.

The most significant jurisdictional limitation of the Local Government Claims Review Board is that it has no power to hear cases brought by taxpayers challenging violations of the Headlee Amendment. As explained below, Section 32 of Article IX makes the Court of Appeals a court of original jurisdiction to which taxpayers may bring Headlee Amendment challenges.

The Headlee Commission noted in late 1994 that the Local Government Claims Review Board has been underutilized. The Commission's Report observed:

Although claims have been filed with the state, the Claims Review Board has never met to review those claims. This has principally

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[24] M.C.L. § 21.244.

occurred because the issues pending before the Board have been tied up in the *Durant* litigation. The ongoing delay in that litigation has unfortunately discouraged local units from filing claims on other issues.[25]

It seems safe to conclude that the Local Government Claims Review Board has not yet realized its full potential.

B. The Meaning of the Term "Necessary Costs."

Section 29 prohibits the State from reducing the state-financed proportion of the *necessary* costs of any existing activity or service required of units of local government under state law. The Legislature has defined the term "necessary cost" to mean

> the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement. Necessary cost does not include the cost of a state requirement if the state requirement satisfies 1 or more of the following conditions:
>
> (a) The state requirement cost does not exceed a de minimus [sic] cost.
>
> (b) The state requirement will result in an offsetting savings to an extent that, if the duties of a local unit which existed before the effective date of the state requirement are considered, the requirement will not exceed a de minimus cost.
>
> (c) The state requirement imposes additional duties on a local unit of government which can be performed by that local unit of government at a cost not to exceed a de minimus cost.
>
> (d) The state requirement imposes a cost on a local unit of government that is recoverable from a federal or state categorical aid program, or other external financial aid. A necessary cost excluded by this subdivision shall be excluded only to the extent that it is recoverable.[26]

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[25] HEADLEE COMMISSION REPORT, *supra* note 4, at 16.

[26] M.C.L. § 21.233(6).

The term "de minimis cost" is defined as "a net cost to a local unit of government resulting from a state requirement which does not exceed $300.00 per claim."[27]

In *Durant v. State Board of Education* (*Durant II*),[28] the Michigan Supreme Court addressed the issue of what constitutes a "necessary cost" within the meaning of the maintenance-of-support provision of Article IX, § 29. (The term "necessary costs" and "necessary increased costs" are both found in Section 29, the latter term being used in the context of post-Headlee state mandates. Presumably, the courts would interpret both terms in the same manner.) The plaintiffs in *Durant II* argued that the term "necessary costs" means "useful or beneficial," citing in support *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819), the seminal U.S. Supreme Court decision interpreting the "necessary and proper" clause of Article I, § 8, cl. 18 of the U.S. Constitution. The defendants in *Durant II* argued that "necessary" was synonymous with "essential or indispensable." The state defendants urged the Court to adopt the Legislature's definition of "necessary costs" found in the implementing legislation quoted above. The Court accepted the defendants' argument and concluded that the more limited definition of the term "essential or indispensable" was in keeping with the voters' intent.[29] The Court approved the Legislature's definition of "necessary costs" found in the first part of the implementing legislation. The Court agreed that the Legislature's use of the actual cost to the State if it provided the service is a legitimate benchmark, adding that the actual market cost would also be a reliable measure.[30]

The Court of Appeals has cautioned that the "actual costs" a unit of local government incurs is not necessarily to be equated with "necessary costs."[31] At the same time, however, "incremental costs" of providing a state-mandated program (e.g., special education) do not necessarily equate with "necessary costs" because of the existing infrastructure provided by a regular education program that would have to be furnished to special education students in the absence of a regular education program.[32] In one of the last phases of the *Durant* litigation, the Court of Appeals held that once

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[27] M.C.L. § 21.232(4).

[28] 424 Mich. 364, 381 N.W.2d 662 (1985).

[29] *See* Durant v. State Bd. of Educ., 424 Mich. at 391, 381 N.W.2d at 673.

[30] *Id.*

[31] *See* Durant v. Dep't of Educ., 203 Mich. App. 507, 514-15, 513 N.W.2d 195, 198-99 (1994).

[32] *Id.* at 519, 513 N.W.2d at 201.

it is established that an activity or service is required by state law (discussed below), the plaintiff has the burden of showing what the actual cost to all units of local government was of carrying out the state-mandated activity or service. Once a prima facie case is established, the burden then shifts to the State to show that these "actual costs" were not "necessary costs."[33] In an earlier phase of the *Durant* litigation, the Court of Appeals held that "necessary costs" would be the least expensive among alternative methods by which a unit of local government could satisfy the state-mandated activity or service.[34]

In *Durant II*, The Michigan Supreme Court invalidated the Legislature's exclusion in M.C.L. § 21.233(6)(d) from necessary costs "a cost on a local unit of government that is recoverable from a federal or state categorical aid program, or other external financial aid." The Court stated that as long as the activity is state-mandated, even if federally-funded in part, to the extent the State uses that section of the implementing legislation to reduce the amount of categorical school aid and to require units of local government to make up the difference through the use of outside funding, the statute violates the Headlee Amendment's prohibition on reductions in the proportion of state aid below 1978-79 levels for specific requirements imposed by statute or state agency rule.[35]

C. The Meaning of the Term "Required . . . by State Law."

What is the meaning of the phrase "required . . . by state law," found in Article IX, § 29? In the implementing legislation for Section 29, the Legislature has conflated the terms "required" and "state law" into the single term "state requirement." It defines "state requirement" as follows:[36]

> "State requirement" means a state law which requires a new activity or service or an increased level of activity or service beyond that required of a local unit of government by an existing law.

The Legislature has excluded from its definition of "state requirement" the following:

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[33] *See* Durant v. Dep't of Education, 213 Mich. App. 500, 541 N.W.2d 278 (1995).

[34] *See* Durant v. Dep't of Education, 186 Mich. App. 83, 463 N.W.2d 461 (1990).

[35] *Id.* at 392, 381 N.W.2d at 673-74.

[36] M.C.L. § 21.234(5).

(a) A requirement imposed on a local unit of government by a state statute or an amendment to the state constitution of 1963 adopted pursuant to an initiative petition, or by a state law or rule enacted or promulgated to implement such a statute or constitutional amendment.

(b) A requirement imposed on a local unit of government by a state statute or an amendment to the state constitution of 1963, enacted or adopted pursuant to a proposal placed on the ballot by the legislature, and approved by the voters, or by a state law or rule enacted or promulgated to implement such a statute or constitutional amendment.

(c) A court requirement.

(d) A due process requirement.

(e) A federal requirement.

(f) An implied federal requirement.

(g) A requirement of a state law which applies to a larger class of persons or corporations and does not apply principally or exclusively to a local unit or units of government.

(h) A requirement of a state law which does not require a local unit of government to perform an activity or service but allows a local unit of government to do so as an option, and by opting to perform such an activity or service, the local unit of government shall comply with certain minimum standards, requirements, or guidelines.

(i) A requirement of a state law which changes the level of requirements, standards, or guidelines of an activity or service that is not required of a local unit of government by existing law or state law, but that is provided at the option of the local unit of government.

(j) A requirement of a state law enacted pursuant to section 18 of Article 6 of the state constitution of 1963.

The terms "court requirement," "due process requirement," "federal requirement," and "impled federal requirement" are defined at M.C.L. §§ 21.232(3),

21.232(7), 21.233(2), and 21.233(3), respectively.[37]

1. Are state constitutional provisions within the scope of the term "state law" found in Article IX, § 29?

In *Durant II*, the Michigan Supreme Court addressed the issue of whether state constitutional provisions are within the scope of the term "state law" as used in Article IX, § 29. The specific issue was whether the constitutional mandate of Article VIII, § 2 for a free public education is a "state law" for purposes of Section 29. The Supreme Court answered this question in the negative, holding that it was not the intent of the voters to include in Section 29 any obligations that may be imposed upon local

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[37] These terms are defined as follows:

"Court requirement" means a new activity or service or an increase in the level of activity or service beyond that required by existing law which is required of a local unit of government in order to comply with a final state or federal court order arising from the interpretation of the constitution of the United States, the state constitution of 1963, an existing law, or a federal statute, rule, or regulation. Court requirement includes a state law whose enactment is required by a final state or federal court order. M.C.L. § 21.232(3).

"Due process requirement" means a statute or rule which involves the administration of justice, notification and conduct of public hearings, procedures for administrative and judicial review of action taken by a local unit of government or the protection of the public from malfeasance, misfeasance, or nonfeasance by an official of a local unit of government, and which involves the provision of due process as it is defined by state and federal courts when interpreting the federal constitution or the state constitution of 1963. M.C.L. § 21.232(7).

"Federal requirement" means a federal law, rule, regulation, executive order, guideline, standard, or other federal action which has the force and effect of law and which requires the state to take action affecting local units of government. M.C.L. § 21.233(2).

"Implied federal requirement" means a federal law, rule, regulation, executive order, guideline, standard, or other federal action which has the force and effect of law and which does not directly require the state to take action affecting units of local government, but will, according to federal law, result in a loss of federal funds or federal tax credits if state action is not taken to comply with the federal action. M.C.L. § 21.233(3).

governmental units by Article VIII, § 2 of the Constitution (and, by a parity of reasoning, by any other provision of the State Constitution), with the expressly stated exception of Article VI, § 18.[38] Reading the first and second sentences of Section 29 as being *in pari materia*, the Court concluded that the term "state law" found in the first sentence of Section 29 refers to state statutes and state agency rules, given that the phrase "required by the legislature or any state agency" is used in the second sentence of Section 29.[39] The Court added that a restrictive view of the term "state law" is warranted because ballot proposals are carefully scrutinized in Michigan to eliminate any possibility of confusion.[40]

2. What activities or services are "required" under state law?

Section 29's freeze on the proportion of state money paid to units of local government to defray their necessary costs applies only to activities or services that are required by state law and that are funded, in whole or in part, by the State. The courts have held that the State is not obligated to reimburse units of local government for increased or expanded activities or services if the initial activity or service is optional. Michigan courts have been asked to determine whether certain activities and services performed by units of local government are "required" by state law, as that term is used in Article IX, § 29. The following cases are illustrative.

a. Public Education.

In *Durant II*, the Supreme Court concluded that free public education, being required under the State Constitution, is thus not required under state law as that term is used in Section 29, notwithstanding M.C.L. § 380.1284 that requires 180 days of school. Federally-mandated educational programs administered by the State also are not within the ambit of Section 29.[41] However, if the activity or service is also mandated under state law, such as special education programs, then it is within the

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[38] *See* Durant II, 424 Mich. at 378, 381 N.W.2d at 667.

[39] *Id.* at 380, 381 N.W.2d at 668.

[40] *Id.* The Court refused to place any reliance on the Drafters' Notes to the Headlee Amendment, inasmuch as they were published *after* the Amendment was passed and were, in any event, internally inconsistent on this issue. *Id.* at 381 n.12, 381 N.W.2d at 669 n.12.

[41] *See* Kramer v. City of Dearborn Heights, 197 Mich. App. 723, 496 N.W.2d 301 (1992).

ambit of Section 29.[42]

b. Fire Protection.

The State is not required to reimburse a municipality for fire protection for state-owned buildings because municipalities are not required by state law to provide fire protection services.[43] Similarly, because municipalities are not required to provide fire protection under state law, state-mandated overtime compensation to firefighters is outside the scope of Section 29.[44]

c. Waste Disposal and Other Public Works Projects.

Because a county is not required to operate a solid waste disposal site, the State is not required to reimburse the county for upgrading a landfill in order to comply with a state environmental law.[45] Similarly, the costs associated with implementing state requirements regarding sewage disposal systems operated by municipalities are not within the scope of Section 29 because sewage disposal is an optional, not a mandatory, activity under state law.[46]

The Attorney General has issued an opinion that M.C.L. § 339.2011, requiring units of local government engaged in public works projects to use licensed architects, engineers, and land surveyors where project costs are $15,000 or more, is not within the scope of Section 29 because units of local government are under no state-mandated obligation to engage in public works projects.[47]

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[42] *See* Durant v. Michigan, 456 Mich. 175, 198-99, 566 N.W.2d 272, 282 (1997); Schmidt v. Dep't of Educ., 441 Mich. 236, 490 N.W.2d 584 (1992).

[43] *See* City of Ann Arbor v. Michigan, 132 Mich. App. 132, N.W.2d (1984).

[44] *See* Saginaw Firefighters Ass'n, Local 422 v. City of Saginaw, 137 Mich. App. 625, 357 N.W.2d 908 (1984).

[45] *See* Livingston County v. Dep't of Management & Budget, 430 Mich. 635, 425 N.W.2d 65 (1988).

[46] *See* Kramer v. City of Dearborn Heights, 197 Mich. App. 723, 496 N.W.2d 301 (1992).

[47] *See* Mich. Att'y Gen. Op. No. 6237 (1984).

d. Assistance to the Accused and to Crime Victims.

The Attorney General has issued an opinion that state law requiring county prosecutors to assist the accused in locating and serving witnesses is within the scope of Section 29, as is services to crime victims to be provided by county prosecutors pursuant to the Crime Victim's Rights Act, M.C.L. §§ 780.751 et seq.[48]

D. The Method of Funding New State Mandates.

If a unit of local government is mandated by state law to perform a new activity or service, must the Legislature enact a new appropriation that specifically identifies and provides the necessary funds, or may the Executive Branch reimburse the unit of local government from the existing budget? In *Mahaffey v. Att'y General,*[49] plaintiffs brought a federal and state constitutional challenge of 1993 legislation that required physicians to provide information to female patients contemplating an abortion. In the context of the Headlee Amendment, the Attorney General conceded that the informed consent law requires new activities or services to be performed by local public health departments. The funding for this new activity or service was to come from the Department of Health's existing budget. The plaintiffs argued that any funding had to come from a specific appropriation from the Legislature earmarked for that purpose. The Court of Appeals agreed with the Attorney General's position that the Headlee Amendment does not require the Legislature to enact a new appropriation specifically identifying and providing funds for new services required of units of local government. The Court stated that Article IX, § 29 requires only that a state appropriation be made to pay the local governmental unit for any increased costs. In accord with the voters' call for responsible and cost-efficient government reflected in the Headlee Amendment, the executive branch may fund a new activity or service required of units of local government by the Legislature from an existing appropriation.[50]

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[48] *See* Mich. Att'y Gen. Op. No. 6576A (1989).

[49] 222 Mich. App. 325, 564 N.W.2d 104 (1997).

[50] *See* Mahaffey, 222 Mich. App. at 342, 564 N.W.2d at 112.

VI. ARTICLE IX, § 30: PROHIBITION AGAINST REDUCING THE PROPORTION OF TOTAL STATE FUNDS PAID TO LOCAL GOVERNMENT

Section 30 of the Headlee Amendment is a corollary to Section 29. While Section 29 ensures that the proportion of state money paid to local government to cover necessary costs will not drop below FY 1978-79 levels, Section 30 provides that the percentage of the total state budget earmarked for local government spending will not decline from the FY 1978-79 level. Section 30 provides:

> The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79.

The DMB has determined that the FY 1978-79 proportion of state pending for local government is 41.61 percent. The DMB used three criteria to determine whether state spending was paid to a unit of local government: (1) the unit must be a governmental entity; (2) the unit must receive payment from the State; and (3) the source of the payment must be from state-raised revenues rather than from federal funds or private or local funds that might flow through the state treasury.[51] According to the DMB, the state has failed to meet that percentage in only two years, FY 1981-82 when the percentage of state spending on units of local government was 41.34 percent, and FY 1982-83 when the percentage of state spending on units of local government was 41.25 percent.

A. The Implementing Legislation.

The current version of the Section 30 implementing legislation was first enacted in 1984, with substantial amendments in 1988. First, M.C.L. § 18.1349 provides:

> In accordance with the provision of section 30 of Article IX of the state constitution of 1963, the proportion of total state spending from state sources paid to all units of local government shall not be less than the proportion in effect in fiscal year 1978-1979. The executive budget submitted to the legislature and the budget enacted by the legislature shall be in compliance with section 30 of Article IX of the state constitution of 1963.

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[51] *See* Oakland County v. Dep't of Mental Health, 178 Mich. App. 48, 55, 443 N.W.2d 805, 808 (1989), *appeal dismissed,* 437 Mich. 1047, 471 N.W.2d 619 (1991).

Second, M.C.L. § 18.1350 addresses the accounting methodology for certain aspects of state spending. It provides:

> (1) If state government assumes the financing and administration of a function, after December 22, 1978, which was previously performed by a unit of local government, the state payments for the function shall be counted as state spending paid to units of local government.
>
> (2) Amounts excepted from the financial liability of a county under section 302(2)(c) of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1302 of the Michigan Compiled Laws, shall be counted as state spending paid to local units of government.
>
> (3) State spending paid to units of local government shall include the same proportion of the state's short-term interest and interfund borrowing expense as the proportion of state spending from state resources paid to all units of local government, as is established pursuant to section 349 [M.C.L. § 18.1349, quoted immediately above.]
>
> (4) Refunds or other repayments of prior year revenues shall not be considered in the determination of total state spending.

Third, the Legislature has enacted definitions of the terms "state spending paid to units of local government," "total state spending," "total state spending from state sources," and "unit of local government."[52]

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[52] Those terms are defined as follows:

> "State spending paid to units of local government" means the sum of total state spending from state sources paid to a unit of local government. State spending paid to a unit of local government does not include a payment made pursuant to a contract or agreement entered into or made for the provision of a service for the state or to state property, and loans made by the state to a unit of local government. M.C.L. § 18.1304(3).
>
> "Total state spending" means the sum of state operating fund expenditures, not including transfers for financing between funds. M.C.L. § 18.1305(1).
>
> "Total state spending from state sources" means the sum of state operating fund expenditures not including transfers for financing between funds, federal aid, and restricted local and private sources of financing. M.C.L. § 18.1305(2).

Fourth, the Legislature has directed the State Budget Director to make an annual report to the Legislature of Section 30 funding.[53] It has also adopted a procedure for making up deficiencies in Section 30 funding that requires that deficiencies be made up in the fiscal year following the fiscal year in which the deficiency in payments was identified and reported to the Legislature.[54]

"Unit of local government" means a political subdivision of this state, including school districts, community college districts, intermediate school districts, cities, villages, townships, counties, and authorities, if the political subdivision has as its primary purpose the providing of local governmental service for citizens in a geographically limited area of the state and has the power to act primarily on behalf of that area. M.C.L. § 18.1115(6).

Article IX, § 33 defines the term "Local Government" as follows:

"Local Government" means any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government.

[53] M.C.L. § 18.1497(1) provides:

The director shall transmit to the auditor general for review and comment, not later than May 31 of each year, an itemized statement of the state spending paid to units of local government and total state spending from state sources for the fiscal year in which this act takes effect, and each fiscal year thereafter, including a calculation of the proportion of state spending paid to units of local government to total state spending from state sources. The report shall be published by submission to the legislature not later than June 30 of each year.

[54] M.C.L. § 18.1497(2)-(3) provides:

(2) If the proportion calculated pursuant to subsection (1) [M.C.L. § 18.1497(1), quoted in footnote 28] is less than required by section 349 [M.C.L. § 18.1349], the statements required by this section shall report the amount of additional payments to units of local government which would have been necessary to meet the requirements of section 349. This amount shall be payable to units of local government not later than in the fiscal year following the fiscal year in which the deficiency in payments to units of local government was ascertained and reported to the legislature.

(3) Any appropriations to the fund which are intended to make up a shortfall in payments to units of local government for a prior fiscal year shall not be

Finally, the Legislature has established a local government payment fund when additional state funding to units of local government is required under Section 30.[55]

B. Judicial Interpretation of Section 30.

The Section 30 case law is sparse. The Supreme Court has rejected the argument that Section 30 means that state funds paid to individual units of local government (e.g., school districts) must remain in the same proportion as it was in FY 1978-79. In *Durant II*, the Court dismissed this contention, noting:

> The clear language of this provision makes it unnecessary to explore this issue further. The term "taken as a group" clearly requires that the overall percentage allotment of the state budget for local units of government must remain at 1978 levels. We decline to accept a strained interpretation of an unambiguous statement of intent by the voters.[56]

Likewise, the Court of Appeals has held that Section 30 does not require the State to allocate a fixed percentage of its budget to a specific purpose or unit of local government (e.g., to public education or to school districts).[57] At the same time, however, in satisfying its Section 30 obligation, the State may not categorize as state spending to units of local government payments made to reimburse a local

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considered as state spending from state resources or as state payments to units of local government in the fiscal year in which the amounts are appropriated.

[55] M.C.L. § 18.1498 provides:

> (1) The local government payment fund is hereby created. Money appropriated to the fund by the legislature shall be reserved for use in a fiscal year when additional state payments to units of local government are necessary to meet the requirements of section 349.
>
> (2) The amounts recommended by the governor or appropriated by the legislature into the fund described in subsection (1) shall be considered, for purposes of fulfilling the requirements of section 349, as state spending to be paid to units of local government.

[56] Durant II, 424 Mich. at 393, 381 N.W.2d at 674 (citations omitted).

[57] *See* Waterford School District v. State Board of Education, 130 Mich. App. 614, 344 N.W.2d 19 (1983), *aff'd sub nom.* Durant v. State Board of Education, 424 Mich. 364, 381 N.W.2d 662 (1986).

governmental unit for providing a service that was the state's obligation to provide in 1978.[58] Thus, even when state funds are paid to a unit of local government, for purposes of Section 30 such funds cannot be counted as "state spending paid to all units of local government" when the local governmental unit is merely discharging the state's obligation.[59] If a contrary interpretation of Section 30 was adopted, then in times of shrinking state budgets, adding state payments for such programs to the category of state spending on units of local government could dilute the amount of state money paid to programs originally included in the 41.61-percent base-year level.

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[58] *See Oakland County v. Dep't of Mental Health*, 178 Mich. App. 48, 443 N.W.2d 805 (1989)(the provision of mental health care services is a state obligation), *appeal dismissed,* 437 Mich. 1047, 471 N.W.2d 619 (1991).

[59] *See Oakland County,* 178 Mich. App. at 60, 443 N.W.2d at 811.

VII. ARTICLE IX, § 31: PROHIBITION AGAINST NEW OR INCREASED LOCAL TAXES WITHOUT VOTER APPROVAL

While the focus of Article IX, §§ 26-30 is on state government revenue and spending limits, the focus of Article IX, § 31 is on limiting the power of local government to tax. Article IX, § 31 provides:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level[60] from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment.

The first two sentences of Section 31 have three main features. First, voter approval is required for any new local tax or any increase in the rate of an existing tax.

Second, if the base upon which any existing tax is expanded, then the rate must be reduced. For example, assume the state law establishing the base of the general property tax was amended to eliminate one or more of the current exemptions, with the

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[60] Article IX, § 33 defines the term "General Price Level" as "the Consumer Price Index for the United States as defined and officially reported by the United States Department of Labor or its successor agency."

result that the state equalized value of all property (the tax base) is increased. In that event, the maximum authorized property tax rate in each unit of local government would have to be reduced so that the total property tax levy of each local governmental unit would not increase as a result of the change in the base. This part of Section 31 prevents an increase in the total revenue yield that results from changes in the tax base.

Third, the tax rate that is limited by Section 31 is "the rate authorized by law" or "the maximum authorized rate." This tax rate limitation ties into Article IX, § 6 which requires voter approval for any millage increase.

The third sentence of Section 31 is arguably the most well-known part of the Headlee Amendment, at least for property owners in the State. It creates a mechanism for reducing property taxes when assessments increase faster than the rate of inflation. This sentence of Section 31 provides for what is popularly known as "Headlee rollbacks." The provision undergirds the first two sentences of Section 31 that require voter approval for new or increased local taxes and that require a proportional reduction in the rate of any existing local tax when the base is broadened. A millage that is allocated from the basic 15 mills or the separate 18 mill tax limitation established under Article IX, § 6 is subject to Headlee rollbacks. As observed by the Attorney General:

> Thus, for example, if the property tax revenue of a township is generated by one of the 15 mills received from the annual allocation and the assessed valuation as equalized of property in the township increases by a greater percentage than the increase in the General Price Level, that one mill rate must be "rolled back" as provided in Const. 1963, art. 9, § 31 unless the qualified electors in that township vote to restore that tax rate or vote for additional millage.[61]

To illustrate, if the state equalized value of property in a unit of local government is $10 million and rises to $11 million in the following year, exclusive of new construction, there would be a 10-percent increase in the state equalized value. If the Consumer Price Index increases by only 6 percent, Section 31 requires that the property tax rate in the local governmental unit be reduced so that the tax levy on existing property increases by no more than 6 percent. Thus, if the total tax levy of the local governmental unit had been $200,000 in Year 1 (i.e., 20 mills x $10 million), in Year 2 the total tax levy on existing property may not exceed $212,000 ($200,000 x

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[61] *See* 1979-1980 Mich. OAG Op. No. 5562, 1979 WL 36,893 (1979).

1.06). Because the new state equalized value of existing property is now $11 million and the maximum authorized rate of taxation is $212,000, the millage must be reduced to 19.273 mills ($212,000 maximum tax levy ÷ $11 million state equalized value). Any new construction added to the tax rolls will be taxed at the rolled-back millage rate of 19.273 mills. The Legislature has enacted an implementing statute for the Headlee rollback provision. It also enacted legislation in 1993 providing for Headlee "rollups." The implementing legislation is discussed below in Section D of this Part.

The last sentence of Section 31 excludes preexisting debt service taxes and ties into Article IX, § 6, the latter provision authorizing the repayment of general obligation bonds with unlimited taxes. After the Headlee Amendment, voter approval is now required before new general obligation bonds can be issued that are to be repaid with unlimited taxes. General obligation bonds are to be distinguished from limited tax general obligation (LTGO) bonds. A unit of local government may issue LTGO bonds without voter approval because they are paid from taxes the issuing unit of government is authorized to impose by law and other non-tax revenues the issuer may receive. The use of LTGO bonds has been criticized by the Headlee Commission as a subversion of the restrictions imposed on units of local government by the Headlee Amendment because they tie the hands of successor governments and erode the voting power of the people.[62]

A. What Constitutes a "Local Tax" Under Section 31?

The plain language of Article IX, § 31 prohibits local governmental units from levying any new taxes or increasing any existing tax beyond the maximum authorized rate after December 23, 1978, unless local voters approve the levy. What if the Legislature enacts a new tax that directly benefits certain localities? Examples of such taxes include the city utility users tax that benefits Detroit, M.C.L. § 141.801;[63] the

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[62] *See* HEADLEE COMMISSION REPORT, *supra* note 4, at 54; Sessa v. County of Macomb, 220 Mich. App. 279, 290-95, 559 N.W.2d 70, 74-76 (1997)(Markman, J., concurring).

[63] The City Utility Users Tax was first enacted in 1972, thus predating the Headlee Amendment. It expired, but was reenacted in 1988. The revised version of this Act was successfully defended against a Section 31 challenge. *See* Taxpayers United for Michigan Constitution, Inc. v. City of Detroit, 450 Mich. 119, 537 N.W.2d 596 (1995). The Court concluded that because the Act was in effect at the time the Headlee Amendment was ratified, there could be no Section 31 violation. The Legislature responded to the litigation with following statute enacted in 1990:

airport parking excise tax that largely benefits Wayne County, M.C.L. § 207.371; the convention and tourism marketing taxes, M.C.L. §§ 141.871, 141.881, 141.891; and the Tiger Stadium tax, M.C.L. § 207.751, which authorizes an excise tax to be levied on hotel and motel accommodations.

The basic focus in answering the question of what is a "local tax" under Section 31 is on the entity responsible for levying the tax. If the entity responsible for levying the tax is the Legislature, then the tax is a state tax for purposes of Section 31, even if the tax benefits localities. (However, such a state tax would then be subject to the limits of Article IX, § 26.) The leading case on this issue is *Airlines Parking, Inc. v. Wayne County*.[64] There, the Michigan Supreme Court held that the airport parking tax that is levied on parking facilities within 5 miles of Metropolitan Airport[65] is a state excise tax, not a "local" tax. The Court noted that "because it is at least theoretically

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> Sec. 8. This act is intended to eliminate the confusion surrounding the legal status of Act No. 198 of the Public Acts of 1970 resulting from an opinion of the attorney general regarding the validity of enactment of various public acts, OAG, 1987-1988, No 6438, p 80 (May 21, 1987) and a circuit court decision in the matter of Ace Tex Corp v Detroit rendered on February 2, 1990 (Wayne County Circuit Court Case No. 88-807858-CZ), as to which an appeal is pending, and to resolve legislatively the issues raised by the appeal. Before that circuit court decision, the legislature had been advised by the attorney general's office in May 1987 that legislative action was not necessary to authorize the collection of the city utility users tax after July 1, 1988 under Act No. 198 of the Public Acts of 1970. In light of the circuit court decision of February 2, 1990, which is presently on appeal, it appears that legislative action is advisable to clarify the authorization for and to ratify the collection of the tax from July 1, 1988, to authorize the continued collection of the tax, and to resolve legislatively the issues raised by appeal. The legislature by enactment of this act intends to validate, ratify, and revive effective from July 1, 1988 a city utility users tax. This act is remedial and curative and is intended to revive and assure an uninterrupted continuation of the authority to collect a city utility users tax. The legislature finds the city utility users tax was authorized by law on the date when section 31 of Article IX of the state constitution of 1963 was ratified.

M.C.L. § 141.1158 (footnotes omitted).

[64] 452 Mich. 527, 550 N.W.2d 490 (1996).

[65] Metro is the only airport that fits the statutory definition of "a regional airport facility," i.e., "an airport that services 4,000,000 or more emplacements annually." M.C.L. § 207.372(h).

possible that the state could levy a tax that was local in character, the entity imposing the tax in question may not conclusively resolve the Headlee question."[66] Notwithstanding that some local governmental units directly benefit from the tax (tax receipts are distributed to Wayne County monthly), the Court nevertheless found that the tax is a state tax because it is styled as a state tax, is structured as a state tax, serves a state purpose, was enacted by the Legislature, is collected by the state, and is distributed by the state. In contrast, the Court added, local taxes are collected by local government, are administered directly by that local entity, and are spent by the local government according to local fiscal policy.

B. Local Tax Increases Necessitated By A Court Judgment.

If a local tax increase becomes necessary in order to satisfy a court judgment, is that tax increase outside the scope of Section 31's prohibitions? The Revised Judicature Act authorizes a court to order the levy of ad valorem (i.e., by value) property taxes to satisfy a money judgment entered against enumerated types of local governmental units.[67] The RJA also provides generally that if a judgment is rendered against any municipality, the legislative body of that municipality may issue certificates of indebtedness or bonds of that municipality for the purpose of raising funds to pay the judgment.[68] That section was enacted before the effective date of the Headlee Amendment. Because the Headlee Amendment does not prevent the imposition of a tax or tax increase that was authorized prior to its effective date, a tax increase necessitated by a court judgment entered pursuant to M.C.L. § 600.6093 arguably does not come within the restrictions of Section 31.[69] Moreover, because a court is not a unit of local government (as the latter term is defined in Article IX, § 33), one federal court has concluded that there would be no violation of Section 31 if local taxes were increased to pay a court judgment.[70]

On the other hand, the Michigan Court of Appeals has stated that while a unit of local government may issue LTGO bonds to pay a judgment levy without violating the last sentence of Section 31, it may not do so if the bonds would cause the local

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[66] Airport Parking, Inc., 452 Mich. at 534, 550 N.W.2d at 493.

[67] M.C.L. § 600.6093. It is reproduced in Appendix A.

[68] M.C.L. § 600.6097(1). It is reproduced in Appendix A.

[69] *See* City of Detroit v. City of Highland Park, 878 F. Supp. 87 (E.D. Mich. 1995).

[70] *See id.*

governmental unit to exceed its authorized rate of taxation without voter approval.[71]

The Headlee Commission suggested that the Revised Judicature Act be amended to provide that a judgment levy be paid out of regular property tax levies or by issuing LTGO bonds (which are paid from existing tax revenues), but that in either case the judgment would at least be satisfied from funds that come from voter-approved taxing authority.[72] In this way, local governmental units will be forced to make the politically difficult budgetary choices that they may have been avoiding, which may have been the catalyst for the litigation that resulted in the judgment levy in the first place.

C. What Constitutes a "New Tax" Under Section 31?

As noted, in the absence of voter approval, Section 31 prohibits units of local government from levying any new tax or from increasing the rate of an existing tax above the rate authorized by law or charter when Section 31 was ratified. A vexing issue is what constitutes a "new tax" as opposed to a "user fee" or "special assessment" under Section 31. Section 31 requires that a "new tax" receive voter approval. A "user fee" and a "special assessment," on the other hand, if not a "tax," are not subject to the same constitutional constraint. The Headlee Amendment does not define the term "tax," nor has the Legislature done so in implementing legislation.[73]

1. User Fees.

In *Bolt v. City of Lansing*,[74] the Court of Appeals considered a Section 31 challenge to a charge imposed by the City of Lansing on landowners for the cost of separating storm water runoff from raw sewage and treating the runoff. The plaintiffs claimed that the charge was a new tax that had not been approved by the voters and

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[71] *See* Sessa v. Macomb County, 220 Mich. App. 279, 284, 559 N.W.2d 70, 72 (1997).

[72] *See* HEADLEE COMMISSION REPORT, *supra* note 4, at 37.

[73] Missouri's Hancock Amendment, which is modelled after the Headlee Amendment, uses the phrase "tax, license or fees." One commentator has concluded that "[t]he decisions defining the phrase 'tax, license or fees' have created a hodgepodge of results with no clear guiding standard." Joanne L. Graham, *Toward a Workable Definition of "Tax, License, or Fees": Local Governments in Missouri and the Hancock Amendment*, 62 U. MO.-KANSAS L. REV. 821, 824 (1994).

[74] 221 Mich. App. 79, 561 N.W.2d 423 (1997).

thus violated Article IX, § 31. The City of Lansing maintained that the charge was a "user fee" and not subject to voter approval under Section 31. The Court agreed with the City of Lansing, offering the following definition of "fee":

> In general, a fee is exchanged for a service rendered or a benefit conferred, and there must be some reasonable relationship between the amount of the fee and the value of the service or benefit.[75]

The Court conceded that a charge for sewage disposal and treatment falls somewhere between two ends of a spectrum, with one end being an ad valorem property tax, and the other being a charge for a city snow removal service that a landowner voluntarily uses. Relying on a 1954 Supreme Court decision that classified a charge for sewage treatment as a user fee,[76] where the Supreme Court analogized charges for sewage disposal to a fee for furnishing water to city residents, the Court of Appeals concluded that the Lansing storm water runoff charge is a user fee, not a new tax.

The Michigan Supreme Court granted leave to appeal in the *Bolt* case and reversed the Court of Appeals.[77] The Court held that the Lansing storm water service charge is a tax for purposes of Article IX, § 31 of the Headlee Amendment, for which approval is required by a vote of the people. The Court conceded that there is no bright-line test for distinguishing a valid user fee and a tax that violates the Headlee Amendment. The Court noted that a user fee generally (1) serves a regulatory rather than a revenue-raising purpose, (2) is proportionate to the necessary costs of the service, and (3) is voluntary.[78] The lack of correspondence between the charges and the benefit conferred demonstrated to the Court that the City of Lansing had failed to differentiate any particularized benefits to property owners, upon whom the tax was imposed) from the general benefits conferred on the public.[79]

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[75] Bolt, 221 Mich. App. at 86, 561 N.W.2d at 427.

[76] The case relied on is Ripperger v. City of Grand Rapids, 338 Mich. 682, 62 N.W.2d 585 (1954).

[77] Bolt v. City of Lansing, ___ Mich. ___, ___ N.W.2d ___, 1998 WL 898865 (dec. 28, 1998).

[78] *Id.* at 4.

[79] *Id.* at 6. *Compare* County of Saginaw v. John Sexton Corp. of Michigan, ___ Mich. App. ___, ___ N.W.2d ___, 1998 WL 723881 (Oct. 16, 1998)(landfill surcharge qualifies as a regulatory fee for purposes of Section 31 of the Headlee Amendment because it is reasonably

2. *Special Assessments.*

In addition to the question of the status of "user fees" under Section 31, are "special assessments" a tax under Section 31? Special assessments are widely used by local governmental units to defray the costs of a variety of local improvement projects. Special assessments rather than general property taxes are used to finance such public improvements because such improvements do not benefit the general population within the unit of local government. Accordingly, it is appropriate that the direct beneficiaries of such improvements pay for them.[80]

Special assessments are distinguishable from general property taxes in at least three respects. First, general property taxes are levied on real and tangible personal property, whereas special assessments are levied only on real property. Also, real property otherwise exempt from general property taxes are not *ipso facto* exempt from special assessments unless specifically exempted under the legislation authorizing the special assessment.

Second, general property taxes are levied across the board within the assessing jurisdiction to defray the costs of government in general, whereas special assessments are levied only within a special assessment district which is comprised of the land and improvements that are specially benefitted by the public improvements (e.g., streets, sewer line, dams to control lake levels). However, the Legislature has authorized the creation of special assessment districts that arguably benefit the general public, such as, for example, ambulance service.[81]

Third, in theory general property taxes are levied on an ad valorem basis, whereas special assessments are levied on the basis of frontage or land area. For example, a lakefront owner with a 100-foot frontage would pay twice as much for a dam installation to control the lake level as would a lakefront owner on the same lake with 50 feet of frontage.

The Michigan Supreme Court has defined a "special assessment" as "an imposition or levy upon property for the payment of the costs of public improvements

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related to the costs involved in managing the county's disposal of solid waste).

[80] *See generally* George Marti, *Special Assessments, in* 2 MICHIGAN MUNICIPAL LAW §§ 11.01-11.27 (1980).

[81] *See* M.C.L. § 333.20346, M.S.A. § 14.15 (20346).

which confer a corresponding and special benefit upon the property assessed."[82] In *Blake v. Metropolitan Chain Stores*,[83] the Supreme Court distinguished "special assessments" from "taxes":

> A special assessment is laid on the property specially benefitted by a local improvement in proportion to the benefit received for the purpose of defraying the cost of the improvement. The word "taxes" represents to the mind exaction to defray the ordinary expenses of the government and the promotion of the general welfare of the county. It is not generally understood as applying to improvements, levied upon property with a resultant benefit thereto to the amount thereof.[84]

A Supreme Court opinion that has approached the question with arguably the greatest precision and candor is *St. Joseph Township v. Municipal Finance Committee*.[85] There, the Court stated:

> While the word "tax" in its broad meaning includes both general taxes and special assessments, and in a general sense a tax is an assessment, and an assessment is a tax, yet there is a recognized distinction between them in that assessment is confined to local impositions upon property for the payment of the cost of public improvements in its immediate vicinity and levied with reference to special benefits to the property assessed. *The differences between a special assessment and a tax are that (1) a special assessment can be levied only on land; (2) a special assessment cannot (at least in most States) be made a personal liability of the person assessed; (3) a special assessment is based wholly on benefits; and (4) a special assessment is exceptional both as to time and locality.* The imposition of a charge on all property, real and personal, in a prescribed area, is a tax and not an assessment, although the purpose is to make a local improvement on a street or highway. A charge imposed only on property owners benefitted is a special assessment rather than a tax

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[82] Fluckey v. City of Plymouth, 358 Mich. 447, 100 N.W.2d 486 (1960).

[83] 247 Mich. 73, 225 N.W. 587 (1939).

[84] Blake, 247 Mich. at 76, 225 N.W. at 588.

[85] 351 Mich. 524, 88 N.W.2d 543 (1958).

notwithstanding the statute calls it a tax.[86]

The Attorney General's Office has issued two opinions regarding the status of "special assessments" under Section 31. The first opinion addressed the status of special assessments, apportioned on an ad valorem basis, for police and fire protection, garbage collection, and street lighting. Citing *Blake v. Metropolitan Chain Stores*, the Attorney General concluded that if the charge is imposed only on those property owners who are benefitted by the charge, then it is a special assessment and not a tax.[87] The second opinion addressed the status of a special assessment district established to defray the cost of ambulance service provided by a city.[88] The Attorney General concluded that since a municipality's ambulance service must benefit all its residents, and since the property specially assessed does not receive a corresponding special benefit not provided the general public, such a "special assessment" would be a "tax" for purposes of Article IX, § 31.

The Headlee Commission recommended that the Legislature define the terms "special assessment" and "user fee" as follows:

> A "special assessment" is a payment for a physical improvement yielding a proportionate increase in the value of property, in which the revenue from the special assessment is used only for the costs of the improvement.
>
> A "fee for service" or "user fee" is a payment made for the voluntary receipt of a measured service, in which the revenue from the fees is used only for the service provided.

As noted in the Headlee Commission Report, local governmental units have increasingly resorted to imposing mandatory user fees since ratification of the Headlee Amendment, including fees for mandatory recycling programs and fees for emergency telephone service.[89]

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[86] St. Joseph Township, 351 Mich. at 532-33, 88 N.W.2d at 547-48 (emphasis added).

[87] *See* 1979-1980 Mich. OAG Op. No. 5562, 1979 WL 36,893 (1979).

[88] *See* 1979-1980 Mich. OAG Op. No. 5706, 1980 WL 113,860 (1980).

[89] *See* HEADLEE COMMISSION REPORT, *supra* note 4, at 26-29.

D. The Assessed Value of Property as Finally Equalized.

In order to implement Headlee rollbacks, a millage reduction fraction has to be determined. Pursuant to Article IX, § 31, if the aggregate values of property as determined by the assessing units of any county are more or less than 50% of true cash value, the State Tax Commission "equalizes" the county assessment by using a multiplier to add to or subtract from the aggregate assessed valuation of the county's taxable and real personal property. That process yields the state equalized value. The purpose of equalization is to adjust for differences in the modes of assessment among assessing units of government with the goal of achieving uniformity of property tax assessment at both the intra-county and intercounty levels.[90]

There are six classes of real property and five classes of personal property.[91] The State Tax Commission equalizes the value of taxable property in each of the classifications. The assessed valuation of property as finally equalized for the separate classes is added together, and that sum is used in determining a "millage reduction fraction." This fraction is multiplied by the maximum millage rate authorized by the unit of local government in determining the tax rate for the local government. M.C.L. § 211.34d(7) states the method by which the millage reduction fraction is calculated:

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[90] *See* Allied Supermarkets, Inc. v. City of Detroit, 391 Mich. 460, 216 N.W.2d 755 (1974).

The Truth in Assessing Act, enacted in 1981, *see* M.C.L. § 211.34, requires that if the state equalized valuation of a city or township exceeds its assessed valuation, then the city or township must reduce its maximum authorized millage rate so that the amount of taxes collected does not exceed the amount that would have been collected had the city or township levied upon its assessed valuation.

The Truth in Taxation Act, enacted in 1982, see M.C.L. § 211.24e, provides that a local unit of government shall not benefit from an increase in state equalized valuation unless the unit's governing body holds a public hearing designed to acquaint the public with the fact that the total tax dollars collected from existing authorized millage rate will be increased due to increases in the state equalized value of taxable property. Units of local government that levy one mill or less are exempted.

See generally Richard D. Reed, *Property Taxation, in* 2 MICHIGAN MUNICIPAL LAW §§ 10.01-10.24 (1980).

[91] *See* M.C.L. § 211.34c. The classes of real property are agricultural, commercial, developmental, industrial, residential, and timber cutover. The classes of taxable personal property are agricultural, commercial, industrial, residential, and utility. *Id.*

> A millage reduction fraction shall be determined for each year for each local unit of government. For ad valorem property taxes that became a lien before January 1, 1983, the numerator of the fraction shall be the total state equalized valuation for the immediately preceding year multiplied by the inflation rate and the denominator of the fraction shall be the total state equalized valuation for the current year minus new construction and improvements. For ad valorem property taxes that become a lien after December 31, 1982 and through December 31, 1994, the numerator of the fraction shall be the product of the difference between the total state equalized valuation for the immediately preceding year minus losses multiplied by the inflation rate and the denominator of the fraction shall be the total state equalized valuation for the current year minus additions. For ad valorem property taxes that are levied after December 31, 1994, the numerator of the fraction shall be the product of the difference between the total taxable value for the immediately preceding year minus losses multiplied by the inflation rate and the denominator of the fraction shall be the total taxable value for the current year minus additions. For each year after 1993, a millage reduction fraction shall not exceed 1.

In *O'Reilly v. Wayne County*,[92] the Court of Appeals considered a challenge to the millage reduction fraction methodology. The Court concluded that separate millage reduction fractions need not be calculated for each class of property specified in M.C.L. § 211.34c. The Court rejected the plaintiff's argument that the phrase in Section 31, "assessed valuation of property as finally equalized," must be interpreted to mean the assessed valuation of each separate class of property as finally equalized. The Court found nothing in the language of Section 31 to suggest an intent to prohibit an increase of taxes within a class of property when such an increase results from equalization of assessments of that class with other classes at the same percentage of true cash value.

E. The Implementing Legislation for Headlee Rollbacks and Rollups.

The third sentence of Article IX, § 31 requires that property tax millage rates be rolled back when assessed values, excluding new construction, exceed the rate of inflation. The implementing legislation provides a methodology and procedures for implementing Headlee rollbacks. It is attached hereto as Appendix B.

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[92] 116 Mich. App. 582, 323 N.W.2d 493 (1982).

What if the rate of inflation exceeds the increase in property valuations? Can local taxing authorities reach back to prior years when property values exceeded inflation and "recapture" a portion of the increase in property values? A 1993 amendment to the implementing legislation prohibits Headlee "rollups" that would have allowed an increase in property taxes up to the "maximum authorized rate" if the rate of inflation exceeded the growth rate in property valuations. The 1993 amendment prohibits rollups without voter approval, thereby permanently reducing property taxes. M.C.L. § 211.34d(16) provides:

> Beginning with taxes levied in 1994, the millage reduction required by section 31 of Article IX of the state constitution of 1963 shall permanently reduce the maximum rate or rates authorized by law or charter. The reduced maximum authorized rate or rates for 1994 shall equal the product of the maximum rate or rates authorized by law or charter before application of this section multiplied by the compound millage reduction applicable to that millage in 1994 pursuant to subsections (8) to (12). The reduced maximum authorized rate or rates for 1995 and each year after 1995 shall equal the product of the immediately preceding year's reduced maximum authorized rate or rates multiplied by the current year's millage reduction fraction and shall be adjusted for millage for which authorization has expired and new authorized millage approved by the voters pursuant to subsections (8) to (12).

The Headlee Commission has concluded that the implementing legislation, although "extremely complex and difficult to understand,"[93] nevertheless limits the increase in property tax revenue to the rate of inflation plus new construction.

[93] HEADLEE COMMISSION REPORT, *supra* note 4, at 34.

VIII. ARTICLE IX, § 32: TAXPAYER SUITS

Section 32 of the Headlee Amendment gives taxpayers standing to challenge alleged violations of the Headlee Amendment and vests the Court of Appeals with original jurisdiction over such taxpayer suits. Section 32 provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

The apparent purpose of vesting the Court of Appeals with original jurisdiction over taxpayer suits was to expedite the judicial review process by eliminating the circuit court step. If this was the drafters' intent, it was misguided. As the experience from the 17-year long *Durant* litigation amply demonstrates, because the Court of Appeals is not a factfinding body, all disputed questions of fact are referred to a special master (i.e., a circuit court judge[94]), who makes findings of fact and recommendations to the Court of Appeals.[95] Other than the applicable standard of appellate review, the only differences between this process and the normal circuit court adjudicatory process followed by an appeal to the Court of Appeals seem to be matters of form rather than substance.

The implementing legislation for Section 32 provides:

M.C.L. § 600.308a. Taxpayers' suits

> Sec. 308a. (1) An action under section 32 of article 9 of the state constitution of 1963 may be commenced in the court of appeals, or in the circuit court in the county in which venue is proper, at the option of the party commencing the action.
>
> (2) The jurisdiction of the court of appeals shall be invoked by filing an action by a taxpayer as plaintiff according to the court rules governing procedure in the court of appeals.

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[94] For example, in the *Durant* litigation, the Court of Appeals appointed special masters on two occasions, both of whom were circuit court judges.

[95] *See* M.C.L. § 600.308a(5); M.C.R. 7.206(D)(3).

(3) A taxpayer shall not bring or maintain an action under this section unless the action is commenced within 1 year after the cause of action accrued.

(4) The unit of government shall be named as defendant. An officer of any governmental unit shall be sued in his or her official capacity only and shall be described as a party by his or her official title and not by name. If an officer dies, resigns, or otherwise ceases to hold office during the pendency of the action, the action shall continue against the governmental unit and the officer's successor in office.

(5) The court of appeals may refer an action to the circuit court or to the tax tribunal to determine and report its findings of fact if substantial fact finding is necessary to decide the action.

(6) A plaintiff who prevails in an action commenced under this section shall receive from the defendant the costs incurred by the plaintiff in maintaining the action.

Although the implementing legislation vests the circuit court and the Court of Appeals with concurrent jurisdiction over taxpayer suits, there are no reported cases in which a taxpayer initiated a Headlee Amendment challenge in circuit court.[96] However, taxpayer lawsuits alleging not only Headlee Amendment violations but also other violations of state law must be filed in circuit court.[97]

A. The One-Year Limitations Period.

All taxpayer suits must be brought within one year after the cause of action accrues. The Supreme Court has upheld the statutory one-year limitations period as a reasonable restriction designed to protect the fiscal integrity of government units that

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[96] Because local governmental units are not "taxpayers," the provisions of Section 32 are inapplicable to them. Claims by units of local government brought under the Headlee Amendment may be filed with the Local Government Claims Review Board, and from there to the circuit court. The Local Government Claims Review Board is discussed above in Part V.

[97] *See, e.g.*, Macomb County Taxpayers Ass'n v. L'Anse Creuse Public Schools, 455 Mich. 1, 564 N.W.2d 457 (1997), where the plaintiff's complaint filed in circuit court alleged violations of both state law and of Article IX, § 29.

might otherwise face the prospect of losing several years' worth of tax revenues.[98]

In connection with a challenge to the issuance of bonds, the Court of Appeals has held that if the taxpayer's challenge goes to the legality of a bond issue under the Headlee Amendment, that challenge is barred if brought after the bonds are issued, even if the taxpayer suit is filed within one year of the bond issuance.[99] Known as the *Bigger* rule (after *Bigger v. City of Pontiac*, 390 Mich. 1, 210 N.W.2d 1 (1973)), the rule protects the vested interests of third-party bondholders. In this connection, the Legislature has protected the interests of taxpayers by requiring publication of a notice of intent to bond, thereby giving taxpayers adequate notice and an opportunity to bring a Headlee challenge in the Court of Appeals.[100]

B. Recovery of Fees and Costs.

Section 32 provides for the recovery of "costs" by a successful taxpayer in a Section 32 lawsuit. The Supreme Court has held that the term "costs" used in Section 32 includes reasonable attorney fees. In *Macomb County Taxpayers Ass'n v. L'Anse Creuse Public Schools*,[101] the Court concluded that the term "costs" was to be given a common meaning rather than be treated as legal term of art. The Court adopted the reasoning of the Court of Appeals in *Durant v. Board of Education*,[102] that the term "costs" include attorney fees:

> [L]itigation brought pursuant to § 32 can be complex and protracted. The financial outlay needed for maintaining a suit of this nature can be extremely burdensome and inhibitive. Attorney fees compose a substantial portion of such outlays. Without the ability to recoup all costs of maintaining an action to enforce the Headlee Amendment, including reasonable attorney fees, the average taxpayer could not withstand the financial obligation incurred as a result of exercising that taxpayer's right

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[98] *See* Taxpayers Allied for Constitutional Taxation v. County of Wayne, 450 Mich. 119, 537 N.W.2d 596 (1995). In that case, plaintiffs brought an action nearly ten years after the tax increase went into effect.

[99] *See* Sessa v. County of Macomb, 220 Mich. App. 279, 286-87, 559 N.W.2d 70, 73 (1997).

[100] *See* M.C.L. § 123.958b(3).

[101] 455 Mich. 1, 564 N.W.2d 457 (1997).

[102] 186 Mich. App. 83, 463 N.W.2d 461 (1990).

to bring suit. Accordingly, we conclude that, in ratifying the Headlee Amendment, "the great mass of people themselves" intended the term "cost" to include reasonable attorney fees.[103]

The Supreme Court also consulted the drafters' notes which, although not authoritative, weigh in favor of a conclusion that "costs" includes attorney fees. The drafters' notes state that by costs is meant all expenses incurred in maintaining a taxpayer's lawsuit, including filing, service, witness, and attorney fees. However, only individual taxpayers are entitled to recover their Section 32 costs; associations and governmental units are ineligible.

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[103] *Durant*, 186 Mich. App. at 118.

APPENDIX A

M.C.L. § 600.6093.

(1) Whenever judgment is recovered against any township, village, or city, or against the trustees or common council, or officers thereof, in any action prosecuted by or against them in their name of office, the clerk of the court shall, on the application of the party in whose favor judgment is rendered, his attorney, executor, administrator, or assigns, make and deliver to the party so applying a certified transcript of the judgment, showing the amount and date thereof, with the rate of interest thereon, and of the costs as taxed under the seal of the court, if in a court having a seal. The party obtaining the certified transcript may file it with the supervisor of the township, if the judgment is against the township, or with the assessing officer or officers of the city or village, if the judgment is against a city or village. The supervisor or assessing officer receiving the certified transcript or transcripts of judgment shall proceed to assess the amount thereof with the costs and interests from the date of rendition of judgment to the time when the warrant for the collection thereof will expire upon the taxable property of the township, city, or village upon the then next tax roll of such township, city, or village, without any other or further certificate than the certified transcript as a part of the township, city, or village tax, adding the total amount of the judgment to the other township, city, or village taxes and assessing it in the same column with the general township, city, or village tax. The supervisor or assessing officer shall set forth in the warrant attached to the tax roll each judgment separately, stating the amount thereof and to whom payable, and it shall be collected and returned in the same manner as other taxes. The supervisor or assessing officer, at the time when he delivers the tax roll to the treasurer or collecting officer of any township, city, or village, shall deliver to the township clerk or to the clerk or recording officer of the city or village, a statement in writing under his hand, setting forth in detail and separately the judgment stating the amount with costs and interest as herein provided, and to whom payable. The treasurer or collecting officer of the township, city, or village, shall collect and pay the judgment to the owner thereof or his attorney, on or before the date when the tax roll and warrant shall be returnable. In case any supervisor, treasurer, or other assessing or collecting officer neglects or refuses to comply with any of the provisions of this section he shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than $1,000.00 and costs of prosecution, or imprisonment in the county jail for a period not exceeding 3 months, or by both fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed to exclude other remedies given by law for the enforcement of the judgment.

(2) In any case where a judgment is recovered against a village which, by reason of holding no municipal elections, or for any other reason has no available assessing officer within the jurisdiction of the court wherein the judgment is rendered, the owner of the judgment or any person knowing the facts, acting on behalf of the owner, may make an affidavit showing that the village against which a judgment is pending and unsatisfied, has no available assessing officer within the jurisdiction, and file it with the clerk of the court wherein the judgment is written. The officer who makes the certified transcript shall attach thereto a copy of the affidavit, the correctness of which copy shall also be certified to in the certificate. Any party receiving the certified transcript of judgment and affidavit may file it with the supervisor of the township in which the village, having no assessing officer is located. The supervisor shall assess the amount of the judgment with costs and interest, upon the taxable property of the village, which is without an assessing officer, and thereafter the same steps and proceedings shall be had in the premises as though it were a judgment against the township within which the village is located, except that it shall be assessed against the property within the corporate limits of the village only.

(3) When judgment is recovered against any county or the board of supervisors or any county officer in an action prosecuted by or against him in his name of office, the judgment unless reversed shall be levied and collected as other county charges, and when collected shall be paid by the county treasurer to the person to whom the judgment has been adjudged upon the delivery of a proper voucher therefor.

M.C.L. § 600.6097. Municipal judgment bonds

(1) If a judgment of a court or administrative agency is rendered against any municipality, the legislative body of that municipality, unless otherwise provided, may issue certificates of indebtedness or bonds of that municipality for the purpose of raising money to pay the judgment, in an amount not exceeding the sum of the judgment, the costs and interest on the judgment, and all cost in connection with issuing the certificates of indebtedness or bonds, which certificates of indebtedness or bonds may be made payable at such time and place, and such rate of interest not exceeding the maximum rate of interest permitted by the municipal finance act, Act No. 202 of the Public Acts of 1943, being sections 131.1 to 139.3 of the Michigan Compiled Laws. The certificates of indebtedness or bonds shall be sold and issued in accordance with the municipal finance act, except that they may be issued for a period of up

to 15 years.

(2) The authorization, issuance, and selling of the bonds are not subject to section 5(g) of Act No. 279 of the Public Acts of 1909, as amended, being section 117.5 of the Michigan Compiled Laws.

(3) As used in this section, "municipality" means a county, township, city, village, school district, intermediate school district, community college district, metropolitan district, port district, drainage district established under the drain code of 1956, Act No. 40 of the Public Acts of 1956, being sections 280.1 to 280.630 of the Michigan Compiled Laws, or another governmental authority or agency in this state which has the power to levy ad valorem property taxes.

APPENDIX B

M.C.L. § 211.34d. Millage reduction; definitions, tabulation of tentative taxable value, computations of taxable values, calculation of millage reduction fractions, computation of tax rate, compounded millage reduction fraction, tax rates in excess of limit, bonds or other evidence of indebtedness, summer tax bills, incorrect fractions, change in taxable values

Sec. 34d. (1) As used in this section or section 27a, [FN1] or section 3 or 31 of Article IX of the state constitution of 1963:

(a) For taxes levied before 1995, "additions" means all increases in value caused by new construction or a physical addition of equipment or furnishings, and the value of property that was exempt from taxes or not included on the assessment unit's immediately preceding year's assessment roll.

(b) For taxes levied after 1994, "additions" means, except as provided in subdivision (c), all of the following:

(i) Omitted real property. As used in this subparagraph, "omitted real property" means previously existing tangible real property not included in the assessment. Omitted real property shall not increase taxable value as an addition unless the assessing jurisdiction has a property record card or other documentation showing that the omitted real property was not previously included in the assessment. The assessing jurisdiction has the burden of proof in establishing whether the omitted real property is included in the assessment. Omitted real property for the current and the 2 immediately preceding years, discovered after the assessment roll has been completed, shall be added to the tax roll pursuant to the procedures established in section 154. [FN2] For purposes of determining the taxable value of real property under section 27a, the value of omitted real property is based on the value and the ratio of taxable value to true cash value the omitted real property would have had if the property had not been omitted.

(ii) Omitted personal property. As used in this subparagraph, "omitted personal property" means previously existing tangible personal property not included in the assessment. Omitted personal property shall be added to the tax roll pursuant to section 154.

(iii) New construction. As used in this subparagraph, "new construction" means property not in existence on the immediately preceding tax day and not replacement construction. New construction

includes the physical addition of equipment or furnishings, subject to the provisions set forth in section 27(2)(a) to (o). [FN3] For purposes of determining the taxable value of property under section 27a, the value of new construction is the true cash value of the new construction multiplied by 0.50.

(iv) Previously exempt property. As used in this subparagraph, "previously exempt property" means property that was exempt from ad valorem taxation under this act on the immediately preceding tax day but is subject to ad valorem taxation on the current tax day under this act. For purposes of determining the taxable value of real property under section 27a:

> (A) The value of property previously exempt under section 7u [FN4] is the taxable value the entire parcel of property would have had if that property had not been exempt, minus the product of the entire parcel's taxable value in the immediately preceding year and the lesser of 1.05 or the inflation rate.
>
> (B) The taxable value of property that is a facility as that term is defined in section 2 of Act No. 198 of the Public Acts of 1974, being section 207.552 of the Michigan Compiled Laws, that was previously exempt under section 7k [FN5] is the taxable value that property would have had under this act if it had not been exempt.
>
> (C) The value of property previously exempt under any other section of law is the true cash value of the previously exempt property multiplied by 0.50.

(v) Replacement construction. As used in this subparagraph, "replacement construction" means construction that replaced property damaged or destroyed by accident or act of God and that occurred after the immediately preceding tax day to the extent the construction's true cash value does not exceed the true cash value of property that was damaged or destroyed by accident or act of God in the immediately preceding 3 years. For purposes of determining the taxable value of property under section 27a, the value of the replacement construction is the true cash value of the replacement construction multiplied by a fraction the numerator of which is the taxable value of the property to which the construction was added in the immediately preceding year and the denominator of which is the true cash value of the property to which

the construction was added in the immediately preceding year, and then multiplied by the lesser of 1.05 or the inflation rate.

(vi) An increase in taxable value attributable to the complete or partial remediation of environmental contamination existing on the immediately preceding tax day. The department of environmental quality shall determine the degree of remediation based on information available in existing department of environmental quality records or information made available to the department of environmental quality if the appropriate assessing officer for a local tax collecting unit requests that determination. The increase in taxable value attributable to the remediation is the increase in true cash value attributable to the remediation multiplied by a fraction the numerator of which is the taxable value of the property had it not been contaminated and the denominator of which is the true cash value of the property had it not been contaminated.

(vii) An increase in the value attributable to the property's occupancy rate if either a loss, as that term is defined in this section, had been previously allowed because of a decrease in the property's occupancy rate or if the value of new construction was reduced because of a below-market occupancy rate. For purposes of determining the taxable value of property under section 27a, the value of an addition for the increased occupancy rate is the product of the increase in the true cash value of the property attributable to the increased occupancy rate multiplied by a fraction the numerator of which is the taxable value of the property in the immediately preceding year and the denominator of which is the true cash value of the property in the immediately preceding year, and then multiplied by the lesser of 1.05 or the inflation rate.

(viii) Public services. As used in this subparagraph, "public services" means water service, sewer service, a primary access road, natural gas service, electrical service, telephone service, sidewalks, or street lighting. For purposes of determining the taxable value of real property under section 27a, the value of public services is the amount of increase in true cash value of the property attributable to the available public services multiplied by 0.50 and shall be added in the calendar year following the calendar year when those public services are initially available.

(c) For taxes levied after 1994, additions do not include increased value attributable to any of the following:

(i) Platting, splits, or combinations of property.

(ii) A change in the zoning of property.

(iii) For the purposes of the calculation of the millage reduction fraction under subsection (7) only, increased taxable value under section 27a(3) after a transfer of ownership of property.

(d) "Assessed valuation of property as finally equalized" means taxable value under section 27a.

(e) "Financial officer" means the officer responsible for preparing the budget of a unit of local government.

(f) "General price level" means the annual average of the 12 monthly values for the United States consumer price index for all urban consumers as defined and officially reported by the United States department of labor, bureau of labor statistics.

(g) For taxes levied before 1995, "losses" means a decrease in value caused by the removal or destruction of real or personal property and the value of property taxed in the immediately preceding year that has been exempted or removed from the assessment unit's assessment roll.

(h) For taxes levied after 1994, "losses" means, except as provided in subdivision (i), all of the following:

(i) Property that has been destroyed or removed. For purposes of determining the taxable value of property under section 27a, the value of property destroyed or removed is the product of the true cash value of that property multiplied by a fraction the numerator of which is the taxable value of that property in the immediately preceding year and the denominator of which is the true cash value of that property in the immediately preceding year.

(ii) Property that was subject to ad valorem taxation under this act in the immediately preceding year that is now exempt from ad valorem taxation under this act. For purposes of determining the taxable value of property under section 27a, the value of property exempted from ad valorem taxation under this act is the amount exempted.

(iii) An adjustment in value, if any, because of a decrease in the property's occupancy rate, to the extent provided by law. For purposes of determining the taxable value of real property under section 27a, the value of a loss for a decrease in the property's occupancy rate is the

product of the decrease in the true cash value of the property attributable to the decreased occupancy rate multiplied by a fraction the numerator of which is the taxable value of the property in the immediately preceding year and the denominator of which is the true cash value of the property in the immediately preceding year.

(iv) A decrease in taxable value attributable to environmental contamination existing on the immediately preceding tax day. The department of environmental quality shall determine the degree to which environmental contamination limits the use of property based on information available in existing department of environmental quality records or information made available to the department of environmental quality if the appropriate assessing officer for a local tax collecting unit requests that determination. The department of environmental quality's determination of the degree to which environmental contamination limits the use of property shall be based on the criteria established for the classifications set forth in section 20120a(1) of part 201 (environmental remediation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being section 324.20120a of the Michigan Compiled Laws. The decrease in taxable value attributable to the contamination is the decrease in true cash value attributable to the contamination multiplied by a fraction the numerator of which is the taxable value of the property had it not been contaminated and the denominator of which is the true cash value of the property had it not been contaminated.

(i) For taxes levied after 1994, losses do not include decreased value attributable to either of the following:

(i) Platting, splits, or combinations of property.

(ii) A change in the zoning of property.

(j) "New construction and improvements" means additions less losses.

(k) "Current year" means the year for which the millage limitation is being calculated.

(l) "Inflation rate" means the ratio of the general price level for the state fiscal year ending in the calendar year immediately preceding the current year divided by the general price level for the state fiscal year ending in the calendar year before the year immediately preceding the current year.

(2) On or before the first Monday in May of each year, the assessing officer of each township or city shall tabulate the tentative taxable value as approved by the local board of review and as modified by county equalization for each classification of property that is separately equalized for each unit of local government and provide the tabulated tentative taxable values to the county equalization director. The tabulation by the assessing officer shall contain additions and losses for each classification of property that is separately equalized for each unit of local government or part of a unit of local government in the township or city. If as a result of state equalization the taxable value of property changes, the assessing officer of each township or city shall revise the calculations required by this subsection on or before the Friday following the fourth Monday in May. The county equalization director shall compute these amounts and the current and immediately preceding year's taxable values for each classification of property that is separately equalized for each unit of local government that levies taxes under this act within the boundary of the county. The county equalization director shall cooperate with equalization directors of neighboring counties, as necessary, to make the computation for units of local government located in more than 1 county. The county equalization director shall calculate the millage reduction fraction for each unit of local government in the county for the current year. The financial officer for each taxing jurisdiction shall calculate the compounded millage reduction fractions beginning in 1980 resulting from the multiplication of successive millage reduction fractions and shall recognize a local voter action to increase the compounded millage reduction fraction to a maximum of 1 as a new beginning fraction. Upon request of the superintendent of the intermediate school district, the county equalization director shall transmit the complete computations of the taxable values to the superintendent of the intermediate school district within that county. At the request of the presidents of community colleges, the county equalization director shall transmit the complete computations of the taxable values to the presidents of community colleges within the county.

(3) On or before the first Monday in June of each year, the county equalization director shall deliver the statement of the computations signed by the county equalization director to the county treasurer.

(4) On or before the second Monday in June of each year, the treasurer of each county shall certify the immediately preceding year's taxable values, the current year's taxable values, the amount of additions and losses for the current year, and the current year's millage reduction fraction for each unit of local government that levies a property tax in the county.

(5) The financial officer of each unit of local government shall make the computation of the tax rate using the data certified by the county treasurer and the state tax commission. At the annual session in October, the county board of commissioners shall not authorize the levy of a tax unless the governing body of the taxing

jurisdiction has certified that the requested millage has been reduced, if necessary, in compliance with section 31 of Article IX of the state constitution of 1963.

(6) The number of mills permitted to be levied in a tax year is limited as provided in this section pursuant to section 31 of Article IX of the state constitution of 1963. A unit of local government shall not levy a tax rate greater than the rate determined by reducing its maximum rate or rates authorized by law or charter by a millage reduction fraction as provided in this section without voter approval.

(7) A millage reduction fraction shall be determined for each year for each local unit of government. For ad valorem property taxes that became a lien before January 1, 1983, the numerator of the fraction shall be the total state equalized valuation for the immediately preceding year multiplied by the inflation rate and the denominator of the fraction shall be the total state equalized valuation for the current year minus new construction and improvements. For ad valorem property taxes that become a lien after December 31, 1982 and through December 31, 1994, the numerator of the fraction shall be the product of the difference between the total state equalized valuation for the immediately preceding year minus losses multiplied by the inflation rate and the denominator of the fraction shall be the total state equalized valuation for the current year minus additions. For ad valorem property taxes that are levied after December 31, 1994, the numerator of the fraction shall be the product of the difference between the total taxable value for the immediately preceding year minus losses multiplied by the inflation rate and the denominator of the fraction shall be the total taxable value for the current year minus additions. For each year after 1993, a millage reduction fraction shall not exceed 1.

(8) The compounded millage reduction fraction for each year after 1980 shall be calculated by multiplying the local unit's previous year's compounded millage reduction fraction by the current year's millage reduction fraction. Beginning with 1980 tax levies, the compounded millage reduction fraction for the year shall be multiplied by the maximum millage rate authorized by law or charter for the unit of local government for the year, except as provided by subsection (9). A compounded millage reduction fraction shall not exceed 1.

(9) The millage reduction shall be determined separately for authorized millage approved by the voters. The limitation on millage authorized by the voters on or before May 31 of a year shall be calculated beginning with the millage reduction fraction for that year. Millage authorized by the voters after May 31 shall not be subject to a millage reduction until the year following the voter authorization which shall be calculated beginning with the millage reduction fraction for the year following the authorization. The first millage reduction fraction used in calculating the limitation on millage approved by the voters after January 1, 1979 shall not exceed 1.

(10) A millage reduction fraction shall be applied separately to the aggregate maximum millage rate authorized by a charter and to each maximum millage rate authorized by state law for a specific purpose.

(11) A unit of local government may submit to the voters for their approval the levy in that year of a tax rate in excess of the limit set by this section. The ballot question shall ask the voters to approve the levy of a specific number of mills in excess of the limit. The provisions of this section do not allow the levy of a millage rate in excess of the maximum rate authorized by law or charter. If the authorization to levy millage expires after 1993 and a local governmental unit is asking voters to renew the authorization to levy the millage, the ballot question shall ask for renewed authorization for the number of expiring mills as reduced by the millage reduction required by this section. If the election occurs before June 1 of a year, the millage reduction is based on the immediately preceding year's millage reduction applicable to that millage. If the election occurs after May 31 of a year, the millage reduction shall be based on that year's millage reduction applicable to that millage had it not expired.

(12) A reduction or limitation under this section shall not be applied to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments or contract obligations in anticipation of which bonds are issued that were authorized before December 23, 1978, as provided by former section 4 of chapter I of the municipal finance act, Act No. 202 of the Public Acts of 1943, or to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments or contract obligations in anticipation of which bonds are issued that are approved by the voters after December 22, 1978.

(13) If it is determined subsequent to the levy of a tax that an incorrect millage reduction fraction has been applied, the amount of additional tax revenue or the shortage of tax revenue shall be deducted from or added to the next regular tax levy for that unit of local government after the determination of the authorized rate pursuant to this section.

(14) If as a result of an appeal of county equalization or state equalization the taxable value of a unit of local government changes, the millage reduction fraction for the year shall be recalculated. The financial officer shall effectuate an addition or reduction of tax revenue in the same manner as prescribed in subsection (13).

(15) The fractions calculated pursuant to this section shall be rounded to 4 decimal places, except that the inflation rate shall be computed by the state tax commission and shall be rounded to 3 decimal places. The state tax commission shall publish the inflation rate before March 1 of each year.

(16) Beginning with taxes levied in 1994, the millage reduction required by section 31 of Article IX of the state constitution of 1963 shall permanently reduce the maximum rate or rates authorized by law or charter. The reduced maximum authorized rate or rates for 1994 shall equal the product of the maximum rate or rates authorized by law or charter before application of this section multiplied by the compound millage reduction applicable to that millage in 1994 pursuant to subsections (8) to (12). The reduced maximum authorized rate or rates for 1995 and each year after 1995 shall equal the product of the immediately preceding year's reduced maximum authorized rate or rates multiplied by the current year's millage reduction fraction and shall be adjusted for millage for which authorization has expired and new authorized millage approved by the voters pursuant to subsections (8) to (12).

[FN1] Section 211.27a.

[FN2] Section 211.154.

[FN3] Section 211.27.

[FN4] Section 211.7u.

[FN5] Section 211.7k.

THE POTENTIAL IMPACT OF THE 2000 DECENNIAL CENSUS ON POPULATION-BASED STATUTES: A REPORT TO THE MICHIGAN LAW REVISION COMMISSION AND RECOMMENDATION TO THE LEGISLATURE

INTRODUCTION.

As the population of the City of Detroit continues to hover at the 1 million level, the results of the 2000 decennial census may have a profound financial and legal impact on the City of Detroit.

In anticipation of the 1990 decennial census, the Michigan Law Revision Commission undertook a study in 1990 of population-based statutes affecting the City of Detroit. That report (available from the Legislative Service Bureau) highlighted the negative financial impact on the City of Detroit if the 1990 census revealed that Detroit's population had dropped below 1 million persons. It noted that the Senate Fiscal Agency estimated that Detroit would lose approximately $140 million in state revenue granted to cities with a population greater than 1 million.

That 1990 report also noted that the population-based statutes do not have fallback provisions in the event a city's population drops below 1 million. Thus, for example, the statutory authorization to municipalities with a population over 1 million to issue general obligations bonds would lapse. See M.C.L. § 117.35a.

In the end, the official 1990 population census for Detroit was 1,027,974, obviating the need for a legislative response to those population-based statutes affecting the City of Detroit.

In addition to the Commission's 1990 report, in 1995 the Legislative Service Bureau conducted an exhaustive survey of Michigan statutes that classify and grant authority to local governments based on a unit's population enumeration. The Bureau identified 328 sections of law encompassing 60 major subject areas. The results of the LSB's research are available in a report entitled ***Population in Statute: How the Numbers Affect Government,*** vol. 15, no. 2 (July 1995).

THE 2000 DECENNIAL CENSUS.

The U.S. Census Bureau's population estimate for the City of Detroit as of July 1, 1996 is 1,000,272, a 2.7% decline from the 1990 census figure. If this downward trend continues, Detroit's 2000 population census will fall below 1 million. The following population-based statutes for cities with a population greater than 1 million will be impacted:

M.C.L. § 16.711	Appointment of one member to the Indian Affairs Commission
M.C.L. § 38.1140i	Investment of assets of public employee retirement systems
M.C.L. § 117.5i	Authority to finance snow removal and certain other services by special assessment
M.C.L. § 120.105	Appointment of two members to port authority
M.C.L. § 125.74	Requirement to adopt an ordinance governing selection of members to the blighted area Rehabilitation Citizen's District Council
M.C.L. § 125.583b	Prohibition against licensing certain residential facilities within 3,000 feet of existing facilities
M.C.L. § 125.585	Requirement of two-thirds vote of members of boards and commissions to reverse order of administrative official
M.C.L. § 125.1607	Power of economic development corporation to combine costs of pollution control projects into single financing arrangement
M.C.L. § 125.1662	Power of downtown development authority to levy a 1 mill ad valorem tax
M.C.L. § 141.425	Requirement that city have an annual audit
M.C.L. § 141.503	Authority to levy and collect income tax of 2% on corporations, 3% on residents, and 1.5% on non-residents
M.C.L. § 141.1152	Authority to impose a city utility users tax
M.C.L. § 168.426a	Nomination and election of municipal court judges
M.C.L. § 168.640	Special elections
M.C.L. § 207.655	Tax exemption of restored facility in an area covered by a tax increment financing plan adopted by a downtown development authority
M.C.L. § 213.321	Prohibition against establishing state agency relating to relocation assistance that removes citizen participation
M.C.L. § 324.11547	Eligibility for environmental protection planning grants
M.C.L. § 408.773	Provisions of Boiler Act inapplicable

M.C.L. § 431.68	Definition of "city area" in the racing law of 1980
M.C.L. § 487.505	Bank reserve requirements
M.C.L. § 559.241	Prohibition against conversion condominiums

RECOMMENDATION TO THE LEGISLATURE.

The Commission recommends that the Senate and House Committees with jurisdiction over the specific subject areas covered in the above-referenced statutes examine them in 1999.

RECENT COURT DECISIONS IDENTIFYING STATUTES FOR LEGISLATIVE ACTION: A REPORT TO THE MICHIGAN LAW REVISION COMMISSION AND RECOMMENDATIONS TO THE LEGISLATURE

I. Introduction.

As part of its statutory charge to examine current judicial decisions for the purpose of discovering defects in the law and to recommend needed reform, the Michigan Law Revision Commission undertook a review of eight Michigan Court of Appeals' opinions and one Michigan Supreme Court decision. These nine cases identify statutes and common law rules as candidates for legislative reform. The eight Court of Appeals' opinions are:

Parker v. Board of Education of the Byron Center Public Schools, 229 Mich. App. 565, 582 N.W.2d 859 (1998)(no statute of limitations for sexual misconduct charges in teacher dismissal hearings)

Van v. Zahorik, 227 Mich. App. 90, 575 N.W.2d 566 (1997)(extension of the equitable parent doctrine)

Omne Financial, Inc. v. Shacks, Inc., 226 Mich. App. 397, 573 N.W.2d 641 (1997)(validity of contractual choice-of-venue clause)

Haberl v. Rose, 225 Mich. App. 254, 570 N.W.2d 664 (1997)(tort liability of government employee while driving her own vehicle in the course of her government employment)

Freeman v. Hi Temp Products, Inc., 229 Mich. App. 92, 580 N.W.2d 918 (1998)(whether substantial compliance with dissolution notice provisions of Business Corporation Act is sufficient)

Williams v. Williams, 229 Mich. App. 318, 581 N.W.2d 777 (1998)(parental consent exception to eavesdropping statute).

Ramsey v. Kohl, 1998 WL 643092 (Sept. 18, 1998)(whether an insurer is entitled to assert a worker's compensation lien against the proceeds of a legal malpractice settlement)

Burchett v. RX Optical, 1998 WL 709329 (Oct. 9, 1998)(whether the Elliott-Larsen Civil Rights Act, the Handicappers' Civil Rights Act, or the Whistleblowers' Protection Act creates an independent cause of action for a person injured by the

deprivation of another person's rights under these three Acts)

The Michigan Supreme Court decision is *Oakland County Board of County Road Commissioners v. Michigan Property & Casualty Guaranty Association,* 456 Mich. 590, 575 N.W.2d 751 (1998)(whether the net-worth exclusion of M.C.L. § 500.7925 applies to public and governmental entities). The Michigan Supreme Court also issued two opinions in 1998 dealing with issues that the Commission previously considered in 1996.

The first opinion, *Nemeth v. Abonmarche Development, Inc.*, 457 Mich. 16, 576 N.W.2d 641 (1998), considered whether an award of attorneys fees should be deemed an aspect of costs under MEPA. The Supreme Court deferred that issue to the Legislature. In its 1996 Annual Report, the Commission took up this same question in its Report on Recent Court Decisions and recommended that the Legislature take no action.

In the second opinion, *Rogers v. Detroit,* 457 Mich. 125, 579 N.W.2d 840 (1998), the Supreme Court examined the question whether police officers should be immune from suit in actions brought by bystanders injured in a high-speed pursuit. The Court deferred that question to the Legislature. The Commission also took this issue up in 1996 in its Report on Recent Court Decisions and recommended that no action be taken by the Legislature.

II. Recommendation to the Legislature.

The Commission recommends that the Legislature review the contractual venue clause issue decided in *Omne Financial, Inc. v. Shacks, Inc.*, and clarify whether pre-dispute, contractual venue selection clauses are valid in Michigan.

With respect to the other Court of Appeals decisions and the one Supreme Court opinion discussed in this Report, the Commission recommends that the Legislature take no action.

III. No Limitations Period for Bringing Sexual Misconduct Charges in Teacher Dismissal Hearing.

A. Background.

In teacher dismissal proceedings brought under the teacher tenure act, M.C.L. §§ 38.71 *et seq.*; M.S.A. §§ 15.1971 *et seq.*, there is no statute of limitations regarding charges of sexual misconduct that are brought against a teacher. The State Tenure Commission considered this issue in *Matson v. City of Berkley School Dist. Bd. of Educ.* (88-25), and refused to allow evidence of sexual misconduct that took place twenty-three years before the filing of the charges. However, in two more recent cases, *Waara v. Van Buren Public Schools Bd. of Educ.* (93-33),

and *Bergerow v. Kentwood Public Schools Bd. of Educ.* (95-36), the Commission allowed evidence of sexual misconduct that allegedly occurred thirteen and twenty years, respectively, before the charges were filed.

In a related matter, *Lemmerman v. Fealk,* 449 Mich. 56; 534 N.W.2d 695 (1995), the Supreme Court considered limitations periods for civil actions brought by plaintiffs who alleged that they were sexually abused forty to fifty years before the actions were filed. In these "repressed memory" cases the Court determined that the policy goals of the statute of limitations to prevent stale, fraudulent, or speculative claims outweighed the plaintiffs' rights to maintain their claims because of the lack of objective verification and indicia of reliability for their underlying claims.

B. The *Parker* Decision.

The appellant Parker was discharged from his position as a tenured teacher by the Byron Center Public School District, based on allegations of sexual misconduct by a former student. Parker allegedly engaged in sexual contact with the student 16 years earlier. He denied the charges, but the State Tenure Commission affirmed his dismissal and rejected his statute of limitations defense.

The Court of Appeals distinguished the "repressed memory" cases on the basis that in the instant case the former student's memory had not been repressed. Rather, she had failed to come forward out of feelings of guilt.

C. Discussion.

Despite the Commission's decisions in the *Waara* and *Bergerow* cases noted above, the Legislature has not acted to include a statute of limitations in the teacher tenure act for charges relating to sexual misconduct. The Court of Appeals in *Parker* took this legislative inaction as tacit approval of the current state of the law. The Court thus declined to establish a bright-line time limit for bringing allegations of sexual misconduct under the teacher tenure act, particularly when the Legislature has chosen not to impose a statutory time limit. The Court added that the Commission's dismissal proceedings in this case were not only punitive but also prophylactic, i.e., to prevent this teacher from sexually abusing a student in the future. Finally, as far as the risk to a defendant of being unable to defend against stale claims, the Court stated that it is questionable whether conduct such as that engaged in by appellant would ever be too remote to support a tenured teacher's dismissal.

Question Presented

Should the Legislature amend the teacher tenure act by adding a statute of limitations for charges of teacher sexual misconduct?

Recommendation

The Commission recommends that the Legislature take no action.

IV. Codification and Extension of the Equitable Parent Doctrine to a Non-Biological Father Who Is Not Married to the Child's Mother.

A. Background.

The equitable parent doctrine originated in *Atkinson v Atkinson*, 160 Mich. App. 601, 408 N.W.2d 516 (1987). In the *Atkinson* case a child was born during the parties' marriage. Subsequently, the plaintiff husband, who was not the child's biological father, filed for divorce and sought custody or visitation of the child. The defendant wife defended on the ground that the plaintiff was not the biological father of the child. The trial court ruled that because of the lack of a biological relationship, the plaintiff did not have any parental rights. The Court of Appeals reversed and remanded, holding that, under the circumstances, the plaintiff was an equitable parent with rights equivalent to those of a biological parent.

An equitable parent is, in short, entitled to all rights and subject to all duties of a natural parent. However, the equitable parent doctrine has been applied in Michigan only in cases in which the child was born while the parties were married.

B. The *Van v. Zahorik* Decision.

Plaintiff and defendant were not married, but did cohabit from 1986 to 1991. Plaintiff claimed that although the parties ceased living together in 1991, they continued to have a "sporadic" relationship for several years. During the course of their relationship, two children were born, one in 1989 and the other in 1993. Plaintiff alleged that defendant told him that he was the father of the children. According to plaintiff, he cared for and supported both children during and after his relationship with defendant. However, plaintiff alleged that from the time he began a relationship with another woman, defendant denied him the opportunity to exercise his normal parenting time with the minor children. Plaintiff therefore filed a complaint seeking to establish his paternity.

In the paternity action defendant denied telling plaintiff that he was the father of the children. Blood tests confirmed that he was not in fact the biological father. Defendant moved for summary disposition, claiming that because plaintiff was not the biological father and could not establish that he was the equitable parent of the children, he had no parental rights. Plaintiff argued that he qualified as an equitable parent.

The Court of Appeals affirmed the trial court's ruling that because plaintiff and defendant

were never married, plaintiff had no grounds upon which to claim he was entitled to equitable relief in the form of parental rights.

C. Discussion.

The equitable parent doctrine has not been free from criticism, but remains good law in Michigan. *See York v. Morofsky,* 225 Mich. App. 333, 571 N.W.2d 524 (1997). Nevertheless. the Court of Appeals in *Van v. Zahorik* expressed reservations about the doctrine, suggesting that the existence and extent of such rights should be legislatively determined due to the social implications and public policy of such a decision. Considering that the Legislature has enacted a comprehensive statutory scheme governing children's rights in the Child Custody Act, M.C.L. §§ 722.21 *et seq.*; M.S.A. §§ 25.312(1) *et seq.*, expansive judicial action would infringe upon occupied, legislative ground. Accordingly, the Court of Appeals declined to extend the equitable parent doctrine to the facts of the *Van* case, noting that "as a general rule, making social policy is a job for the Legislature, not the courts. . . . In our opinion, accepting plaintiff's position would, in effect, contravene established policy of this state and establish a right with social implications more appropriately addressed by the Legislature."

Questions Presented

1. Should the equitable parent doctrine be legislatively repealed? Should it be codified?

2 If codified, should the equitable parent doctrine be extended to cover cases where the non-biological parent is not married to the natural parent of the child?

Recommendation

The Commission recommends that the Legislature take no action.

V. The Validity of Contractual Choice-of-Venue Clauses.

A. Background.

In Michigan, the venue statute applicable to contract claims, M.C.L. § 600.1621; M.S.A. § 27A.1621, has no express provision that allows parties to agree contractually to a venue other than the one provided for in the statute. Case law concerning venue adds two rules, namely, that venue is determined at the time a suit is filed, and agreements in which the parties stipulate a proper venue *after* a cause of action has arisen are valid.

B. The *Omne Financial* Decision.

In this case a lease provision selected Oakland County as the proper venue for any cause of action arising under the lease. When the lessee failed to satisfy the terms of the lease, Omne Financial filed suit in Oakland County per the terms of the contractual venue provision. The trial court denied defendant's motion that venue was improper.

The Court of Appeals reversed. It declined to create a rule that binds parties to a pre-dispute agreement on venue. The Court held that such provisions are not binding on Michigan courts and reversed and remanded for a determination whether venue was proper in Oakland County independent of the venue selection clause in the lease.

C. Discussion.

Despite the overarching rule of freedom of contract, the Court stated that it would be improper for a court to enforce a pre-dispute venue selection clause. In the Court's view, to permit parties to avoid by contract the statutory provisions regarding venue would undermine the power of the Legislature.

Cutting against the majority's position is the fact that the Legislature drafted the venue statute against the general backdrop of contract law that permits contracting parties to fashion their own bargain subject to rules on fraud, overreaching, adhesion contracts, and unconscionability. In addition, in Michigan parties are free to agree to pre-dispute forum selection and choice-of-law clauses. *See, e.g.*, M.C.L. § 600.475 (Michigan's version of the Model Choice of Forum Act that validates pre-dispute forum selection clauses). Finally, unless a defendant makes a timely objection, defects in venue are waived. Despite the waivability of the venue defense, the Court of Appeals essentially treats the venue statute as mandatory law in the pre-dispute context which binds the parties and limits their freedom of contract.

Question Presented

Should M.C.L. § 600.1621 be amended to authorize pre-dispute venue selection clauses?

Recommendation

The Commission recommends that the Legislature review the contractual venue clause issue decided in *Omne Financial, Inc. v. Shacks, Inc.*, and clarify whether pre-dispute, contractual venue selection clauses are valid in Michigan.

VI. The Applicability of Governmental Tort Immunity to Government Employees Who Drive Their Own Vehicles While on Government Business.

A. Background.

The Government Tort Liability Act, M.C.L. § 691.1407; M.S.A. § 3.996(107), grants broad immunity from liability to government employees for torts committed while performing a government function that do not amount to gross negligence. M.C.L. § 691.1405; M.S.A. § 3.996(105) does provide, however, that "Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . . "

B. The *Haberl* Decision.

Defendant Rose collided with plaintiffs' car while Rose was acting within the scope of her government employment but driving her own car. Haberl brought a negligence action against Rose for injuries sustained in the accident. While not contesting the negligence claim, Rose moved for summary disposition, arguing the claim was barred by governmental tort immunity. Plaintiff responded that defendant was not protected by governmental immunity because she was liable under the motor vehicle civil liability act, M.C.L. § 257.402, M.S.A. § 9.2101. The trial court entered judgment in Rose's favor based on a jury finding that defendant was acting in a governmental capacity. The Court of Appeals vacated the judgment and remanded the case for entry of a judgment on the jury's verdict of damages for the plaintiff.

The Court of Appeals summarized that "[t]here are really two parallel theories of liability here; defendant claims immunity from common-law negligence as the driver of the vehicle by virtue of MCL 691.1407; MSA 3.996(107) because she was a governmental employee in the course of her employment when the accident occurred. However, she enjoys no such immunity from the duties imposed on her as the owner of the vehicle by MCL 257.401(1); MSA 9.2101(1)." The Court continued that "were we to reach the result requested by defendant, the following anomalous results would follow: (1) if a government employee negligently caused an accident while driving a government-owned vehicle, the injured person would have redress against the owner of the vehicle, the government, MCL 691.1405; MSA 3.996(105); (2) if a government employee negligently caused an accident while driving a motor vehicle owned by a third person, the injured person would have redress against the owner of the vehicle, the third person, MCL 257.401; MSA 9.2101; (3) if, however, a government employee negligently caused an accident while driving a motor vehicle owned by that employee, the injured person would have no redress."

The Court held that such a result would be directly counter to the policy of the government-owned vehicle exception, M.C.L. § 691.1405; M.S.A. § 3.996(105). If such an immunity is intended for government employees driving their own vehicles in the course of their government employment, then the Legislature is responsible for such a change.

Question Presented

Should M.C.L. § 691.1407(2) be amended to provide government employees with immunity from tort liability for negligence as vehicle owners?

Recommendation

The Commission recommends that the Legislature take no action.

VII. Substantial Compliance With the Dissolution Notice Provisions of the Business Corporation Act.

A. Background.

Michigan businesses may dissolve under the Business Corporation Act (BCA), M.C.L. § 450.1842; M.S.A. § 21.200. A business dissolved under the BCA may notify current and potential claimants against the business either by mail stating a deadline for filing a claim, or by publication limiting allowable claims to one year from the date of publication. The notice of dissolution must be posted after the business certificate of dissolution as a Michigan business corporation is filed with the Bureau of Corporations and Securities. Any claims against the dissolved business filed more than one-year after the date of notice are disallowed.

B. The *Freeman* Decision.

High Temp Products submitted to the Bureau of Corporations and Securities its certificate of dissolution on October 14, 1993. The certificate was not stamped "filed" until October 25, 1993. High Temp Products sent mail notice to known creditors and claimants, including the plaintiffs, before October 25, 1993. Similarly, newspaper notice of the dissolution was published on October 25, 1993. All claims in the present case were filed sometime after October 25, 1994. Hi Temp Products' motion for summary disposition on the ground of the BCA one-year statute of limitations was denied.

The Court of Appeals affirmed the circuit court's order. The Court held that unless publication occurred or notice was sent to plaintiffs *after* the certificate of dissolution was filed, such publication or notice is invalid. High Temp Products' argument that the submission of the certificate of dissolution for filing on October 14, 1993, was substantial compliance with the statutory requirement was rejected because it was not explicitly provided for in the statute. The Court concluded that "[i]f the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written."

C. Discussion.

In order for a corporation that has dissolved to take advantage of the protections against creditors' claims afforded by the BCA, it must furnish or publish notice "at any time after the effective date of dissolution." The BCA provides that the dissolution of a corporation "shall be effected by the filing of a certificate of dissolution on behalf of the corporation."

The statute clearly requires notice after filing, and that filing is accomplished when the document is endorsed and stamped "filed."

Question Presented

Should a rule of substantial compliance be added to the Business Corporation Act in connection with filing procedures for dissolution?

Recommendation

The Commission recommends that the Legislature take no action.

VIII. A Parental Consent Exception to the Eavesdropping Statute.

A. Background.

The Michigan eavesdropping statute, M.C.L. §§ 750.539 *et seq.*; M.S.A. §§ 28.807 *et seq.*, makes it a felony to electronically eavesdrop on a conversation without the consent of all the parties thereto. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, makes electronic eavesdropping punishable "(e)xcept as otherwise specifically provided in this chapter." One such exception is if a party to the conversation consents to the interception of the conversation.

Courts in Utah, Alabama, Kentucky, Mississippi, and West Virginia have extended the consent exception to include vicarious consent by a parent on behalf of a minor child to intercepting and using communications with a third party where such action is in the child's best interests.

B. The *Williams* Decision.

The defendant tape-recorded telephone calls between his son and the plaintiff, the boy's mother, neither of whom were aware of the recordings. Upon learning of the tape recordings, plaintiff filed a three-count action, claiming violations of the federal wiretapping act, the

Michigan eavesdropping statute, and the common-law tort of invasion of privacy. The defendant, who had sole legal and physical custody of his son at the time of the tape recording, argued that he had the authority to give consent on Jason's behalf to the interception of the telephone conversations. The trial court granted the father's motion for summary disposition.

The Court of Appeals reversed. It rejected the defendant's argument that the conversations should not be considered "the private discourse of others," the phrase used in the Michigan eavesdropping statute, because defendant was a vicarious participant in the conversation, i.e., "a party to the communication," by virtue of his role as custodial parent. Noting that statutory construction requires determining the Legislature's intent, the Court found no indication in the Michigan eavesdropping statute that the Legislature intended to create a parental consent exception for conversations involving minor children. "Unlike the judiciary," the Court added, "the legislative branch of government is able to hold hearings and sort through the competing interests and policies at stake."

C. Discussion.

The Michigan eavesdropping statute clearly requires the "consent of all parties thereto." There is no indication that the Legislature intended to create an exception for a custodial parent of a minor child to consent on the child's behalf to interceptions of conversations between the child and a third party. Similarly, the federal wiretapping act states that any exceptions to its prohibitions are "specifically provided in this chapter." 18 U.S.C. § 2511(1).

Question Presented

Should the Michigan eavesdropping statute be amended to include an exception that permits a custodial parent of a minor child to consent on the child's behalf to interceptions of conversations between the child and a third party?

Recommendation

The Commission recommends that the Legislature take no action.

IX. Whether An Insurance Carrier That Has Paid Worker's Compensation Benefits Has a Lien in the Form of A Legal Malpractice Action Against the Attorneys Who Allegedly Mishandled the Injured Worker's Personal Injury Lawsuit.

A. Background.

As a general matter, an employer or worker's compensation insurance carrier that has paid out benefits to an injured employee has a statutory entitlement to reimbursement from any

recovery that the employee ultimately obtains in a third-party tort action. See M.C.L. § 418.827, M.S.A. § 17.237(827). Reimbursement is allowed only where the compensable injury was caused under circumstances creating liability in a third party, and only to the extent that the benefits were paid for the same injury.

B. The *Ramsey* Decision.

Plaintiff Ramsey filed a worker's compensation claim against his employer for injuries suffered due to exposure to industrial chemicals. He received $65,000 in benefits. Subsequently, Ramsey hired the Kohl law firm to pursue a products liability claim against the manufacturer of the chemicals. His lawsuit was dismissed for failure to properly serve the complaint.

Ramsey thereafter brought a legal malpractice lawsuit against the Kohl firm. The worker's compensation insurance carrier moved to intervene in the legal malpractice action, but its motion was denied. Ramsey settled with the law firm for $335,000.

In a case of first impression, the Court of Appeals rejected the insurance carrier's argument that it had a statutory lien against any recovery Ramsey received in his legal malpractice action. Turning to the specific language of the worker's compensation statute, and employing the plain meaning rule of statutory construction, the Court held that the language of the statute was clear: worker's compensation liens are limited to those third-party actions in which recovery is sought from persons liable for causing the injury for which compensation was payable. Because Ramsey's lawyers did not cause the injury for which compensation was paid, no statutory lien could be placed on the legal malpractice settlement.

C. Discussion.

Despite the general policy against multiple recoveries for the same injury reflected in the worker's compensation statute, the Court of Appeals in *Ramsey* declined to enforce the general policy suggested by the statute at the expense of the specific language of the statute. Courts in other jurisdictions have split on this issue. Some courts have permitted such liens based on the general policy of the worker's compensation statute (the 7th Circuit, Massachusetts, New Jersey, Oregon). Other courts have rejected this argument because of the absence of express statutory language authorizing such liens under these circumstances (Arizona, Illinois, and Iowa).

Question Presented

Should the Worker's Compensation Act be amended to authorize liens against legal malpractice recoveries stemming from the compensable injury?

Recommendation

The Commission recommends that the Legislature take no action.

X. Derivative Liability Under the Elliott-Larsen Civil Rights Act, the Handicappers' Civil Rights Act, and the Whistleblowers' Protection Act.

A. Background.

The Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101, M.S.A. § 3.548(101), prohibits discrimination on the basis of sex, race, national origin, religion, height, weight, or marital status in employment, housing, use of public accommodations, public service, and educational facilities.

The Handicappers' Civil Rights Act parallels Elliott-Larsen, and extends the protection of Elliott-Larsen to person with handicaps. The HCRA has the same purposes and the identical civil enforcement provisions as Elliott-Larsen. The Court of Appeals treats claims under the HCRA in a manner similar to those brought under Elliott-Larsen.

The Whistleblowers' Protection Act is designed to protect employees who report violations of the law to a public body. The civil enforcement provision of the WPA is substantively the same as those of Elliott-Larsen and the HCRA.

None of the three laws expressly creates a derivative right of action.

B. The *Burchett* Decision.

Burchett was terminated from her employment for allegedly complaining about her employer's purported violations of the wage and hour laws. On the day Burchett informed the owner that their wage and hour practices were illegal, she experienced vaginal bleeding. The next week, she was placed on a two-week disability leave. Before the end of that two-week period, she was discharged by her employer allegedly for having a bad attitude. She filed a lawsuit against her former employer alleging violations of Elliott-Larsen, the HCRA, and the WPA. Following the premature birth of her son, she amended her complaint naming her son as a party, alleging that his birth was premature as a result of stress brought on by her employer, and seeking damages under these three acts for his prenatal injuries.

The Court of Appeals rejected Burchett's claims on behalf of her son. Recognizing that remedial statutes are to be liberally construed to suppress the evil and advance the remedy, the Court was nevertheless constrained to conclude that nowhere in the language of these three laws could one find legislative intent authorizing derivative causes of action. Because the conduct

complained of under the three Acts was directed at Burchett and not her son, the Court concluded that Burchett's son cannot maintain a cause of action against the defendant under Elliott-Larsen, the HCRA, or the WPA. The Court added that "because these areas of the law have been so extensively addressed by the Legislature, we are not prepared to recognize a new derivative cause of action in the area of civil rights or the WPA for prenatal injuries inflicted upon the child of the person whose rights were violated."

C. Discussion.

This case raises an issue distinct from the one addressed by the Michigan Supreme Court in *Eide v. Kelsey-Hayes Co.*, 431 Mich. 26 (1988). There, the Court was asked to decide whether a derivative claim for loss of consortium could be brought under Elliott-Larsen. The Court noted that a claim for loss of consortium exists at common law and needs no statutory authorization. The only question was whether Elliott-Larsen repealed the common law action for loss of consortium when the loss of society and companionship arises from alleged violations of the civil rights act. The Court concluded that there was nothing in Elliott-Larsen that precluded a derivative action for loss of consortium.

The Commission notes that in 1998 the Legislature enacted P.A. 211, codified at M.C.L. § 600.2922a, that authorizes a civil damages action against "[a] person who commits a wrongful or negligent act against a pregnant individual . . . if the act results in a miscarriage or stillbirth by that individual or physical injury to the embryo or fetus."

Question Presented

Should the Elliott-Larsen Civil Rights Act, the Handicappers' Civil Rights Act, and the Whistleblowers' Protection Act be amended to allow a derivative claim for injuries suffered as a consequence of the violation of these Acts?

Recommendation

The Commission recommends that the Legislature take no action.

XI. The Applicability of the "Net-Worth" Exclusion of the Property and Casualty Guaranty Association Act to Public and Governmental Entities.

A. Background.

The Property and Casualty Guaranty Association Act (PCGAA) was enacted to protect insureds and third-party claimants who rely on the existence of insurance but whose insurer becomes insolvent and is unable to provide indemnification. The PCGAA is designed to serve as

a safety net. However, claims from insureds whose net worth exceeds a statutory limit (explained below) are excluded because they are able to absorb the loss.

Between 1981 and 1985 the Oakland County Road Commission carried general liability insurance through Midland Insurance Co. During that period personal injury claims were made against the Road Commission. In 1986, Midland became insolvent and liquidated. The Road Commission paid the third-party claims and sought indemnification from the Michigan Property and Casualty Guaranty Association (MPCGA). The MPCGA is a statutorily-created association of insurers whose duty it is to pay certain obligations of insolvent insurers. The MPCGA denied the Road Commission's claims for indemnification on the ground that the Commission's net worth ($18,446,051) was greater than 1/10 of 1% of the aggregate premiums written by MPCGA member insurers in the state in the preceding calendar year ($5,820,973), thus making the Commission's claim one that is not covered under the PCGAA.

B. The *MPCGA* Decision.

In the Supreme Court, MPCGA maintained that it had no duty to reimburse the Road Commission because the Commission's net worth exceeded the statutory maximum and, therefore, its claims were not covered under the Act, M.C.L. § 500.7925(3), M.S.A. § 24.17925(3). For purposes relevant to this Report, the Supreme Court addressed two issues of statutory interpretation: (1) whether the "net worth" exclusion of the PCGAA applies to insureds or to third-party claimants, and (2) whether the Road Commission is a "person" within the meaning of the PCGAA claim exclusion provision.

The Supreme Court agreed with the MPCGA that the net-worth exclusion applies to insureds, not to third-party claimants; that the Road Commission is a person covered under the PCGAA; and that its claim is not covered because its net worth exceeds the 1/10 of 1% statutory limit. In response to the Road Commission's assertion that it was not covered under the net-worth exclusion because it is not a "person" within the meaning of the Act, the Court stated that the Commission was essentially arguing that the Legislature made an unwise decision by providing for the application of the term "person" to public and governmental entities. Arguments that a statute is unwise or results in bad policy should be addressed to the Legislature, the Court concluded.

Question Presented

Should the PCGAA be amended to except governmental entities from the net-worth exclusion of the Act?

Recommendation

The Commission recommends that the Legislature take no action.

PRIOR ENACTMENTS PURSUANT TO MICHIGAN LAW REVISION COMMISSION RECOMMENDATIONS

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

1967 Legislative Session

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

1996 Legislative Session

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

1998 Legislative Session

Subject	Commission Report	Act No.
Repeal of Article 6 of the Uniform Commercial Code	1994, p. 111; 1997, p. 131	489
Uniform Fraudulent Transfer Act	1988, p. 13	434
Uniform Trade Secrets Act	1993, p. 7	448

BIOGRAPHIES OF COMMISSION MEMBERS AND STAFF

RICHARD D. McLELLAN

Richard D. McLellan is the head of the Government Policy and Practice Group of Dykema Gossett PLLC, a Michigan-based law firm. He is responsible for the firm's public policy, administrative law and lobbying practices in Lansing and Washington, D.C.

In addition to serving as Chairman of the Michigan Law Revision Commission, Mr. McLellan serves as a Trustee of the Detroit College of Law at Michigan State University, the Mackinac Center for Public Policy, the Oxford Foundation, the Cornerstone Foundation, the Michigan Information Technology Network and the Library of Michigan Foundation. He is a member of the Board of Governors of the Cranbrook Institute of Science and a director of the Chief Okemos Council of the Boy Scouts of America.

He is also a member of the Michigan Jobs Commission and was previously appointed by the Governor as a member and secretary of the Michigan International Trade Authority, Chairman of the Michigan Corrections Commission and a member of the Library of Michigan Board of Trustees.

Mr. McLellan is a former Chairman of the Board of Directors of the Michigan Chamber of Commerce and President of the Michigan/Japan Foundation.

In 1990, Mr. McLellan was appointed by President George Bush as a Presidential Observer to the elections in the People's Republic of Bulgaria. The elections were the first free elections in the country following 45 years of Communist rule.

Following the 1990 elections, Mr. McLellan was named Transition Director to then Governor-elect John Engler. In that capacity, he assisted in the formation of Governor Engler's Administration.

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

Mr. McLellan is a member of the Board of Directors of the Mercantile & General Life Reassurance company of America and a Trustee of JNL Series Trust, a subsidiary of the Jackson National Life Insurance Company and Chairman of the Michigan Competitive Telecommunications Providers Association, a trade association of telecommunications companies.

ANTHONY DEREZINSKI

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

Mr. Derezinski is Director of government relations and policy services for the Michigan Association of School Boards. He also is an adjunct professor of law at The University of Michigan Law School.

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

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is a member of the Board of Regents of Eastern Michigan University, and also of the Board of the Michigan Theater Foundation.

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, and the Michigan Council of School 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 and was nominated by her colleagues and appointed by the Michigan Supreme Court to serve as Chief Judge of the Court of Appeals, effective January 1, 1997.

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.

GEORGE E. WARD

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

Mr. Ward has been the Chief Assistant Prosecuting Attorney in Wayne County since January 1986. Prior to this, he was a clerk to a justice of the Michigan Supreme Court and in private civil practice for twenty years in the City of Detroit.

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

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

BILL BULLARD, JR.

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

Mr. Bullard is a Republican State Senator representing the 15th Senatorial District. He was first elected to the Michigan House of Representatives in 1982 and served in that body until his election to the Senate in June 1996. He is currently Chairman of the Senate Government Operations Committee and also serves on the Education, Health Policy and Senior Citizen Committees.

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

Mr. Bullard is the recipient of the first annual "Legislator of the Year" award from the Michigan Townships Association and also the Guardian Award from the National Federation of Independent Business.

GARY PETERS

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

Mr. Peters is a Democrat State Senator representing the 14th Senatorial District. He was elected to the Michigan Senate in November 1994. He serves as Vice Chair of the Senate Finance Committee, and a member of the Education, Judiciary, and Families, Mental Health and Human Services Committees.

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

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

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

Mr. Peters' community involvement includes serving on the Board of Directors for Common Cause of Michigan, a member of the Environmental Policy Advisory Committee for the Southeast Michigan Council of Governments (SEMCOG) and as Chair of the Air Issues Committee for the Michigan Sierra Club.

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

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 Vice-Chair of the House Judiciary Committee and serves on the Corrections and Agriculture Committees.

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.

He is a member of the Michigan Sentencing Guidelines Commission, a member of the Trial Court Assessment Commission, and Chairman of the American Legislative Exchange Council (ALEC) Task Force on Criminal Justice. He has received the Michigan Aeronautics Commission's Individual Award of Excellence (1996), and the Michigan Association of Counties special award for court reform legislation.

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.

TED WALLACE

Mr. 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 State Representative representing the 5th House District. He was first elected to the Michigan House in November 1988. He is a member of the Michigan Sentencing Guidelines Commission, and serves in the House as an Assistant Floor Leader. He is also the Democratic Vice-Chair of the House Judiciary and Civil Rights Committee and a member of the House Tax Policy Committee.

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 is the immediate-past Chairman of the Michigan Legislative Black Caucus. He serves as Parliamentarian for the National Black Caucus of State Legislators.

Representative Wallace is married and has three children.

DIANNE M. ODROBINA

Since January 1996, Ms. Odrobina, as the Legislative Council Administrator, has served as the ex-officio member of the Michigan Law Revision Commission. The following agencies fall under her supervision: Legislative Service Bureau, Library of Michigan, Legislative Council Facilities Agency, Joint Committee on Administrative Rules staff, Legislative Corrections Ombudsman, Michigan Law Revision Commission, Commission on Uniform State Laws, and the Sentencing Commission. She also serves as a member of the Library of Michigan Board of Trustees and Foundation Board.

Ms. Odrobina has served the Michigan Legislature in several capacities since 1991, serving as the Director of the Senate Majority Policy Office from February 1993 to January 1996. She was previously an Assistant Prosecuting Attorney for Wayne County, attorney for Macomb County Friend of the Court, and in private practice.

Ms. Odrobina holds the degrees of Bachelor of Arts in Political Science from Michigan State University, Master of Business Administration from the University of Detroit, and Juris Doctor from Wayne State University.

KEVIN C. KENNEDY

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

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

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

Mr. Kennedy is the author of more than thirty law review articles concerning international law, international trade, and civil procedure.

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.