38th Annual Report 2003

Michigan Law Revision Commission

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Michigan
Law Revision Commission

THIRTY-EIGHTH ANNUAL REPORT
2003

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MICHIGAN LAW REVISION COMMISSION
Thirty-Eighth Annual Report to the Legislature
for Calendar Year 2003

To the Members of the Michigan Legislature:

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

The Commission, created by section 401 of 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 2003 were Senator Michael D. Bishop of Rochester; Senator Hansen Clarke of Detroit; Representative Edward J. Gaffney of Grosse Pointe Farms; and Representative Stephen F. Adamini of Marquette. As Legislative Council Administrator, John G. Strand was the ex-officio member of the Commission. The appointed members of the Commission were Richard D. McLellan, Anthony Derezinski, William C. Whitbeck, and George E. Ward. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Kevin C. Kennedy of Michigan State University - Detroit College of Law served as Executive Secretary. Gary B. Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 2003 Commission members and staff are located at the end of this report.

The Commission's Work in 2003

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 2003, the Commission held meetings on the topic of the use of technology to conduct government meetings. A recommendation is included. In 2003, the Commission also examined the Governor's power to remove public officials from office and several recent court opinions suggesting legislative action. The Commission's recommendations regarding those laws and opinions are set forth in the body of this report.

Proposals for Legislative Consideration in 2004

The Commission continues to recommend favorable consideration of the following recommendations of past years upon which no final action was taken by the Legislature in 2003:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(19) Examine the statutory definition of "future damages," 2002 Annual Report, page 54.

(20) Amend the provisions on adequacy of notice to trigger the statutory redemption period, 2002 Annual Report, page 58.

(21) Examine the provisions of the Sex Offenders Registration Act regarding public disclosure of a juvenile sex offender's record upon reaching the age of majority, 2002 Annual Report, page 60.

(22) Examine the "household exclusion" provision of MCL § 500.3123(1)(b), 2002 Annual Report, page 48.

(23) Examine MCL §§ 421.27(f)(1) and 421.27(f)(5) regarding coordination of pension and unemployment benefits, 2002 Annual Report, page 52.

Current Study Agenda

Topics on the current study agenda of the Commission are:

(1) Declaratory Judgment in Libel Law/Uniform Correction or Clarification of Defamation Act.
(2) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal).

(3) Health Care Consent for Minors.
(4) Health Care Information, Access, and Privacy.
(5) Uniform Statutory Power of Attorney.
(6) Uniform Arbitration Act.
(7) Legislation Concerning Teleconference Participation in Public Meetings.
(8) Michigan Legislation Concerning Native American Tribes.
(9) Revisions to Michigan's Administrative Procedures Act and to Procedures for Judicial Review of Agency Action.
(10) Intergovernmental Agreements under the Michigan Constitution, Art III, § 5.
(11) Electronic Transactions.
(12) Termination of Parental Rights of Biological Fathers.
(13) Government Ethics Legislation.
(14) Publishing Updates of Executive Branch Reorganizations.
(15) Uniform Nonjudicial Foreclosure Act.
(16) Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are at Michigan State University - Detroit College of Law, East Lansing, Michigan 48824. The Executive Secretary of the Commission is Professor Kevin Kennedy, who was responsible for the publication of this report. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions. At the end of this report, the Commission provides a list of more than 120 Michigan statutes passed since 1967 upon the recommendation of the Commission.

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

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

Respectfully submitted,

Richard D. McLellan, Chairman
Anthony Derezinski, Vice Chairman
William C. Whitbeck
George E. Ward
Senator Michael D. Bishop
Senator Hansen Clarke
Representative Edward J. Gaffney
Representative Stephen F. Adamini
John G. Strand

A RESOLUTION HONORING GARY B. GULLIVER

A resolution to honor and thank Gary B. Gulliver.

Whereas, It is with deep appreciation for his excellent work in a variety of capacities with the Michigan Legislature that we commend Gary B. Gulliver upon the occasion of his retirement from state service. We are especially grateful for his exemplary dedication to the mission and responsibilities of the Michigan Law Revision Commission over the past 20 years; and

Whereas, A graduate of Albion College and the Wayne State University Law School, Gary Gulliver began his efforts with lawmaking in Michigan when he joined the legal staff of the Legislative Service Bureau in 1974. Since that time, his abiding respect for the role of the law in society and his keen legal mind have been put to good use in the drafting of legislation and as the Director of the Legal Research Division since 1984; and

Whereas, Gary Gulliver brought his understanding of the legislative process to the Michigan Law Revision Commission in 1984. He has earned the respect of commission members through his knowledge and cooperative spirit. While quick to express gratitude for the leadership provided by the two chairs with whom he has worked, Tom Downs and Richard McClellan, Gary has also contributed significantly to the stability and quality of the commission's work. His talents and belief in the goals of the Law Revision Commission will long be remembered; now, therefore, be it

Resolved by the membership of the Michigan Law Revision Commission, That we offer our thanks and best wishes to Gary B. Gulliver upon his retirement from state service and two decades of commitment to this commission.

A REPORT ON THE USE OF TECHNOLOGY TO CONDUCT GOVERNMENT MEETINGS AND RECOMMENDATION TO THE LEGISLATURE

I. INTRODUCTION

This report examines the possible ways that technology could be employed by state government to conduct government meetings, conferences, and hearings. It analyzes the current open meetings legal regime in Michigan and elsewhere to determine the extent to which the use of electronic communication would comply with the law in its current state. Employing such technology has the potential not only for making the conduct of government business more efficient and more accessible to the public, but also for making it more cost effective, an important consideration in a time of a serious state budget crisis.

While the technology to engage in digital deliberation[1] is widely available, any use of such a tool would have to conform with state law requiring access to government meetings and documents. The most important of these is the Open Meetings Act.[2] This report thus considers the possibility of amending current law to allow for full utilization of existing and future technologies, while fully maintaining regard for the overriding public policy of promoting "openness and accountability in government."[3]

The report is divided into five parts. Following the introduction in Part I, Part II examines the different types of telecommunication technology currently available and the differences between them. Part III reviews Michigan case law and opinions of the Attorney General interpreting the Open Meetings Act in order to determine what kinds of electronic communication would and would not comply with the statute. Part IV looks at how other states have dealt with the use of technology under their open meetings or "sunshine" laws. Part V contains an analysis and recommendation to the Legislature.

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[1] The expression "digital deliberation" is sometimes used to describe the process of using the latest telecommunication technology to carry on a meeting with members not physically present at the meeting (referred to as "virtual presence"). *See* Jessica M. Natale, *Exploring Virtual Legal Presence: The Present and the Promise*, 1 J. HIGH TECH. L. 157 (2002).

[2] M.C.L. § 15.261 *et seq.*

[3] *See Booth Newspapers, Inc.* v *Univ. of Michigan Bd. of Regents*, 192 Mich. App. 574 (1992).

II. TECHNOLOGY AND ITS USES

The purpose of deliberative technology is to allow public officials to conduct meaningful deliberation on public policy issues without physically being present in one location. The technology could be used in two ways. The first would be to allow one or more individuals to virtually attend a meeting that was physically being held at a central location. Under this scenario, members of the Michigan Law Review Commission, for example, would meet as usual in the Legislative Service Bureau conference room. Other Commission members who live far from the Lansing area and who would be unable to physically attend the meeting in downtown Lansing could participate by teleconferencing into the meeting from a remote location in Detroit or elsewhere. The meeting would proceed as usual with the minor exception that the member participating at the remote site would interact with the Commission through a speakerphone or other technological device. This scenario can be referred to as "virtual presence" since the meeting physically takes place and it is only the presence of one or more members that is "virtual."

A second scenario can be referred to as a "virtual meeting."[4] Here, instead of one person virtually attending a meeting, the entire meeting would take place virtually or through electronic means. Under this scenario, there would be no central location like a conference room. Instead, participants' physical locations would be scattered and they would communicate exclusively through technological means. The location of the meeting, as some would characterize it, would be "cyberspace."

Both methods are viable ways to conduct business and hold meetings and are equally used in the business world. However, with the requirement of openness and accessibility of government meetings, these two very distinct ways of conducting digital deliberation seem to be treated very differently under the law. Nevertheless, when looking at the technology itself, most of the available solutions can accommodate both types of virtual meetings.

There are four basic types of virtual meeting technology, each with its own advantages and disadvantages: (1) teleconferencing, (2) web teleconferencing, (3) video conferencing, and (4) web chat.

[4] For purposes of this report, the terms "virtual presence" and "virtual meeting" are not mutually exclusive. In order to have a "virtual meeting," there must be no central physical location of the meeting. However, individuals participate in a virtual meeting using their virtual presence.

A. Teleconferencing

Teleconferencing allows an individual not physically present at a meeting to communicate with all members through audio means only. Of the four types of technology, this is the oldest form for conducting virtual meetings. The technology is widely available and almost universally accepted as a reliable way to conduct a meeting in the business world. While the participant(s) cannot be seen, he or she can hear everyone physically present, while those physically present, including non-participants, can hear the virtual attendee. Based on the case law and opinions that will be discussed, the use of this type of technology could be employed currently without offending the Open Meetings Act.[5]

B. Web Conferencing

Web conferencing is best thought of as "teleconferencing plus." In addition to the audio of teleconferencing, web conferencing uses the Internet to relay the data of certain computer programs, such as Microsoft's Power Point. Though participants would not see video of the actual participants, they would have the benefit of viewing slide presentations or documents. In some cases, the visual communication can be two way, thus allowing a virtual attendee to annotate documents from a remote computer. Many setups also utilize a virtual chalkboard allowing virtual attendees to see drawings and diagrams they would not otherwise be privy to if using the phone only.

Web conferencing can be seen as one step closer to getting the full benefit of physical attendance at a meeting. Instead of just being able to listen in, a participant may also view all the documents handed out at a meeting (the agenda, past minutes, and reports) and view a presentation with computerized presentation software, including information written on a chalkboard.

C. Videoconferencing

Videoconferencing is by far the most advanced form of virtual presence. In addition to audio and the ability to see and transmit electronic documents, an attendee can view and transmit video. This allows the users on both ends to view the participants. This advanced form of remote communication is being utilized in businesses, universities (virtual courses), and in Michigan courts where criminal arraignments are frequently held

[5] *See Goode* v *Dept. of Social Services*, 143 Mich. App. 756 (1985).

by videoconferencing, alleviating the need to transport an inmate to the court.[6] The Michigan Court of Appeals has also begun to hold oral arguments using this technology.

There is a great disparity in the technology available to create a video conference. Systems, such as those utilized by Michigan courts, utilize closed circuit television and require dedicated hardware. However, many other systems exist to achieve the same goals, including using the Internet and personal computers equipped with video cameras to transmit the data (this is the technology used by the Michigan Court of Appeals). Though beyond the scope of this report, it is important to note that, while some video conferencing technology requires a large up-front investment, others are affordable and certainly cost effective.

D. Web Chat

Of all the foregoing technologies, web chat offers the least amount of interaction. It has no audio, but instead allows a user to type messages on a computer screen in real time. Though a virtual user would have little trouble transmitting his comments or ideas to the members physically present, he would have no way to monitor the physical meeting unless someone physically present transcribed the proceedings. Because of this barrier, web chat is best used when an entire meeting is virtual and there is no physical component at all.

III. THE MICHIGAN STATUTE AND CASE LAW

Michigan's Open Meetings Act (OMA or the Act) requires that all "meetings of a public body be open to the public and shall be held in a place available to the general public."[7] It expressly states that decisions of the body, as well as deliberations where a quorum is present, are required to be open to and accessible by the general public. The Act defines a meeting as "the convening of a public body at which a quorum is present for the purpose of deliberating toward or rendering a decision on a public policy." The Act does not speak in terms of physical presence at meetings nor does it make reference to the use of technology in the conduct of meetings. Accordingly, any determination regarding the compliance of such technological devices must come from extra-textual sources.

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[6] *See* Mich. Ct. R. Admin. Order 2000-3.

[7] M.C.L. § 15.263(1).

A. Case Law

In *Herald Co.* v *City of Bay City*,[8] the Michigan Supreme Court set forth the substantive requirements for meetings subject to the OMA. First, all meetings of a public body shall be open to the public and held in a place available to the general public. Second, all decisions of a public body shall be made at a meeting open to the public. Third, all deliberations of a public body constituting a quorum of its members shall take place at a meeting open to the public. Most of the disputes arising under the OMA involve the threshold question of what is a "public body," as the Act only applies to such bodies.[9] Other case law focuses on the second and third requirements, questioning whether a public body is making a decision and whether the quorum requirement is satisfied.[10] For purposes of this report, neither of these requirements is at issue here because the assumption is that public bodies are engaged in activities that are subject to the Act. Rather, the question addressed in this report is whether meetings conducted using virtual presence are "open to the public and held in a place available to the general public."

The Michigan Court of Appeals addressed the issue of whether a "conference call" meeting complied with the OMA's mandate of "open and available" meetings in *Goode* v *Department of Social Services.*[11] There, the Michigan Department of Social Services was holding contested case hearings using conference calls with speakerphones. Those interested in attending the meeting could be present in the room where the speakerphone was audible. The court framed the question as "whether the performance of necessary governmental functions is open to the public."[12] The court concluded that even though all individuals were not in the same room, the fact the speakerphone was audible to members of the public was sufficient to constitute an open and available meeting. The court added that meetings of this type were in fact more accessible because an individual presumably has a choice of two locations from where he or she can observe and participate. Finally,

[8] 463 Mich. 111 (2000).

[9] *Id.* at 127.

[10] See *Booth Newspapers, Inc.* v *University of Michigan Bd. of Regents*, 444 Mich. 211 (1992).

[11] 143 Mich. App. 756 (1985).

[12] *Id.* at 758 (citing *Bd. of Ed.* v *Mich. State Bd. of Ed.*, 104 Mich. App. 569 (1981), stating that the "primary purpose served by open meeting legislation . . . is to ensure that the performance of necessary governmental functions is open to the public.").

while the court recognized that it is desirable to see and observe members and witnesses, it is not entirely necessary under the OMA.[13]

B. Opinions of the Attorney General

In 1979, the Attorney General issued an opinion regarding the actual location of a meeting under the OMA.[14] The Attorney General recognized that with regard to the physical location of the meeting, the statute only requires that it be held in a place available to the general public, and that it does not require that meetings take place within the geographical limits of a public body's jurisdiction. The opinion does go on to state, however, that a meeting outside of the jurisdiction of a public body may not be accessible.

This opinion is valuable to anyone advocating for the expansion of technology. As pointed out in *Goode*, with the use of technology, sometimes the location of the meeting is in question. This opinion points out that the elements "where" a meeting is held is not an issue; rather, the element of accessibility is one that must be examined. Accordingly, as long as a meeting was accessible, the location of it is not restricted.

In 1995, the Attorney General answered the inquiry of a state representative whether a member of a school board could participate in the meeting through interactive television.[15] Relying largely on the *Goode* decision to suggest that interactive television would not violate any provision of the OMA, the opinion answered the inquiry in the affirmative. The opinion reasoned that interactive television enhances the public's access to meetings. This opinion further solidifies the proposition that the OMA does not contain rigid procedural requirements. Rather, its cornerstone is the general concept of "openness," as the text of the statute suggests.

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[13] In *Detroit Coalition for Human Rights of the Handicapped* v *Dept. of Social Services*, 431 Mich. 172 (1988), the Supreme Court enjoined the practice of using conference calls because they violated the Department of Social Services' own rules regarding meetings. The Court was clear, however, that their ruling was not based on a reading of the OMA. Specifically, the Court looked to a Department rule that required that hearings take place in the county of the defendant's residence. The Court rejected the argument that the hearing took place in two counties, where the defendant was and where the referee was. Instead, the Court found that the hearing took place only where the referee was and invalidated the practice as violative of the agency's rule.

[14] Mich. Op. Att'y Gen. No. 5560 (1979).

[15] Mich. Op. Att'y Gen. No. 6835 (1995).

IV. STATUTES AND CASE LAW IN OTHER JURISDICTIONS

Every state has some version of an open meetings law.[16] Some states have included specific provisions regarding the use of technological communication. Still others, like Michigan, have broad statutes that leave open the question whether virtual presence is permissible under the statute.

A. Interpretations of Opening Meetings Laws Without Express Technology Provisions.

A survey of the case law from other jurisdictions reveals that few courts have addressed the issue of whether a meeting utilizing telecommunications satisfies that state's open meetings act.

The issue was played out in the Pennsylvania courts starting with *Finucane* v *Pennsylvania Milk Marketing Board.*[17] Here, the court was asked to determine whether a meeting of the State Milk Board complied with the Sunshine Act[18] where two board members physically attended the meeting while a third, needed for a quorum, participated by speakerphone. In an effort to give effect to the spirit of the law, the court concluded that participation via speakerphone would not satisfy the statute. It stated:

> [H]aving board members conduct a meeting by speakerphone . . . seriously violates the public's right to observe and assess the quality of representation they are receiving. This type of telephonic communication clearly cannot replace actual attendance at the Board meeting without specific legislative authorization, nor can it qualify as a quorum of members as required under the Sunshine Act.

This reasoning was rejected by the Pennsylvania Supreme Court in *Babac* v *Pennsylvania Milk Marketing Board.*[19] Here, the Court relied on a strict textual interpretation of the word "meeting," defined as a "gathering of an agency which is

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[16]For a survey of these laws, *see* Richard J. Bindelglass, *New Jersey's Open Public Meetings Act: Has Five Years Brought "Sunshine" Over the Garden State?*, 12 RUTGERS L.J. 561 (1981). For a look at how some legislatures have treated the use of technology within the language of the OMA statute itself, *see* Professor Jerold Israel's Study Report for the Michigan Law Revision Commission, *Telephone Conference Call Participation in Public Meetings* (1992).

[17] 584 A.2d 1069 (Pa. Cmwlth. 1990).

[18] 65 Pa. Stat. § 274.

[19] 613 A.2d 551 (Pa. 1992).

attended or participated in by a quorum of the members . . . .” The court held that the phrase “attended or participated in” explicitly allows a member to be “present” or “participate in” a meeting without physically attending the meeting.

The Supreme Court of Kansas came to a different conclusion, in *State* v *Board of County Commissioners of Seward County*,[20] in interpreting a provision of their OMA that defined a meeting as a “gathering or assembly.”[21] The Court there found that the ordinary meaning of the words “gathering” and “assembly” inherently requires physical presence.[22]

B. Statutes Expressly Providing for the Use of Technology

About half of the states provide, in some form, for the use of technology in public meetings. Alaska, with its geographical enormity and rough climate, has one of the oldest and best developed programs for utilizing meeting technology. Its open meetings statute expressly states that “attendance and participation at meetings by members of a governmental body may be by teleconferencing.”[23]

Besides Alaska, a number of other states either expressly allow for participation by electronic equipment or define the term “meeting” as contemplating attendance by teleconference or other electronic means.[24]

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[20] 866 P.2d at 1024 (1994).

[21] Kan. Stat. Ann. § 75-4317(a).

[22] 866 P.2d at 1026.

[23] Alaska Stat. § 44.62.310(a).

[24] *See, e.g.*, Kan. Stat. Ann. § 75-4317a (“As used in this act, ‘meeting’ means any gathering, assembly, telephone call or any other means of interactive communication by a majority of a quorum of the membership of a body or agency subject to this act for the purpose of discussing the business or affairs of the body or agency”); Ky. Rev. Stat. Ann. § 61.826 (“A public agency may conduct any meeting, other than a closed session, through video teleconference”); Mo. Rev. Stat. § 610.010 (“The term ‘public meeting’. . . shall include a public vote of all or a majority of the members of a public governmental body, by electronic communication or any other means, conducted in lieu of holding a public meeting with the members of the public governmental body gathered at one location in order to conduct public business”); N.J. Rev. Stat. § 10:4-8 (“‘Meeting’ means and includes any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to discuss or act as a unit upon the specific public business of that body”); S.C. Code Ann. §30-4-20 (“‘Meeting’ means the convening of a quorum of the constituent membership of a public body, whether corporal or by

Other states allow for the use of technology, but restrict the type of technology that may be used. Hawaii, for example, permits government meetings by video conference so long as all members can see and hear each other.[25] In contrast, North Carolina allows electronic meetings as long as the government agency provides a location where members of the public may simply hear the proceedings.[26]

Some state statutes limit what can be undertaken at a virtual meeting, as well as the circumstances in which such meetings are permitted. California and South Dakota, for example, allow deliberation to take place through teleconferencing, but do not allow any official action to be taken by a board or committee.[27] Virginia government agencies may not conduct more than one-fourth of their meetings using electronic means.[28] Iowa and New Mexico only allow electronic meetings when physical presence is impossible or impractical.[29]

V. ANALYSIS AND RECOMMENDATION

Unlike some states, a requirement of physical presence at meetings is neither expressly mandated in the plain language of the OMA nor expressly required by any judicial interpretation of the Act. Rather, the small body of authority that does exist focuses on two requirements: openness and accessibility of meetings. Thus, technology that creates a "virtual presence" would seem to comply with the statute's requirements, if not actually enhance them.

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means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power"); Utah Code Ann. § 52-4-2 ("'Meeting' means the convening of a public body, with a quorum present, whether in person or by means of electronic equipment, for the purpose of discussing or acting upon a matter over which the public body has jurisdiction or advisory power").

[25] Haw. Rev. Stat. § 92-3.5.

[26] N.C. Gen. Stat. § 143-318.13(a) ("If a public body holds an official meeting by use of conference telephone or other electronic means, it shall provide a location and means whereby members of the public may listen to the meeting and the notice of the meeting required by this Article shall specify that location.").

[27] Cal. Govt. Code § 54953; S.D. Codified Laws Ann. § 1-25-1.

[28] Va. Code Ann. § 2.1-343.1.

[29] Iowa Code § 21.1, 21.8; N.M. Stat. Ann. § 10-15.1.

First, regarding accessibility, there is at least one physical component to the meeting, so the public can attend a meeting either in person or by electronic communication. As the Court of Appeals pointed out in *Goode*, meetings utilizing virtual presence are in effect more accessible because members of the public may have two or more venues from which to observe and participate in the meeting.[30]

Second, as far as the question of openness is concerned, at the very least the *Goode* decision indicates that teleconferencing is an acceptable alternative to physical presence. Two of the remaining three forms of creating virtual presence simply add to teleconferencing, i.e., web conferencing takes a teleconference and adds the ability to view documents, while video conferencing takes teleconferencing and adds the ability to see and observe individuals. Accordingly, under *Goode*, three of the four technologies, if being used in the "virtual presence mode," would seem capable of withstanding judicial scrutiny relative to the OMA.

Using Web chat to create "virtual presence" is more troubling. First, as pointed out earlier, it is not an ideal method of creating virtual presence given that the virtual attendee has know way to monitor the ongoing meeting. Additionally, the statements from the attendee would either need to be read aloud or possibly visually projected on a screen. In either case, there is a significant gap between this arrangement and the teleconference used in *Goode*. It is not hard to see how this arrangement could be characterized as something less than open.

Conducting an entire "virtual meeting" presents a different set of problems. Without a central physical location, both openness and accessibility could be reduced. These concerns could be addressed simply by setting up "communication centers" where the public could view and comment through the same technological devices that the members are using. Another possibility would be to utilize the Internet as a means of communication.[31] Though the requirement of openness might in this way be satisfied, the issue of accessibility would remain. First, there is the question of whether the general public has adequate Internet access. Second, outdated computer equipment and bandwidth requirements may limit accessibility to the meeting to a large degree. Again, however, computer workstations set up in public buildings or public libraries might resolve this problem.

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[30] 143 Mich. App. at 758.

[31] It is important to know that the Internet is capable of fully hosting all of the communication technologies listed above.

The current state of Michigan law affords an opportunity for introducing new technology to conduct government meetings. Even without amendatory legislation, it would appear that most modern means of telecommunication could be utilized to allow members of Michigan boards and commissions to remotely attend meetings when doing so in person is burdensome or expensive. The overarching caveat is that public meetings be open and accessible. But, as previously noted, it would seem that the use of modern telecommunications would not only enhance accessibility and the public's right to participate, but would also facilitate the work of government.

Notwithstanding these observations, without clear legislative guidance on this question, it is the Commission's view that government agencies will be slow or reluctant to invest in the technology needed to conduct virtual meetings if there is any argument that such meetings violate OMA. For that reason, and in the interests of legislative clarity, the Law Revision Commission recommends to the Legislature that it amend the Open Meetings Act by adding clarifying language to the definition of "meeting" found at M.C.L. § 15.262(b), and clarifying language to M.C.L. § 15.263(1), to make it clear in which circumstances it is permissible to conduct a public meeting using technology.

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

I. INTRODUCTION

Broadly stated, the Governor is granted the express power to remove any state official, elected or appointed, from office for gross neglect of duty or corruption. Moreover, the Michigan Constitution makes it clear that the Governor not only has the power to remove state officers for corruption and malfeasance, but that it is his or her duty to inquire into the condition and administration of those offices. However, this gubernatorial power does not extend to legislative or judicial officers.

Removal of public officers from office is governed by two sections of the 1963 Michigan Constitution. The first is Article 5, § 10, which provides:

> The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance[1] therein, any elective or appointive *state officer*, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature. [Emphasis and footnote added.]

The second provision of the Constitution, Article 7, § 33, provides:

> Any elected officer of *a political subdivision* may be removed from office in the manner and for the causes provided by law. [Emphasis added.]

These two sections are derived from the 1908 Constitution, Articles 9, §§ 7 and 8, respectively. Article 5, § 10 essentially replicates the language of Article 9, § 7 of the 1908 Constitution, with the exception that under the 1908 Constitution the Governor's removal power was limited to periods when the Legislature was not in session.[2]

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[1] Interpreting similar language, Michigan courts have held that misfeasance "is a default in not doing a lawful thing in a proper manner, or omitting to do it as it should be done." *Gray* v *Hakenjos*, 366 Mich. 588, 593, 115 N.W.2d 411, 413 (1962). Malfeasance is the failure to perform the duties of a public office. *Gray*, *supra* this note, 366 Mich. at 594.

[2] Under prior Michigan Constitutions, the Governor=s removal power was limited to times when the Legislature was not in session. The drafters of the 1963 Constitution removed the phrase, Aexcept at such time as the legislature may be in session.@ Accordingly, "[t]he new language places authority for inquiry as well as removal and suspension of officials in the hands of the governor at all times.@ Const. Conv. Official Record 3380 (1961).

II. REMOVAL OF STATE OFFICERS UNDER ARTICLE 5, § 10 OF THE 1963 CONSTITUTION

Article 5, § 10 confers upon the Governor the power to remove state officers for cause, after notice and an opportunity for a hearing. *Attorney General ex rel. Rich* v *Jochim*, 99 Mich. 358, 58 N.W. 611 (1894). The details of the gubernatorial removal power are described in *Jochim*:

> [The Governor] is given inquisitional power, that he may ascertain their condition, for the public welfare. No other means is provided for acquiring the necessary information. If he discovers irregularities of particular character, it is his duty to remove the officer, and supply his place by appointment, reporting his action to the Legislature at the next session. *Dullam* v *Willson* is authority for the proposition that the incumbent is entitled to notice of the charge, and an opportunity to be heard in his defense. This necessarily implies that the Governor=s action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the Governor; that the complainant must procure counsel; or that the Governor is necessarily interested, and thereby disqualified from hearing and determining, because he performs the other duties which are specifically imposed upon him by this section of the Constitution. . . . There is nothing in the record to show any interest upon the part of the Governor, further than to ascertain the condition of the office, and to act upon the information obtained as the Constitution requires. It is the duty of the Governor to investigate, using all lawful means to go to the bottom of any real or supposed irregularity. To that end, he may use clerks and expert accountants, if necessary, and it is fair to presume that the State would recognize.

Jochim, supra, 99 Mich. at 374-75.

The power of the Governor to remove state officials under Article 5, '10, is self-executing, i.e., it does not require implementing legislation. Interpreting a substantially similar predecessor provision (Const. 1908, art. 9, § 7), the Michigan Supreme Court held that the constitutional provision is self-executing and requires no legislation to make it effective. *People ex rel. Clardy* v *Balch*, 268 Mich. 196, 201, 255 N.W. 762, 764 (1934). Nevertheless, there do exist specific statutory provisions providing for the removal of state officials pursuant to Article 5, § 10. They include the following:

A. M.C.L. § 168.83 (Attorney General and Secretary of State)

> The governor shall have the power and it shall be his duty, except at such times as the legislature may be in session, to examine into the condition and administration of the public offices and the acts of the public officers enumerated herein, and to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, and report the causes of such removal to the legislature at its next session as provided in section 10 of article 5 of the state constitution. Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a public hearing conducted personally by the governor.

B. M.C.L. § 168.293 (State Board of Education, Board of Regents of the University of Michigan, Board of Trustees of Michigan State University)

> The governor shall have the power and it shall be his duty, except at such time as the legislature may be in session, to examine into the condition and administration of the said boards and the acts of the members enumerated herein and to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, and report the causes of such removal to the legislature at its next session. Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a public hearing conducted personally by the governor.

C. M.C.L. § 201.5 (Appointees filling vacancy during legislative recess)

> All officers who are or shall be appointed by the governor to fill a vacancy which shall have existed during the recess of the legislature, may be removed by the governor.

III. REMOVAL OF LOCAL OFFICIALS UNDER ARTICLE 7, § 33 OF THE 1963 CONSTITUTION

Under Article 7, § 33 of the 1963 Constitution, a public officer may be removed from office "in a manner and for the causes provided by law." This constitutional provision is not self-implementing. Mich. Op. Att'y Gen. No. 5395 (1978). "Where 'provided by law' is used, it is intended that the legislature shall do the entire job of implementation." *Beech Grove Investment Co.* v *Civil Rights Comm'n*, 380 Mich. 405, 418-419, 157 N.W.2d 213, 219 (1968). The Governor's power to remove officers of a

political subdivision has been implemented by the Election Law, which includes provisions for removal of the following local officers:

- M.C.L. § 168.207 (all county officers named in M.C.L. § 168.200, including the county clerk, the county treasurer, register of deeds, prosecuting attorney, sheriff, drain commissioner, surveyor, and coroner)[3];
- M.C.L. § 168.238 (county auditor);
- M.C.L. § 168.268 (county road commissioner);
- M.C.L. § 168.327 (city officers);
- M.C.L. § 168.369 (township officers); and
- M.C.L. § 168.383 (village officers).

Noticeably absent are statutory provisions on the removal of elected county executives, members of community college boards, members of boards created under the Urban Cooperation Act (M.C.L. §§ 124.501-124.512), and school board members. Specifically, the Attorney General has opined that the Governor lacks constitutional authority under Article 5, § 10 to remove local school board members because the framers of the 1963 Constitution intended that removal of such public officials be governed by Article 7, § 33 of the 1963 Constitution. The term, Apolitical subdivision,@ that is used in that section was interpreted to include local municipalities (including school districts), and the removal of school board members has not been provided for by law. *See* Mich. Op. Att'y Gen. No. 5395, *supra*, at 706-707.

IV. THE REMOVAL PROCESS

The Governor=s power to remove public officials generally is not subject to judicial review. AWhere the removal power has been assigned to the Governor or to a state agency, this court has refused to interfere with the exercise of that power.@ *Burback* v *Romney*, 380 Mich. 209, 217, 156 N.W.2d 549, 553 (1968). However, an arbitrary exercise of the removal power is subject to judicial review. *See McDonald* v *Schnipke*, 380 Mich. 14, 155 N.W.2d 169 (1968).

Regardless of the constitutional source of the Governor's removal power, in exercising that power, the Governor must afford the accused public officer notice and a reasonable opportunity to present a defense. *People ex rel. Clardy* v *Balch*, 268 Mich. 196, 201, 255 N.W. 762, 764 (1934). While public officials do not have vested contract or

[3] M.C.L. § 168.200 uses the term Acounty boards of commissioners,@ but does not mention the office of county commissioner or individual members of a county board of commissioners.

property rights in a public office, *Molinaro* v *Driver*, 36 Mich. 341 (1962), an accused public officer is also entitled to fair and just treatment in the course of the removal proceedings:

> The right of all individuals . . . to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Const. 1963, art. 1, § 17. *Accord Burback* v *Romney*, 380 Mich. 209, 218-219, 156 N.W.2d 549, 553-554 (1968).

Despite these protections for the accused, the Governor is the sole tribunal in removal proceedings, with no right of appeal or review afforded the accused. If the Governor acts within the law, the Governor=s decision is final. *Balch*, *supra*, 268 Mich. at 201-202, 255 N.W. at 764. The Governor=s exercise of this quasi-judicial removal power has been long recognized under Michigan law:

> *Dullam v Willson* is authority for the proposition that the incumbent is entitled to notice of the charge, and an opportunity to be heard in his defense. This necessarily implies that the Governor=s action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the Governor; that the complainant must procure counsel; or that the Governor is necessarily interested, and thereby disqualified from hearing and determining, because he performs the other duties which are specifically imposed upon him by this section of the Constitution.

Jochim, *supra*, 99 Mich. at 375.

Michigan courts have generally refused to interfere with the removal power of the Governor. *See, e.g.*, *Burback*, 380 Mich. at 217, 156 N.W. at 553, *citing People ex rel. Clay* v *Stuart*, 74 Mich. 411, 41 N.W. 1091 (1889); *Fuller* v *Attorney General*, 98 Mich. 96, 57 N.W. 33 (1893); *Speed* v *City of Detroit Common Council*, 98 Mich. 360, 57 N.W. 406 (1894); *Jochim*, 99 Mich. 358, 58 N.W. 611; *Attorney General* v *Berry*, 99 Mich. 379, 58 N.W. 617 (1894); *Attorney General* v *Hambitzer*, 99 Mich. 380, 58 N.W. 617 (1894); *In re Fredericks*, 285 Mich. 262, 280 N.W. 464 (1938); *Lilienthal* v *City of Wyandotte*, 286 Mich. 604, 282 N.W. 837 (1938). However, an arbitrary exercise of the removal power is subject to judicial review. *See, e.g.*, *Burback*, 380 Mich. at 217, 156 N.W. at 553, *citing People ex rel. Andrews* v *Lord*, 9 Mich. 227 (1861); *Dullam* v *Willson*, 53 Mich. 392, 19 N.W. 112 (1884); *Lilienthal* v *City of Wyandotte*, *supra; McDonald* v *Schnipke*, 380 Mich. 14, 155 N.W.2d 169 (1968).

Recommendation to the Legislature

The Commission recommends that the Legislature fill the statutory gaps in the Governor's power to remove other officials of political subdivisions by enacting specific statutory provisions, including but not limited to, governing the removal of elected county executives, members of community college boards, members of boards created under the Urban Cooperation Act (M.C.L. ' ' 124.501-124.512), and school board members.

Alternatively, the Commission recommends repealing all existing removal statutes and replacing them with a general removal statute that tracks the language of Article 5, § 10, but whose scope would cover the removal of all public officials, both state and local.

AN UPDATE REPORT ON THE MICHIGAN SALES REPRESENTATIVE COMMISSION ACT

In its 2000 Annual Report to the Legislature, the Commission issued a report on the Michigan Sales Representative Commission Act and made several recommendations to the Legislature. What prompted that Report and the recommendations was a decision by the U.S. District Court for the Eastern District of Michigan in *Kenneth Henes Special Products Procurement* v *Continental Biomass Industries, Inc*., 86 F. Supp. 2d 721 (2000). That decision was appealed to the U.S. Court of Appeals for the Sixth Circuit.

In 2003, pursuant to M.C.R. 7.305(B), the United States Court of Appeals for the Sixth Circuit in the *Henes* appeal certified the following question to the Michigan Supreme Court: What standard is appropriate in evaluating the mental state required for double damages under the Michigan Sales Representative Commission Act? The relevant statutory language at issue, M.C.L. § 600.2961(5), provides:

> A principal who fails to comply with this section is liable to the sales representative for both of the following:
>
> (a) Actual damages caused by the failure to pay the commission when due.
> (b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due but not paid as required by this section or $100,000, whichever is less.

The Court accepted the certification and held that the plain language of the statute requires only that the principal purposefully fail to pay a commission when due. The Court added that the statute does not require evidence of bad faith before double damages, as provided in the statute, may be imposed. *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich. 109, 659 N.W.2d 597, 598-99 (2003). The Court reached this conclusion notwithstanding some legislative history to the contrary.

The Commission recommends that the Legislature closely consider whether the construction that the Supreme Court has given to M.C.L. § 600.2961(5) is in line with the Legislature's intent, but makes no other recommendation.

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

I. INTRODUCTION

As part of its statutory charge to examine current judicial decisions for the purpose of discovering possible defects or ambiguities in the law and to recommend needed reforms, the Michigan Law Revision Commission undertook a review of one Michigan Supreme Court and two Court of Appeals decisions released in 2003. These opinions identify state statutes as candidates for the Legislature's attention. The four opinions are:

> *Haynie* v *State*, 468 Mich. 302, 664 N.W.2d 129 (holding that workplace harassment based on gender that is not at all sexual in nature does not constitute sexual harassment under the Civil Rights Act, overruling *Koster* v *Novi*, 458 Mich.1, 580 N.W.2d 835 (1998))
>
> *Nippa* v *Botsford General Hospital*, 257 Mich. App. 387, 668 N.W.2d 628 (holding that in an action against a hospital on a theory of vicarious liability the plaintiff's affidavit of merit in a medical-malpractice case was insufficient under M.C.L. § 600.2169 because it was not signed by a doctor who specializes or is board-certified in the same specialty as the doctors on whose conduct the action was based)
>
> *Hill* v *Sacka*, 256 Mich. App. 443, 666 N.W.2d 282 (holding that M.C.L. § 600.2957and M.C.L. § 600.6304, concerning comparative fault and allocation of fault, are not applicable in an action brought pursuant to the dog bite statute, M.C.L. § 287.351)

II. WHETHER WORKPLACE HARASSMENT BASED ON GENDER THAT IS NOT SEXUAL IN NATURE CONSTITUTES SEXUAL HARASSMENT UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

A. Background

The Elliott-Larsen Civil Rights Act (the Elliott-Larsen Act or CRA), M.C.L. § 37.2202(1), provides in relevant part:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to

> employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Accordingly, it is unlawful for employers to discriminate against an individual with respect to a condition of employment because of sex. M.C.L.§ 37.2103(i) further provides:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> > (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
> >
> > (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
> >
> > (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Subsections (i) and (ii) are commonly known as quid pro quo sexual harassment, and subsection (iii) is commonly known as hostile work environment sexual harassment.

B. The *Haynie* v *State* Decision

The complaint alleged that a fellow employee had made hostile and offensive remarks about plaintiff's gender (essentially that females had no business being in law enforcement). She complained to her supervisors, but they took no remedial action.

The Court of Appeals concluded that gender-based harassment is sufficient to make out a hostile work environment claim based on sexual harassment under the CRA. The Court of Appeals relied on *Koester* v *Novi*, 458 Mich. 1, 580 N.W.2d 835 (1998),

which held that allegations of gender-based harassment can establish a claim of sexual harassment under the CRA.

The Supreme Court reversed. The Court observed that the CRA prohibits sexual harassment, which is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature." M.C.L. § 37.2103(i). Accordingly, the Court concluded, conduct or communication that is gender-based, but is not sexual in nature, does not constitute sexual harassment, as that term is defined in the CRA. The Court added that "[t]he proper recourse for conduct or communication that is gender-based, but not sexual in nature, is a sex-discrimination claim, not a sexual-harassment claim." 664 N.W.2d at 131 n.2. Because plaintiff conceded that there were no "unwelcome sexual advances, requests for sexual favors, [or] other verbal or physical conduct, or communication of a sexual nature," plaintiff had not established a claim of sexual harassment under the CRA, according to the Court.

In order to reach this conclusion, the Court had to overrule its 1998 decision in *Koester* v *Novi*, *supra*. The Court reasoned that because M.C.L. § 37.2103(i) specifically defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature," the conclusion reached in *Koester* that gender-based harassment that is not at all sexual in nature can constitute sexual harassment is clearly wrong.

In his dissenting opinion, Justice Cavanagh argued, *inter alia*, that because the Elliott-Larsen Act largely mirrors federal civil rights legislation, the Court should look to federal law when interpreting the Michigan statute. Justice Cavanagh then noted that the U.S. Supreme Court has interpreted the analogous federal statute—containing language nearly identical to M.C.L. § 37.2202—and has concluded that its text supports hostile-work-environment claims on the basis of any ground enumerated in 42 U.S.C. § 2000e-2. According to the U.S. Supreme Court, the prohibition on discrimination is not limited to economic or tangible discrimination. *Meritor Savings Bank, FSB* v *Vinson*, 477 U.S. 57, 64 (1986). Accordingly, Justice Cavanagh concluded,

> [b]ecause the text of M.C.L. § 37.2202(1) indicates our Legislature's intent to track the scope of protections provided by federal law, and because federal law recognizes hostile-work-environment claims on any ground articulated in 42 U.S.C. 2000e, *Meritor, supra,* it is proper to conclude that Michigan employees share the right to assert hostile-work-environment claims on the basis of any ground articulated in M.C.L. § 37.2202(1).

664 N.W.2d at 151.

C. Recommendation

The Commission recommends that the Legislature examine this issue but makes no specific recommendations concerning statutory amendments.

III. WHETHER IN AN ACTION AGAINST A HOSPITAL ON A THEORY OF VICARIOUS LIABILITY THE PLAINTIFF'S AFFIDAVIT OF MERIT IN A MEDICAL-MALPRACTICE CASE MUST BE SIGNED BY A DOCTOR WHO SPECIALIZES OR IS BOARD-CERTIFIED IN THE SAME SPECIALTY AS THE DOCTORS ON WHOSE CONDUCT THE ACTION WAS BASED

A. Background

As part of medical malpractice tort reform, the Legislature enacted M.C.L. § 600.2912d(1). That section provides:

> The plaintiff in an action alleging medical malpractice shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169.

M.C.L. § 600.2169(1)(a) provides that a medical expert witness must meet the following criteria, *inter alia*:

> If the party against whom or on whose behalf the testimony is offered is a specialist, [then the expert medical witness must also] specialize[] at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

In *Nippa* v *Botsford Gen'l Hosp.*, 251 Mich. App. 664, 651 N.W.2d 103 (2002) (*Nippa I*) plaintiff argued that pursuant to the plain language of M.C.L. § 600.2169(1)(a), her expert medical witness was competent to testify against the hospital. Plaintiff maintained that, because the hospital, the only named defendant to the action, was not board certified, plaintiff was not required to produce an expert witness with like qualifications as the doctors she alleged were negligent in her complaint. The Court concluded that plaintiff's affidavit of merit in this medical-malpractice case was insufficient because it was not signed by a doctor who specializes or is board-certified in the same specialty as the doctors on whose conduct the action was based. M.C.L. § 600.2169.

On appeal to the Supreme Court, the Supreme Court remanded for reconsideration in light of *Cox* v *Flint Bd. of Hosp. Mgrs*, 467 Mich. 1, 651 N.W.2d 356 (2002), where the Court held that a hospital may be held vicariously liable for the acts of its agents.

B. The *Nippa* v *Botsford General Hospital* Decision (*Nippa II*)

In light of the *Cox* decision, the Court of Appeals concluded that, with regard to vicarious liability, medical-malpractice law applicable to a physician is also applicable to the physician's hospital. The Court continued that a plaintiff cannot avoid the procedural requirements of the law by naming only the principal as a defendant in a medical-malpractice lawsuit. All procedural requirements are applicable to the hospital in the same manner and form as if the doctor were a named party to the lawsuit. This is so because the law creates a practical identity between a principal and an agent, and, by a legal fiction, the hospital is held to have done what its agents have done. "Therefore," the Court concluded,

> the term "party" under M.C.L. § 600.2169(1)(a) encompasses the agents for whose alleged negligent acts the hospital may still be liable. A plaintiff must submit with a medical-malpractice complaint against an institutional defendant an affidavit of merit from a physician who specializes or is board-certified in the same specialty as that of the institutional defendant's agents involved in the alleged negligent conduct.

668 N.W.2d at 632.

In his dissenting opinion, Chief Judge Whitbeck disagreed with the majority's application of the *Cox* decision to the facts of the *Nippa* case, as well as with their reading of M.C.L. § 600.2169:

> One can apply the logic of *Cox* to this legal issue to reach the majority's result only if one is willing to amend M.C.L. § 600.2169 so that the term ''party'' in that statute includes the term ''agent.'' This Court is not a super-Legislature nor should it endeavor to do that which the Legislature did not do in order to make the statute less illogical and thereby more sensible.

C. Recommendation

The Commission recommends that the Legislature examine this issue but makes no specific recommendations concerning statutory amendments.

IV. WHETHER M.C.L. § 600.2957 AND M.C.L. § 600.6304, CONCERNING ALLOCATION OF FAULT, ARE APPLICABLE IN AN ACTION BROUGHT PURSUANT TO THE DOG BITE STATUTE, M.C.L. § 287.351

A. Background

The dog-bite statute, M.C.L. § 287.351, provides in pertinent part:

> (1) If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

The dog-bite statute thus places absolute liability on the dog owner, except where the dog bites after having been provoked.

The comparative negligence statute, M.C.L. § 600.2957, provides in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304 [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

The apportionment-of-fault statute, M.C.L. § 600.6304, in turn provides in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> (a) The total amount of each plaintiff's damages.
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> * * *
>
> (4) [A] person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1).
>
> Finally, M.C.L. § 600.6304(8) contains the following definition of fault:
>
> As used in this section, fault includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or *any conduct that could give rise to the imposition of strict liability*, that is a proximate cause of damage sustained by a party. [Emphasis added.]

Through the enactment of M.C.L.§ 600.2957 and M.C.L. § 600.6304, Michigan adopted a comparative fault system for apportioning damages awarded in a personal-injury action. The statutes reveal a clear legislative intent to apportion fault of all persons contributing to the accrual of a plaintiff's personal-injury damages.

The question presented in *Hill* v *Sacka* was whether the latter statutes apply in the dog bite situation.

B. The *Hill v. Sacka* Decision

In the summer of 1997, two-year-old Kyle Hill was bitten, gnawed, and mauled by defendants' German shepherd. The incident occurred in defendants' yard after Mr. Hill, Kyle, and others went to defendants' home to socialize. Defendants' dog was chained to a tree at the time of the attack. Kyle was attacked by the dog when he came within reach of the dog's chain. There was evidence presented that Mr. Hill observed Kyle's actions before the mauling and yelled at Kyle to stop approaching the dog. Mr. Hill finally ran to stop Kyle, but it was too late to prevent the attack. By the time Mr. Hill rescued his son from the dog, it had bitten Kyle's neck and head. Kyle's injuries required surgery on three different areas of his head and face. The attack resulted in significant scarring.

On appeal, defendants argued that M.C.L. § 600.2957 and M.C.L. § 600.6304, concerning comparative fault and allocation of fault, are applicable in actions brought pursuant to the dog-bite statute.

The Court of Appeals held that M.C.L. § 600.2957 and M.C.L. § 600.6304 are inapplicable where absolute liability is involved:

> [W]e conclude that the dog-bite statute does not allow for consideration of any comparative negligence on the part of the dog-bite victim, excluding possibly where the negligence may relate to the defense of provocation. The dog-bite statute by its clear and unequivocal language does not allow consideration of any negligence or fault, as that term is generally used, on the part of the owner of the dog. If the other considerations contained in the dog-bite statute are satisfied, there is no liability where provocation exists, and there is liability where provocation is lacking.

666 N.W.2d at 289.

The Court acknowledged that in some cases it has referred to the dog-bite statute as imposing strict liability, thus arguably bringing the dog-bite statute within the scope of the comparative fault and apportionment-of-liability statutes. The Court in *Hill* nevertheless concluded that the term "strict liability" as used in M.C.L. § 600.6304(8) was not intended to apply to the dog-bite statute, noting that the "strict liability" referred to in M.C.L. § 600.6304(8) was intended to refer to products-liability cases.

The Court concluded its opinion with the following observation concerning the intent of the Legislature:

> It is a well-established principle of statutory construction that when the Legislature enacts legislation concerning an area of law where the appellate courts of this state have rendered opinions, the Legislature is presumed to have acted with knowledge of the court's interpretations. *Jackson* v *Nelson*, 252 Mich. App. 643, 651-652, 654 N.W.2d 604 (2002). Because "absolute liability" applies in the context of the dog-bite statute absent provocation and has historically applied in dangerous animal cases, and because subsection 6304(8) does not include absolute liability in the definition of fault, we conclude that the Legislature did not intend § 6304 or § 2957 to be applicable to an action brought pursuant to the dog-bite statute. Even had we concluded that the dog-bite statute conflicted with the statutes regarding allocation of fault, i.e., fault is not to be considered with respect to the dog owner under M.C.L. § 287.351 versus the consideration of fault, the dog-bite statute is more specific to the subject matter than the general statutes regarding allocation of fault and thus controls.

666 N.W.2d at 291.

C. Recommendation

The Commission recommends that the Legislature examine this question. The *Hill* decision raises the possibility that other context-specific statutes on tort liability may be in actual or potential conflict with the general principle of comparative fault and liability.

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 Bylaws	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 Revised Judicature Act 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

1993 Legislative Session

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

1995 Legislative Session

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

1996 Legislative Session

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

1998 Legislative Session

Subject	Commission Report	Act No.
Condemnation Procedures of General Law Villages	1989, p. 16	254
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

2003 Legislative Session

Subject	Commission Report	Act No.
Anatomical Gifts	1993, p. 53	62, 63

BIOGRAPHIES OF COMMISSION MEMBERS AND STAFF

RICHARD D. McLELLAN

Richard D. McLellan is Chairman of the Michigan Law Revision Commission, a position he has filled since 1986 following his appointment as a public member of the Commission in 1985.

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

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

Following the 1990 Michigan elections, 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 and conducted a review of state programs. He was also appointed by the Governor as Chairman of the Corrections Commission, a member of the Michigan Export Development Authority, a member of the Michigan International Trade Authority, a member of the Library of Michigan Board of Trustees, a member of the Michigan Jobs Commission, a member of the McPherson Commission on Charter Schools and Chairperson of the Michigan Film Advisory Commission.

During the administration of President Gerald Ford, he served as an advisor to the Commissioner of the Food and Drug Administration as a member of the National Advisory Food and Drug Committee of the U.S. Department of Health, Education and Welfare.

In 1990, Mr. McLellan was appointed by President George Bush as a Presidential Observer to the elections in the People's Republic of Bulgaria. The elections were the first free elections in the country following 45 years of Communist rule. In 1996, he again acted as an observer for the Bulgarian national elections. And again in February, 1999, he acted as an observer for the Nigerian national elections with the International Republican Institute.

Mr. McLellan is a member of the Board of Governors of the Cranbrook Institute of Science, one of Michigan's leading science museums. He helped establish and served for ten years as president of the Library of Michigan Foundation. He helped establish and served as both President and Chairman of the Michigan Japan Foundation, the private foundation providing funding for the Japan Center for Michigan Universities.

Mr. McLellan has served as member of the Board of Trustees of Michigan State University—Detroit College of Law and is a member of the Advisory Board for MSU's James H. and Mary B. Quello Center for Telecommunication Management and Law. He is a Member of the Board of

Commissioners of the State Bar of Michigan by appointment of the Supreme Court where he also serves as co-chair of the Standing Committee on Justice Initiatives.

Mr. McLellan is a former Chairman of the Board of Directors of the Michigan Chamber of Commerce and is a member of the Board of Directors of the Mackinac Center for Public Policy, the Oxford Foundation, and the Cornerstone Foundation.

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

Mr. McLellan has been active in matters concerning persons with disabilities. He is a former President of the Arthritis Foundation, Michigan Chapter, a former member of the National Advocacy Committee of the Arthritis Foundation, and a former member of the National Research Committee, Arthritis Foundation.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School. He has served as an adjunct professor of international studies at Michigan State University.

ANTHONY DEREZINSKI

Mr. Derezinski is Vice Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski is Director of Government Relations for the Michigan Association of School Boards. He also serves as an adjunct professor of law at the University of Michigan Law School and at the Department of Education Administration of Michigan State University, and previously was a visiting professor of law at the Thomas M. Cooley Law School.

He is a graduate of Muskegon Catholic Central High School, Marquette University, the University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and resides in Ann Arbor, Michigan.

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He was a member of the Board of Regents of Eastern Michigan University for 14 years and currently serves on the Committee of Visitors of the University of Michigan Law School. He also is a member of the Boards of Ann Arbor Blues and Jazz Festival and the Center for the Education of Women in Ann Arbor.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezinski Post 7729, the National Association of College and University Attorneys, the Michigan and National Councils of School Attorneys, and the American Bar Association.

WILLIAM C. WHITBECK

Judge William C. Whitbeck is a public member of the Michigan Law Revision Commission and has served since his appointment in January 2000.

Judge Whitbeck was born on January 17, 1941, in Holland, Michigan, and was raised in Kalamazoo, Michigan. His undergraduate education was at Northwestern University, where he received a McCormack Scholarship in Journalism. He received his LL.B. from the University of Michigan Law School in 1966, and was admitted to the Michigan Bar in 1969.

Judge Whitbeck has held a variety of positions with the state and federal governments, including serving as Administrative Assistant to Governor George Romney from 1966 to 1969, Special Assistant to Secretary George Romney at the U.S. Department of Housing and Urban Development from 1969 to 1970, Area Director of the Detroit Area Office of the U.S. Department of Housing and Urban Development from 1970 to 1973, Director of Policy of the Michigan Public Service Commission from 1973 to 1975 and Counsel to Governor John Engler for Executive Organization/Director of the Office of the State Employer from 1991 to 1993. He served on the Presidential Transition Team of President-Elect Ronald Reagan in 1980, and as Counsel to the Transition Team of Governor-Elect John Engler in 1990.

In private practice, Judge Whitbeck was a partner in the law firm of McLellan, Schlaybaugh & Whitbeck from 1975 to 1982, a partner in the law firm of Dykema, Gossett, Spencer, Goodnow and Trigg from 1982 to 1987, and a partner in the law firm of Honigman Miller Schwartz and Cohn from 1993 to 1997.

Judge Whitbeck is a member of the State Bar of Michigan, the American Bar Association, the Ingham County Bar Association, the Castle Park Association, and has served as Chair of the Michigan Historical Commission. He is a Fellow of both the Michigan State Bar Foundation and the American Bar Foundation.

Judge Whitbeck and his wife, Stephanie, reside in downtown Lansing in a 125-year-old historic home that they have completely renovated. They are members of St. Mary Cathedral.

Governor John Engler appointed Judge Whitbeck to the Court of Appeals effective October 22, 1997, to a term ending January 1, 1999. Judge Whitbeck was elected in November of 1998 to a term ending January 1, 2005. Chief Judge Richard Bandstra designated Judge Whitbeck as Chief Judge Pro Tem of the Court of Appeals effective January 1, 1999. The Supreme Court

appointed Judge Whitbeck as Chief Judge of the Court of Appeals effective January 1, 2002 and reappointed him as Chief Judge effective January 1, 2004.

GEORGE E. WARD

Mr. Ward is a public member of the Michigan Law Revision Commission and has served since his appointment in August 1994.

Mr. Ward was the Chief Assistant Prosecuting Attorney in Wayne County in the administration of the Honorable John D. O'Hair. Prior to that, he was a clerk to a justice of the Michigan Supreme Court and in private civil practice for 20 years in the City of Detroit. He recently returned to private practice in Detroit.

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

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

MICHAEL D. BISHOP

Mr. Bishop is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 2003.

Mr. Bishop (R-Rochester) was first elected to the Michigan Senate last November after two terms in the Michigan House of Representatives. He was sworn into office in January to represent Michigan's 12th District in the State Senate, which includes the communities of Auburn Hills, Keego Harbor, Lake Angelus, Sylvan Lake, Pontiac, Rochester, and Rochester Hills, and the townships of Addison, Independence, Oakland, Orion, and Oxford.

Mr. Bishop was chosen as Assistant Senate Majority Leader, chairman of the Senate Banking & Financial Institutions Committee, and as vice chairman of both the Gaming & Casino Oversight Committee and Judiciary Committee. He also serves as co-chair of the Joint Committee on Administrative Rules.

During his four-year tenure in the Michigan House, Mr. Bishop served as vice chairman of the Commerce Committee and as a member of the Energy & Technology, Criminal Justice,

Redistricting & Elections, and Commerce Subcommittee on Appropriations. He was also appointed to chair the Commerce Subcommittee on Banking & Finance, Congressional Redistricting Subcommittee, and Joint Committee on Administrative Rules.

Mr. Bishop is a member of the American Bar Association, State Bar of Michigan, Oakland County Bar Association, Macomb County Bar Association, Sports Lawyer Association, and Michigan Association of Realtors. He served on the Municipal Law and Business Law Committees of the Oakland County Bar Association and is a member of the National Association of Sportsmen Legislators. Mr. Bishop was sworn in as a member of the United States Supreme Court Bar, as well as the District of Columbia Bar in December 2002.

A 1989 graduate of the University of Michigan, Mr. Bishop received his law degree from the Detroit College of Law in 1993. He is a practicing attorney for Booth & Patterson, P.C., a licensed real estate broker, and president/owner of Freedom Realty, Inc. and Pro Management, Inc.

A native of Almont, Michigan, Mr. Bishop, 37, resides in Rochester with his wife, Cristina, and two children, Benjamin Donald and Gabriella Maria.

HANSEN CLARKE

Mr. Clarke is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 2003.

Mr. Clarke was elected to the Michigan State Senate in 2002 when he defeated an incumbent state Senator. Mr. Clarke had previously been elected to the Michigan House of Representatives three times. He currently serves on the Senate Appropriations Committee and is Assistant Democratic Caucus Chair.

Before being elected to his recent tenure in public office, Mr. Clarke was active in the nonprofit community. He is the former President of the Michigan Public Purchasing Officers Association and a former Trustee of the Michigan Housing Trust Fund. He also served on the St. John NorthEast Community Hospital Board of Trustees. As a college student, Mr. Clarke was an elected member of the Cornell University Board of Trustees.

Mr. Clarke is the former chief of staff to Congressman John Conyers, Jr. He also served as Executive Assistant to the Wayne County Executive and as Wayne County Purchasing Director.

Mr. Clarke graduated from Cornell University in 1984 with a Bachelors of Fine Arts degree in painting. In 1987, he graduated from Georgetown University Law Center with a Juris Doctorate degree. Mr. Clarke is licensed to practice law in Michigan.

EDWARD J. GAFFNEY

Mr. Gaffney is a legislative member of the Michigan Law Revision Commission and has served on the Commission since February 2003. He has been an attorney practicing in Michigan for 25 years.

He serves on the House Judiciary, Criminal Justice, Health Policy, Transportation, and Regulatory Affairs Committees. He is also a member of the Legislative Council.

Mr. Gaffney attended Michigan State University and graduated with a master's degree in history. After graduating from MSU, he took a position with the Michigan Legislative Service Bureau working in the research division. He entered the first class of Cooley Law School. After graduating, he joined the LSB legal division and drafted legislation.

Mr. Gaffney left Lansing to be a legislative analyst with the American Automobile Manufacturing Association. He was promoted to a position as a Regional Manager and dealt with state legislatures in Michigan, Ohio, Indiana, Illinois, and Kentucky. Mr. Gaffney eventually went to work for the Michigan Trucking Association where he managed a safety grant to help experienced truck drivers learn how to be safer drivers.

In 1991, Mr. Gaffney ran for Grosse Pointe Farms City Council. He won the election and eight years later was elected Mayor. He was elected to the state House in 2002.

STEPHEN F. ADAMINI

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

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

Mr. Adamini has practiced law for over 33 years. He is senior partner at Kendricks, Bordeau, Adamini, Chilman & Greenlee, P.C., a Marquette law firm. He is a graduate of Negaunee High School, and received his Bachelor of Arts degree in political science from the University of Michigan in 1967 and his Juris Doctorate from the University of Michigan Law School in 1970.

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

Mr. Adamini has a longtime civic commitment to the Central Upper Peninsula community. From 1971 to 1976, he served on the Michigan Boundary Commission. From 1973 to 1979, he served on the Alger-Marquette Community Mental Health Board, including one term as chair and two terms as treasurer. Mr. Adamini chaired the Marquette County Democratic Party from 1986 to 1992. He served on the Michigan Transportation Commission, appointed by former

Governor Jim Blanchard, from 1987 to 1991. In 1991, he served on the Marquette County Re-Apportionment Commission. From 1994 to 1999, he served on the Marquette County Airport Board, including two terms as Chairperson. From 1997 to 2000, he served on the Executive Committee of the Gwinn Area Chamber of Commerce.

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

JOHN G. STRAND

Since January 2001, Mr. Strand, as the Legislative Council Administrator, has served as the ex-officio member of the Michigan Law Revision Commission. The following agencies fall under his supervision: Legislative Service Bureau, Legislative Council Facilities Agency, Joint Committee on Administrative Rules staff, Legislative Corrections Ombudsman (until October 2003), Michigan Law Revision Commission, and the Commission on Uniform State Laws.

Prior to being appointed to the Legislative Council, Mr. Strand served as Chairman of the Michigan Public Service Commission since October 1993 and had been a Tribunal Judge for the Michigan Tax Tribunal from January 1993 to October 1993. He had previously served six terms as a state legislator beginning in 1981, serving in a leadership position and as vice-chairman of the Insurance and the House Oversight Committees and as a member of the Taxation and Judiciary Committees.

Mr. Strand is a member of the State Bar of Michigan. He holds a B.A. from the University of Pittsburgh in Economics and Political Science (1973) and a J.D. from Case Western Reserve University (1976).

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

KEVIN C. KENNEDY

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

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

He is a graduate of the University of Michigan, Wayne State University, and Harvard University. He was a law clerk at the U.S. Court of International Trade, was a private

practitioner in Hawaii, and served as a trial attorney for the U.S. Department of Justice. He is married.

Mr. Kennedy is the author of nearly 40 law review articles concerning international law, international trade, and civil procedure. He is the co-author of World Trade Law, a treatise on international trade law.

GARY B. 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.