Negligence Law Section E-NEWS

Issue 4 Volume 1 **Fall 2012**

Message from the Chair

Thomas W. Waun
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I am beginning my term as Chair of the Negligence Section Council. I want to thank Paul Manion for his hard work and excellent leadership over the past year. I am thankful for and looking forward to the opportunity to work with and serve the membership.

Two new members have joined our Council. They include Tom Behm from Grand Rapids and Jim Bradley from Lansing. Additionally, Mike Janes has been appointed as the newest Officer on our Council.

Our Section, through the Council, is very active and provides significant services for the modest dues paid by our membership. For those of you who are unaware of all of the activity that takes place, I would like to take this opportunity to bring you up to speed.

Read Article Below

Exemplary Damages—Point/Counter-Point

The Defense Perspective: Exemplary Damages Are Not An Excuse To Double-Dip

Michael J. Cook

Exemplary damages are recoverable in Michigan, when appropriate. Unfortunately, Michigan case law on when or how they can be recovered is a muddy pool. Sifting through the silt requires first distinguishing cases involving statutory claims from those involving common law claims and then understanding the rules for each.

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Plaintiff's Perspective: Exemplary Damages- A Legitimate Component of Recovery

Robert Garvey

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Read Article Below

Insurance Coverage ADVISOR

Steps on the Path to Finding Coverage

Hal O. Carroll

The quest to find insurance coverage is different in each case, of course, but there are some general principles and specific actions that most of them share. Here are a few of them. Work Together

Read the underlying complaint

Read the policy...carefully

and more

Read Article Below

The Michigan Association for Justice in cooperation with the Michigan Defense Trial Counsel offer their membership and the public this first time opportunity to purchase: Motor Vehicle No-Fault Law in Michigan 2011 Edition

After a year-long study, the Michigan Judicial Selection Task Force has released its report and recommendations for improving the state's process for selecting Supreme Court Justices.

Read Report Below

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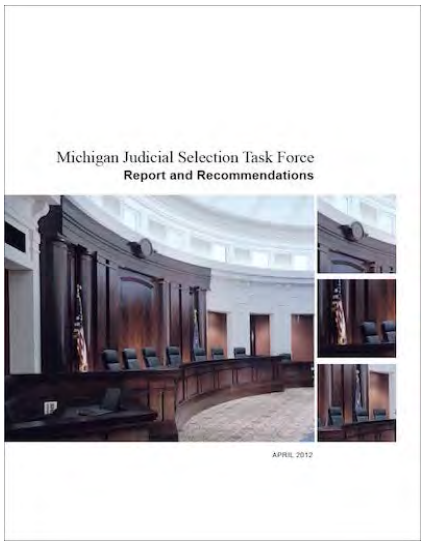

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Legislative Update

Todd Tennis
Captiol Services, Inc.

2012, the Year of the Ballot Proposal

While most voters will be showing up to vote for candidates at the top of the ticket, this year in Michigan they will also get to vote "yea" or "nay" on a half dozen ballot proposals that could have a huge impact on public policy. Since most readers of this column will be well versed on the federal and state candidates they will see on their ballot (and better versed than most on the judicial candidates, too!), I chose to devote this space to summarizing the 6 ballot proposals.

Read Article Below

New Treasurer 2012-2013

Michael R. Janes
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Michael R. Janes is a shareholder and president of Martin, Bacon and Martin P.C. in Mt. Clemens, Michigan. His practice includes all areas of personal injury defense with emphasis on the defense of medical malpractice causes of action. Mr. Janes obtained his undergraduate degree from The University of Notre Dame in 1979 and his Juris Doctorate degree from The University of Detroit School of Law in 1981. In addition to his longtime membership in the Michigan Defense Trial Counsel, he is also past president of The Association of Defense Trial Counsel, current council member for the Negligence Law Section of the State Bar of Michigan, member of the American Board of Trial Advocates, Fellow of the Michigan State Bar Foundation and member of the Michigan Society of Health Care Attorneys.

New Council Members 2012-2013

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MESSAGE FROM THE CHAIR

I am beginning my term as Chair of the Negligence Section Council. I want to thank Paul Manion for his hard work and excellent leadership over the past year. I am thankful for and looking forward to the opportunity to work with and serve the membership.

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Our Section, through the Council, is very active and provides significant services for the modest dues paid by our membership. For those of you who are unaware of all of the activity that takes place, I would like to take this opportunity to bring you up to speed.

We produce two separate electronic publications. Our quarterly newsletter provides articles addressing negligence law issues, as well as legislative updates. Additionally, the section also publishes periodic e-news flashes alerting our membership to legislative activity, court rule changes and recent court decisions that affect our respective areas of practice.

The Council monitors proposed legislation in both the House and Senate through our excellent lobbyist, Todd Tennis. When a consensus is reached among our Council members, we take active positions either supporting or opposing proposed legislation. Our Council is often invited by the House and Senate to testify in hearings held on legislation affecting the practice of negligence lawyers. For example, over the past year our Section was actively involved in the legislative discussions pertaining to proposed no-fault and medical malpractice reform.

Our amicus committee considers submitting, and in appropriate cases, writes, briefs in appellate cases involving significant issues affecting negligence law. The Supreme Court will often invite our Section to write a brief on a tort issue that it is considering on appeal. If anyone within our membership is aware of a case on appeal that deserves our Amicus Committee's attention, they should contact either Mike Janes or Ven Johnson who serve as the Amicus Committee Chairs.

The Negligence Section puts on various educational programs available to the membership. This past August, Steve Galbraith moderated our annual Supreme Court Seminar, which addresses significant Supreme Court decisions occurring during the course of the past year. We would like to thank Jim Gross, Roni Tischler, Andrew Sugerman, Bob Drazin, Bob Raitt, Ron Sangster, Sarah Nadeau and Todd Stearn for their excellent presentations in conjunction with this seminar.

Last, Our Section also holds two meetings during the course of the year allowing the membership to get together. This past year we met in Traverse City for our annual summer meeting and next summer we will be meeting in Grand Rapids. We also have an annual spring trip which next year will be held in Cabo San Lucas from April 21 through April 24. More information on this trip will be provided in the near future.

I am looking forward to the upcoming year. If any of the membership has suggestions, concerns or complaints, please feel free to contact me at any time. I can be reached at my office at 810/695-9600 or by email at twaun@waunlaw.com.

EXEMPLARY DAMAGES ARE NOT AN EXCUSE FOR DOUBLE DIPPING (UNLESS THE LEGISLATURE SAYS IT'S OK)

Michael J. Cook

Collins, Einhorn, Farrell & Ulanoff P.C.

Exemplary damages are recoverable in Michigan, when appropriate.[1] Unfortunately, Michigan case law on when or how they can be recovered is a muddy pool. Sifting through the silt requires first distinguishing cases involving statutory claims from those involving common law claims and then understanding the rules for each.

A. Common law claims permit jury instructions for emotional distress damages or exemplary damages, but not both.

Veselenak v Smith[2] is the leading Michigan case on the recovery of exemplary damage under a common law tort claim. There, the Michigan Supreme Court reversed a damages award because a separate award for exemplary damages gave the plaintiff a double recovery.[3] Through its study on the development of Michigan law on damages, the Court explained that so-called "exemplary damages" arose as a means to compensate non-economic damages (i.e., pain and suffering). This concept was created because historically the award of actual damages to compensate economic loss barred recovery for non-economic damages.[4] But modern jurisprudence does not adhere to that rule – we include non-economic damages in the plaintiff's "actual damages." As a result, the historical basis for exemplary damages was negated. The Court accordingly rejected the historical distinction

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[1] In order to assess **when** exemplary damages are recoverable, we must first leave aside the fact that punitive damages are not recoverable (unless authorized by statute) and yet the very term "exemplary" implies a punitive deterrent purpose. Merriam-Webster Online, http://www.merriam-webster.com (defining "exemplary" as "serving a warning" or "serving as an example") ; see also *Peisner v Detroit Free Press, Inc*, 421 Mich 125, 135 n11 (1984) (acknowledging that exemplary damages "undoubtedly operate indirectly to punish). To the consternation of many, Michigan courts have perpetuated the misnomer and reaffirmed that exemplary damages are not punitive; they are "compensatory." *Peisner*, 421 Mich at 132-133; *McPeak v McPeak*, 233 Mich App 483, 487 (1999) ("Exemplary damages are a class of compensatory damages that allow for compensation for injury to feelings.").

[2] 414 Mich 567 (1982).

[3] *Veselenak*, 414 Mich at 573.

[4] *Veselenak*, 414 Mich at 573, citing *Warren v Cole*, 15 Mich 265 (1867) and *Hyatt v Adams*, 16 Mich 179 (1867).

between mental distress intrinsic to the injury itself and mental distress emanating from the manner in which it occurred:[5] "[I]f the plaintiff is being compensated for *all* mental distress and aguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way in which the injury occurred."[6]

United States District Court Judge Paul Gadola summarized a plaintiff's options after *Veselenak*:

> First, plaintiffs may forego their claims for exemplary damages and opt for a jury instruction on actual damages that includes elements of pain, suffering and mental anguish. … Alternatively, plaintiffs may request an instruction on actual damages that does not include any mention of mental injury, and then request a separate instruction on exemplary damages.[7]

For the first option, Michigan's Model Civil Jury Instructions include damages instructions for pain and suffering.[8] For the second option, courts and practitioners may consider the Nonstandard Jury Instruction.[9] A brief review of these instructions will lead the plaintiff's attorney to prefer the first option, while defense counsel should jump at any opportunity to go with option two. To be certain though, use of the Nonstandard Jury Instruction in addition to the Model Jury Instruction on pain and suffering as a "tack on" element of damages is not permissible under *Veselenak*.

B. Statutory claims may require jury instructions for emotional distress damages and exemplary damages, but only when the Legislature expressly says it's OK.

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[5] *Veselenak*, 414 Mich at 576; see also *Kewin v Massachusetts Mut Ins Co*, 409 Mich 401, 419 (1980) ("The theory of these cases is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feeling.").

[6] *Veselanak*, 414 Mich at 576-577. The Supreme Court later reiterated this principle: "A plaintiff claiming damages for mental and emotional distress would not be entitled to exemplary damages if mental and emotional distress damages are included as part of compensatory damages." *Phillips v Butterball Farms Co*, 448 Mich 239, 251 (1995), citing *Veselenak*, 414 Mich at 574.

[7] *Ramik v Darling Intern, Inc*, 60 F Supp 2d 680, 686 (ED Mich, 1999).

[8] M Civ JI 50.02.

[9] Mich Nonstandard Jury Instructions Civ §13:1.

The confusing aspect of exemplary damages comes when we shift to cases involving statutory claims. In those cases, the rule from *Veselenak* against double recovery, i.e., you can't use the Model Jury Instruction on pain and suffering **and** the Nonstandard Jury Instruction on exemplary damages, **may** succumb to giving effect to statutory dictates. Before delving into those cases where double-dipping is permitted, it cannot be over emphasized that the rule in Michigan is that "where a cause of action is statutorily based, there must be a basis in the statute for awarding exemplary damages."[10] In other words, the rule from *Veselenak* against a double instruction prevails **unless** the statute specifically provides for exemplary damages.

In *Peisner v Detroit Free Press, Inc*,[11] the Supreme Court was confronted with the unique text of the libel statute, which provided that a plaintiff can recover (1) "actual damages which he has suffered in respect to his … feelings" **and** (2) "exemplary and punitive damages."[12] The Court explained that in 1895 the Legislature added injury to feelings as an element of damages **in addition to** the already existing provision for exemplary and punitive damages.[13] After the 1895 amendment, the Supreme Court continued to treat exemplary damages under the statute as compensation for injury to feelings and the Legislature continued to reenact the same text.[14] Accordingly, the *Peisner* Court was faced with a real pickle: the statute plainly provides for two elements of damages that are understood to compensate for injury to feelings. In order to resolve the seeming redundancy and give effect to the Legislature's allowance of recovery for

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[10] *B&B Inv Grp v Gitler*, 229 Mich App 1, 10 (1998); see also *Eide v Kelsey-Hayes Co*, 431 Mich 26, 56-57 (1988); *Christie v Fick*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2010 (Docket No. 285924); 2010 WL 716097 lv den 488 Mich 924 (2010) ("[A] separate award for exemplary damages is not appropriate in a statutorily based action unless the statute in question specifically provides for such damages.").
[11] 421 Mich 125 (1984).
[12] MCL 600.2911.
[13] *Peisner*, 421 Mich at 132.
[14] *Peisner*, 421 Mich at 132-133.

damages to "feelings" and "exemplary damages," the Court resorted to the historical distinction that was rejected for common law claims in *Veselenak*.[15] And, in those rare circumstances that exemplary damages are recoverable, the Court explained that proof of malice or bad faith is required.[16] But the Court was adamant that it did not overrule *Veselenak*, explaining that *Veselenak* continued to apply "[i]n the absence of a legislative prescription for exemplary damages."[17] The Court also encouraged the development of a specific jury instruction on this issue and the Committee on Model Civil Jury Instructions accommodated with Model Civil Jury Instruction 118.21.

C. Unfortunately, confusion has resulted from courts failing to either recognize or enforce the essential distinction between *Peisner* and *Veselenak* – common law versus statutory claims.

Peisner has undoubtedly led to a great deal of confusion. For example, in *White v City of Vassar*,[18] the Court chose to "follow" *Peisner* instead of *Veselenak* because it "more clearly distinguished between actual and exemplary damages."[19] Simply stated, the *White* Court missed the point. *Veselenak* did not fail to "clearly distinguish" the damages; it rejected the distinction. And *Peisner* did not revive the distinction; it gave meaning to a unique statutory provision.

These apparent missteps in Michigan jurisprudence have led to unwary practitioners suggesting that exemplary damages are "an additional element of emotional distress."[20] That is simply not correct. *Veselenak* could not be more direct on

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[15] *Peisner*, 421 Mich at 134.
[16] *Peisner*, 421 Mich at 137.
[17] *Peisner*, 421 Mich at 134 n10.
[18] 157 Mich App 282 (1987).
[19] *White*, 157 Mich App at 291; see also *Janda v City of Detroit*, 175 Mich App 120 (1989) (holding that recovery of compensatory and exemplary damages did not constitute a double recovery in an assault and battery case).
[20] See Bob Garvey, UNPUBLISHED ARTICLE.

this point: "[I]f the plaintiff is being compensated for *all* mental distress and aguish, it matters not whether the source of the mental distress and anguish is the injury itself or the way in which the injury occurred."[21] The fiction of an "additional element of emotional damages" is born from a failure to grasp the essential difference between *Veselenak* and *Peisner* – a common law claim versus a statutory claim with a legislative prescription for exemplary damages. Despite *White* and other similar misstatements, *Veselenak* remains controlling precedent in Michigan and should be followed.

D. Conclusion: Three simple rules for exemplary damages instructions.

While determining when exemplary damages are recoverable has caused a great amount of consternation, it shouldn't. The general rules are simple:

- If the complaint alleges a common law claim, the plaintiff either gets the pain and suffering instruction or the exemplary damages instruction but not both.[22]
- If the complaint alleges a statutory claim that does not specifically provide for exemplary damages, the plaintiff does not get an exemplary damages instruction.[23]
- If the complaint alleges a statutory claim that specifically provides for both actual and exemplary damages, the plaintiff gets the pain and suffering instruction and the exemplary damages instruction.[24]

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[21] *Veselenak*, 414 Mich at 576-577. The Supreme Court later reiterated this principle: "A plaintiff claiming damages for mental and emotional distress would not be entitled to exemplary damages if mental and emotional distress damages are included as part of compensatory damages." *Phillips v Butterball Farms Co*, 448 Mich 239, 251 (1995), citing *Veselenak*, 414 Mich at 574.
[22] See *Veselenak*, 414 Mich at 576-577.
[23] See *Eide*, 431 Mich at 55-56.
[24] See *Peisner*, 421 Mich at 135-136.

In short, it is simply wrong to suggest that an instruction on exemplary damages is appropriate in all cases of aggravated misconduct. The cases in which an exemplary damages instruction is appropriate are few and far between.

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Exemplary Damages,
Robert Garvey
October 1, 2012

The subject of exemplary damages is a cause of unnecessary confusion in Michigan. Many experienced trial lawyers are unaware of the fact that exemplary damages are in fact a legitimate component of damages in cases of aggravated misconduct. In fact, there is a nonstandard jury instruction dedicated to them. (M Civ JI (nonstandard) 13:1)

Exemplary damages are not punitive damages. They are not meant "to make an example" of a defendant. They exist as a way of compensating for the mental anguish associated with bad conduct. A plaintiff injured by a driver driving on a suspended license after three OUILs suffers mental distress damages associated with the conduct itself. The law recognizes that the anger and outrage associated with the defendants conduct causes an additional element of emotional distress to the plaintiff.

Wise defense attorneys will attempt to sanitize a trial by admitting negligence knowing that if they can accomplish the concealment of the misconduct of their client they can prevent the plaintiff from recouping the very real mental distress damages associated with the misconduct. They will argue that with negligence admitted any recitation of facts that relate to the issue of negligence would be irrelevant. They also understand that liability drives damages.

A defendant should not be allowed to admit negligence and sanitize the facts where the plaintiff has suffered mental distress damages associated with the misconduct. The argument against sanitizing the record by admitting negligence is a damages argument not a liability argument.

The availability of exemplary damages in the State of Michigan was firmly established by the Supreme Court in the case of *Veselenak vs Smith* (414 Mich 567;3278 NW2d 261) the case also stands for the proposition that "exemplary damages" are really just another manifestation of traditional mental distress damages. (In *Veselenak* the exemplary damages portion of the verdict was vacated because of the possible duplication with the mental distress damage jury instruction).

In *Flannigan vs. Goldberger* (reported in MLW 9/26/05) a Macomb County jury awarded our client $872,000.00 in damages as a result of a misplaced surgical screw and a specific finding that the physician concealed his malpractice from the patient thereby producing anger and outrage. The jury in that case awarded $442,000.00 in general compensatory damages and $430,000.00 in exemplary damages. (Per *Veselenak* we did not go to the jury on traditional "mental distress, anguish" damages. This avoided the possibility of duplication that was fatal to the plaintiff in the *Veselenak* decision).

In malpractice cases, exemplary damages associated with concealment should not be subject to the caps since the damages are awarded in relationship to the concealment not the acts of medical malpractice.

In cases of aggravated misconduct plaintiffs council should not ignore mental distress damages associated with the conduct of the defendant. Whether you go to the jury asking for exemplary damages as a separate element under NJJI (Nonstandard Jury

Instruction 13:1) or as a component of mental distress and anguish, in our experience jurors understand these damages and respond in appropriate cases.

NEGLIGENCE LAW SECTION QUARTERLY

FALL 2012

INSURANCE COVERAGE ADVISOR

STEPS ON THE PATH TO FINDING COVERAGE

By Hal O. Carroll
WWW.HalOCarrollEsq.com

The quest to find insurance coverage is different in each case, of course, but there are some general principles and specific actions that most of them share. Here are a few of them.

Work together. This is the theme of many of the points below. It's a peculiarity of insurance coverage cases that the parties shift their alignments. Plaintiffs and defendants are on the same side in this area, and should recognize that. If the insurer files a declaratory action, tort plaintiff and tort defendants should coordinate their response. If the tort defendant files the dec action, the tort plaintiff should not think of the dec case as the tort defendant's problem. Working together saves money on the cost end and provides benefits in the form of a coordinated response.

Read the underlying complaint. Remember it's the allegations in the complaint that control coverage, at least initially. It's the facts, not the labels, that count.[1] So allegations of intentional conduct will jeopardize coverage. Sometimes there is flexibility in how a case is framed. A defendant who wants coverage might want to ask the plaintiff to make some amendments if that will enhance the chances of getting coverage, maybe by adding a count.

Reading the policy – carefully. Even lawyers who specialize in insurance coverage probably never read their own homeowner and General Liability policies. Nobody reads policies for fun. But good things can be hiding in there. There's no substitute for reading the policy. Always keep the word "context" in your mind. If the insurer cites an exclusion, read the whole exclusion, and the ones that are nearby.[2]

Manuscript policies. If you have a "manuscript" policy or a policy with manuscript endorsements, *i.e.*, written by the company itself, as opposed to the form ISO policies, then you want to be especially careful. Manuscript policies can be gold mines. It's the same principle that applies to reservation of rights letters that are written by the insurers. Drafting policies really is an art and it does require skill. And a secret that comes from years of experience is that the worst writers are the most confident about what they have written. There are some horrible policies out there, and they can be gold mines. One policy, to give a simple example, said that in the case of ambiguity, the parties could use "parole evidence." In the first place, there is no

reason to say that extrinsic evidence can be used; that's basic contract law. In the second place, it's "parol," not "parole."

Assembled policies. Sometimes a policy is assembled from various forms. Usually it's a main form and some endorsements, but not always. For example, a policy was of the claims made type, so that late reporting of a claim has a guillotine effect – no proof of prejudice needed. The policy said "the claim must be reported in the year in which it is made." Pretty tough language. But then they added a form that said "a claim is deemed to be made in the year in which you report it to us." So when the insured got sued in 2002 and reported it in 2005 it was timely.

Tender. If you are the tort plaintiff, make sure the tort defendant has tendered the claim to the insurer. An unreasonable delay will release the insurance company, and the fact that it's the insured's fault won't help the tort plaintiff. If you are the tort defendant, make sure you tender promptly. Even if the insurer knows a claim is coming, it's still your job to tell the insurer.[3] Also, if you are the tort defendant, and this is a construction site injury, check for other potential insurers, and for indemnity clauses in contracts.

Reservation of rights letter. Obviously you want to read this closely. You might be surprised how many of these are amateur jobs. It's not unusual for a letter that's 10 pages long to be 80% fluff and padding. Claim representatives often write them and they work from a formula with a lot of quotations from the policy and very little analysis. So don't be intimidated. But do respond promptly, politely and with carefully expressed reasoning. If you are the tort plaintiff, get a copy of the letter. Again, work together. Although the tort plaintiff doesn't have a contractual relation with the insurer, he or she is still an interested party, to the extent that in a dec action they must be joined. So there's no reason the tort plaintiff can't also respond to the reservation of rights letter.

If it's a denial letter, by the way, the insurer may be estopped from coming up with new defenses.[4]

Explain to persuade. This is a good mantra for anyone dealing with coverage. There's no point spending time vilifying the insurer as evil and grasping. If the judge also dislikes insurers, you don't need to say it, and if the judge is neutral, vilifying the insurer diminishes your argument. Another reason to stress explanation is that judges are not necessarily experts in insurance. So you need to find a way to work the basics into your argument without talking down to the judge, and end up giving the judge a good short analysis that he or she can adopt.

Explain the policy. Policies are densely written; they have to be. The language is arcane, but it has a reason for being there. If you get a handle on what the language is legitimately trying to accomplish, you have a basis for explaining why the insurer's use of that language in your case is not legitimate.

Get a certified copy. Always ask for that. The insured may have his or her own copy, but even if so, get a certified copy. It's probably rare for an insurer to intentionally leave something out or put something in, but it's better to have someone's name above an oath.

Get the underwriting file and the agent's file. If the insurer claims that this particular activity of the defendant falls outside the scope of the risk that the insurer thought it was taking on, it's good to be able to see that the underwriter knew of all of the insured's business activities.

Getting to coverage requires bringing many pieces together. These are some of the pieces that go into making the argument into a comprehensive and understandable whole.

Hal Carroll is a co-founder and the first Chairperson of the Insurance and Indemnity Law Section, and a frequent contributor to the *Negligence Law Quarterly*. He is a chapter author of ICLE's Michigan Insurance Law and Practice. He represents insureds in disputes over insurance coverage and indemnity obligations, and in general civil appeals. His email address is HOC@HalOCarrollEsq.com.

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[1]The injuries resulting from the car accident are excluded from coverage regardless of the label the allegations were given in the complaint. We must look to the underlying cause of the injury to determine coverage and not the theory of liability. *Gorzen v Westfield Ins Co*, 207 Mich App 575, 578; 526 NW2d 23 (1994).

[2]"[W]e read the contract as a whole to effectuate the overall intent of the parties." *Hayley v Allstate Ins Co*, 262 Mich App 571, 575; 686 NW2d 273 (2004).

[3] "Absent a request, an insurer has no duty to defend an insured." *DAIIE v Higginbotham*, 95 Mich App 213, 218; 290 NW2d 414 (1980).

[4] Generally, once an insurance company has denied coverage to an insured and stated its defenses, the insurance company has waived or is estopped from raising new defenses. *Kirschner v Process Design Associates, Inc*, 459 Mich 587; 592 NW2d 707 (1999).

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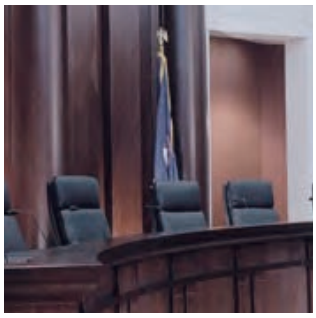
Michigan Judicial Selection Task Force
Report and Recommendations



APRIL 2012

"The judicial systems of the United States at the beginning of the 21st Century remain unparalleled in their capacity to deliver fair and impartial justice, but these systems are in great jeopardy. Our state courts play a critical role in preserving American freedom and democracy. Almost 100 million cases are resolved peacefully and with relatively little fanfare by some 30,000 state judges each year. Increased political involvement in the judiciary, diminished public trust and confidence in the justice system, and uncertain resources supporting the courts place burdens on the judiciary's capacity to provide fair and impartial justice. Indeed, the escalating partisanship and corrosive effects of excessive money in judicial campaigns, coupled with changes in society at large and the courts themselves, have served to create an environment that places our system of justice, administered by independent and impartial judges, at risk."

Report of the American Bar Association Commission on the 21st Century Judiciary, 2003

"The mission of the Judicial Selection Task Force is to assemble a group of persons of superior character, integrity and intellect to study the processes of judicial selection in this state and various alternatives that are exercised in other states. The study group will affirm what is good about Michigan's judicial selection processes and formulate recommendations for appropriate changes that could enhance or elevate public trust and confidence in the impartiality of Michigan courts.

The task force will reflect the political and demographic diversity of this state. Members will be drawn from the bar, the bench, civic groups, the academic community and associations of shared interest. All members will share a commitment to fair and impartial courts. The study is concerned with the processes of judicial selection, not the judges and justices who are selected through those processes."

Mission Statement of the Judicial Selection Task Force, December, 2010

MICHIGAN JUDICIAL SELECTION TASK FORCE

Report and Recommendations

HON. SANDRA DAY O'CONNOR
Senior Associate Justice
United States Supreme Court
Honorary Chair

HON. MARILYN KELLY
Justice
Michigan Supreme Court
Co-Chair

HON. JAMES L. RYAN
Senior Circuit Judge
United States Court of Appeals for the Sixth Circuit
Co-Chair

JUSTIN R. LONG
Assistant Professor of Law
Wayne State University Law School
Reporter

Contents

Abstract

Michigan's process for choosing supreme court justices has recently attracted national attention for its excessive cost, its lack of transparency, and its damaging negativity. Led by two widely-esteemed Michigan jurists, Justice Marilyn Kelly and Judge James Ryan, a diverse group of leading citizens from across the state came together as volunteers united by the conviction that Michigan deserves better.

This group, known as the Michigan Judicial Selection Task Force, is composed of conservatives, liberals, and independents; lawyers and non-lawyers; business people and experienced campaigners. The members examined other states' models of judicial selection through the research and direct testimony of leading scholars and practitioners on all sides of the issue. After intense study and hours of debate, the Task Force developed common-sense, practical solutions that can rapidly make judicial selection in this state more democratic and more effective.

These Are the Recommendations of the Task Force:

- **Campaign Finance Reform:**
  First, the Task Force urges that supreme court campaign advertisements fully disclose the source of their funding. Too often special interest groups hide behind innocuous-sounding names that obscure their real purpose in funding supreme court-campaign advertisements. If corporations, unions, trade groups, political parties, or private persons wish to fund advertisements, they are free to do so. But they should inform the public of their true identity so that voters can weigh the messages in context.

- **Open Nonpartisan Primaries for the Supreme Court:**
  Second, the Task Force proposes the elimination of the partisan nomination process for candidates for supreme court so that it matches the current nonpartisan election system. Justices of the supreme court must offer equal justice under the law without regard for political agendas. The current system leaves the nomination process in the control of party insiders. In its place, an open primary system could reduce the influence of partisan politics on the selection of supreme court candidates and permit the people of Michigan to make their selections directly. Just as importantly, it would remove a powerful source feeding the perception that Michigan justices are partisan. And an open primary system would bring the nomination and election of supreme court justices in line with all of the rest of Michigan's judiciary.

- **A Supreme Court Campaign Oversight Committee:**
  Third, the Task Force recommends the establishment of a citizens' campaign oversight committee. This nonpartisan private group of respected citizens would monitor judicial campaign advertisements (produced by both candidates and third parties). This oversight committee would check the factual claims in advertisements and denounce false, misleading, or

destructive messages. The honesty, respect, and fairness that citizens expect from their courts should also mark campaigns for judicial office. The campaign oversight committee would identify departures from these values.

- VOTER EDUCATION GUIDES:
  Fourth, the Task Force suggests that the Secretary of State create a voter education guide each election cycle for candidates seeking office as a justice. These guides would provide voters with a neutral, factual, relevant description of each candidate's qualifications. In addition, the guides would be a timely source of information about the judicial branch and the responsibilities of judicial officers. This could help citizens to overcome ignorance and misinformation as they seek to cast informed votes for one of the most important offices in the state.

- VACANCY APPOINTMENTS FOR THE SUPREME COURT; ADVISORY SCREENING COMMISSION:
  Fifth, the Task Force recommends that the Governor voluntarily create an advisory commission to screen candidates for appointment to fill supreme court vacancies. Currently, the Governor exercises unfettered discretion; regardless of how thoughtfully governors have approached their weighty responsibility in this respect, there may remain a belief that raw political calculation, rather than the qualifications of the appointed justices, forms the basis for these vacancy appointments. A nonpartisan advisory commission composed of lawyers and non-lawyers could publicly evaluate and recommend potential appointees on ability and qualifications alone. Such a process would restore the public's confidence in the Governor's vacancy appointments to the supreme court.

- AGE 70 LIMITATION:
  Sixth, the Task Force recommends the removal, by constitutional amendment, of the provision in the judicial article of the Michigan Constitution that prohibits the election or appointment to a judicial office of those persons who have reached the age of 70 years.

- CONSTITUTIONAL AMENDMENT TO REQUIRE GUBERNATORIAL APPOINTMENT OF SUPREME COURT JUSTICES:
  Seventh, many members of the Task Force support a constitutional reform to establish gubernatorial appointment with nominating commission screening for all supreme court openings, not merely those created by mid-term vacancy. The highly successful Arizona procedure, which includes a majority of non-lawyers on the nominating commission and open hearings with public participation, or the federal procedure could provide a model for this process.

Part I: The Current System of Selecting Michigan Justices

Currently, the Michigan Constitution[1] provides for a supreme court of seven justices, each holding office for renewable eight-year terms. The justices are elected, generally two at a time, at regular statewide general elections.

All candidates must be younger than age 70 at the time of election. They must be registered Michigan voters and licensed Michigan attorneys for at least five years.[2]

Candidates have two ways of gaining access to the ballot. Incumbents may file an affidavit of candidacy to confirm their desire to run again;[3] they are then identified as incumbents on the ballot. According to statute, the political parties are responsible for nominating candidates other than the incumbents who file affidavits.[4] Although the nominees are chosen by political parties, the general elections are nonpartisan; no party-identifying information appears by the candidates' names on the ballot.

Nearly half of Michigan's justices first reached office without election. In the event of a vacancy that arises at any point during an eight-year term, the Governor appoints the replacement justice with no oversight from the Legislature or any other institution. That appointed justice must then run to keep his or her seat at the next general election, but then must run again as soon as the original term that gave rise to the vacancy expires.[5]

As noted above, the members of the Task Force have diverse backgrounds and political beliefs. Importantly, not one member of the Task Force suggested or supported maintaining the current process for selecting justices.

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[1] *See generally* MICH. CONST. ART. VI, § 2.
[2] *See* MICH. COMP. L. § 168.391.
[3] *See* MICH. COMP. L. § 168.392a.
[4] *See* MICH. COMP. L. § 168.392.
[5] *See* MICH. COMP. L. § 168.404.

Part II: Problems with the Current System of Selecting Michigan Justices

Campaign Spending

The 2010 campaign season for the Michigan Supreme Court was the most expensive and most secretive in the nation.[6] Outside expenditures, including by political parties ($5,503,369) and interest groups ($1,274,841), dwarfed the candidates' own spending ($2,342,827.) Voters saw ads attributed to the Michigan Republican Party, the Michigan Democratic Party and the Virginia-based Law Enforcement Alliance of America that were not subject to disclosure in the State's campaign finance reporting system.[7] Over the last decade, more than half of all spending on supreme court races in Michigan went unreported (and therefore the sources went undisclosed).[8]

Secret spending on campaigns is harmful in two ways: it can confuse voters about the messages they rely upon to assess the candidates, and it obscures financial contributions that might cause apparent conflicts of interest and require justices' recusal from cases involving those donors. Both problems undermine the public's respect for the courts and diminish democratic accountability.

Voters rightfully consider the source of campaign messages they view when deciding what weight to place on them. If a voter strongly disagrees with other issue positions that an organization takes, the voter may discount that organization's views on which judicial candidate to support. Where voters are unable to identify the source of an advertisement, they will lack this important cue. This reason for public disclosure of campaign spending is especially important in judicial races because voters generally feel uninformed about the qualifications of judicial candidates.[9]

The United States Supreme Court has held that campaign contributions on a judge's behalf can become so significant that they require the judge's recusal from cases involving that contributor.[10] Michigan justices must recuse themselves under similar circumstances.[11] The problem is real: in the 1990s, 86% of supreme court cases involved contributors to the justices' campaigns.[12] As Justice O'Connor has explained, "motivated interest groups are pouring money into judicial elections in record amounts. Whether they succeed in their attempts to sway the voters, these efforts threaten the integrity of judicial

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[6] Adam Skaggs, Maria da Silva, Linda Casey, and Charles Hall, *The New Politics of Judicial Elections: 2009-2010* (2011), *available at* http://newpoliticsreport.org/site/wp-content/uploads/2011/10/JAS-NewPolitics2010-Online-Imaged.pdf .

[7] *Id.*

[8] *Id.*

[9] According to a recent poll, the most common reason voters decline to vote in judicial elections is that they do not know enough about the candidates. *See* Denno-Noor poll, "Survey of Michigan Statewide Voters" (Mar. 12, 2009).

[10] *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

[11] *See* Mich. Ct. R. 2.003(C)(1)(b).

[12] Jesse Rutledge, ed., *The New Politics of Judicial Elections in the Great Lakes States, 2000-2008* (Justice at Stake).

selection and compromise public perception of judicial decisions."[13] Where the source of campaign expenditures remains unknown to the public, parties to supreme court litigation are unable to identify the conflict of interest that would lead them to move for a justice's recusal. Similarly, voters considering a justice for re-election are unable to determine whether the justice sat on cases involving secret campaign supporters.

As a result of undisclosed spending, citizens and litigants alike lack a sound basis for confidence in the impartiality of their highest court. Michigan voters already believe that campaign spending has infected the decision-making of their judiciary; 63% believe that judicial campaign contributions have a lot or some influence on the decisions judges make.[14] Perhaps this explains the overwhelming support nationwide for full-disclosure laws among both Democrats (86% in favor) and Republicans (88% in favor).[15] In Michigan, 96% of voters believe it is very or somewhat important to require public disclosure of <u>all</u> sources of spending for judicial elections.[16]

Excessive Partisanship

The Task Force believes that a significant cause of the suspicion regarding judicial decision-making is the powerful role of the political parties in selecting supreme court candidates. Even though the Michigan constitution prohibits party designations from appearing on the ballot,[17] non-incumbent candidates for the supreme court must first win the right to campaign for their seats through a political party's nomination at its party convention.[18]

This process compels would-be candidates for nomination to the supreme court to compete for support from party insiders, who may prefer conformity to party ideology over devotion to the judicial qualities of impartiality, even temper, and intellectual honesty. These potential nominees must spend precious resources pursuing party loyalists' endorsements and funds from across the state, which strengthens the popular perception of the justices as partisan.

The Task Force strongly believes that the justices are not like other office-holders, for whom partisan alignment is a valid signal of their policy preferences. Supreme court justices must apply the law even-handedly, without regard for wealth, power, or whether a particular political party will gain advantage. Not only must justices act even-handedly, the public must perceive this impartiality for the court to retain its legitimacy. The close link between candidates for the supreme court and the political parties that Michigan's current process signals may suggest to the voters that justices decide cases merely to carry out the political platforms of their respective parties. Michigan most certainly deserves better.

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[13] Sandra Day O'Connor, *Justice for Sale*, THE WALL STREET JOURNAL at A25 (Nov. 15, 2007).
[14] Denno-Noor poll, "Survey of Michigan Statewide Voters" (Mar. 12, 2009).
[15] Charles Hall, Justice at Stake poll, 2010.
[16] Denno-Noor poll, *supra* n.8.
[17] MICH. CONST. ART. VI, § 23.
[18] MICH. COMP. LAWS § 168.393.

Attack Advertisements

Judicial campaigns have been marked in the last ten years by bitterly negative advertisements on both sides. Personal attacks against judicial candidates cause a variety of harms. The best lawyers may choose not to run for the bench if doing so means they must submit themselves and their families to vicious insults on the campaign trail. Citizens may come to believe the disparaging remarks against both sides, including those attacks on the winning candidates. Thus, negative campaigns weaken public confidence in the justices. Negative campaigns may convince voters that no candidate deserves support at the ballot box, driving down the number of participants in judicial elections. And because tabloid-style attack advertisements exaggerate facts, take them out of context, or focus on personal characteristics irrelevant to judging, negative campaigns can greatly distort the limited information available to voters and potentially affect confidence in our judicial system. The Task Force believes that the suite of reforms it recommends for the electoral process will help to decrease the number, intensity, and effect of judicial attack ads.

Lack of Voter Knowledge About Judicial Candidates and Qualifications

With supreme court races heavily influenced by misleading negative advertisements funded by secret sources, Michigan voters lack the information they need to make meaningful choices between candidates despite the enormous amounts of money spent on these campaigns. Furthermore, the basic task of determining what qualities are necessary to a successful supreme court justice requires more knowledge than is currently available to most voters. Even the most civic-minded voters are often asked to make a ballot choice among candidates they do not know on grounds they do not fully understand. Voting for supreme court justices without adequate information is not an exercise in democratic accountability. It is a farce. But today, our current system asks well-intentioned voters without adequate time or training to study judicial candidates' records to do their own time-consuming research or else remain uninformed. The result is a profound blow to the exercise of meaningful democratic judicial selection and may create a significant obstacle to the election of the best-qualified jurists.

Gubernatorial Discretion to Fill Mid-term Vacancies

While voters must endure expensive, caustic, partisan campaigns for supreme court seats, it would appear that they at least retain the final say as to who sits on the supreme court. But actually, nearly half of Michigan justices first took office having spent no money on campaigns at all.[19] Instead, these justices joined the court by appointment by the Governor. The Michigan constitution authorizes the Governor to fill vacancies that arise whenever a justice does not complete his or her eight-year term.[20] The only legal limits on the Governor's choice are the statutory requirements that justices of the supreme court be

[19] According to the Michigan Supreme Court Historical Society, since 1963, twelve justices first took office by gubernatorial appointment; fourteen first gained their seats by election.
[20] MICH. CONST. ART. VI, § 23 (the Governor holds the same power to fill vacancies on all courts of record by appointment).

registered voters, lawyers admitted for at least five years, and under age 70 at the time of appointment.[21] The Governor has sole discretion, with no checks or balances from any other branch of government, to fill vacancies with anyone he or she favors. Once in office, appointed justices must then run for election at the next general election, but their names appear on the ballot with the electoral advantage of an incumbency designation.[22]

The absence of any public input before the Governor's choice makes the Governor vulnerable to accusations of using vacancy appointments to manipulate the supreme court. Regardless of how thoughtful and earnest a Governor's decision might be, the public has no independent assurance that the new justice has satisfied any test other than that of pleasing the chief executive. Supreme court seats are far too important to be treated as—or popularly perceived as—mere plums of political patronage. A justice's loyalty must be seen to be to the law rather than to the Governor or party leaders.

Lack of Judicial Independence

The members of the Task Force were closely divided on the question of whether the current system of selecting supreme court justices should be retained. A significant number believes that the election of justices compromises judicial independence even with appropriate reforms to address the problems described above. These members argue that justices must be free to apply the law without fear of losing office due to an unpopular decision. According to these members, so long as judicial elections remain the method of selecting and retaining justices, there will be undue pressure on the supreme court to match its rulings to majority will, an inappropriate consideration in judicial decision-making. Even deeply unpopular litigants deserve to win if their legal case merits it; even widely favored laws sometimes must be struck down as unconstitutional.[23] These members believe that where legal questions are close, as is typically the situation at the supreme court, justices need protection from political majorities so that they can freely apply their learning, experience, and wisdom to those questions. These members contend that elections compromise this needed independence.

Scope of the Report

The primary focus of this Report is the reform of the judicial selection process for the Michigan Supreme Court and, unless otherwise specifically indicated, the recommendations that follow are limited to that court. The Task Force recognizes, however, that some of the problem areas that it has identified and some of the recommendations it has made could have applicability across the entire judicial system in Michigan and invites further study and investigation of the feasibility of expanding such recommendations to include the entire judiciary.

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[21] MICH. COMP. LAWS § 168.391(1).
[22] MICH. COMP. LAWS § 168.404(1).
[23] *See, e.g.*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2101-02 (2010).

Part III: Solutions

Full Open Disclosure of Campaign Spending

To address the problem of unreported, undisclosed spending on supreme court races, the Task Force unanimously urges the Legislature to extend the disclosure requirements of the Michigan Campaign Finance Act[24] to all judicial campaign expenditures, including so-called "issue ads" by political parties or interest groups outside the candidates' control. The United States Supreme Court has expressly upheld campaign disclosure requirements as a salutary complement to high levels of private spending on electoral campaigns.[25]

Disclosure and maintenance of a central registry of the people and groups who fund advertisements will permit opponents, journalists, and the public to identify the true source of campaign messages.[26] Only then will voters have access to the information they need to weigh these advertisements in context. Full disclosure will expose special interest groups seeking to twist the supreme court's jurisprudence for private gain. Public trust in the candidates and the courts will increase as voters begin to feel less manipulated by unseen forces. An immediate amendment to the Campaign Finance Act will accomplish this desperately needed reform, and the Task Force calls for quick bipartisan adoption of this effective step toward a more democratic and impartial supreme court in time for the next judicial election cycle. The Task Force has attached an appendix to this report containing draft legislation with its specific recommendations on this point.[27]

Open Nonpartisan Primaries

While the Michigan constitution requires that judicial elections be nonpartisan, the Legislature retains the power to determine the method by which candidates win the right to appear on the ballot. For the supreme court, Michigan delegates this responsibility by statute to the political parties,[28] resulting in the appearance of a politicized court with justices pressured to be loyal to party ideology rather than the rule of law. The Task Force's proposed solution is direct and efficient: eliminate the role of the political parties in selecting supreme court candidates in favor of an open primary.

By gathering petition signatures sufficient to demonstrate the would-be candidate's statewide electoral viability, supreme court aspirants would win a place on a nonpartisan primary ballot. The top vote-getters at the primary would run in a general election for the supreme court seats at stake. This process would take power over the court away from party insiders and give it to the people of Michigan. The public could be confident that supreme court justices would decide cases without worrying whether their rulings conformed with party ideology or otherwise put their party support at risk. And this

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[24] MICH. COMP. LAWS § 169.226(1).
[25] *See* Citizens United v. F.E.C., 130 S. Ct. 876, 915-917 (2010).
[26] *See* Roy A. Schotland, *The Post*-Citizens United *Fantasy-Land*, 20 CORNELL J. L. & PUB. POL'Y 753 (2011).
[27] See Appendix D
[28] MICH. COMP. LAWS § 168.393.

reform would not require any amendment to the constitution; the Legislature already has the power to enact these changes by statute. The Task Force calls on the Legislature to adopt an open, nonpartisan nomination process in time for the next judicial election cycle. To that end, the appendices contain draft legislation to provide for the nomination of supreme court candidates by open nonpartisan primaries, similar to the process for electing all other Michigan judges.[29]

Citizens' Campaign Oversight Committee

Free speech principles permit those interested in judicial campaigns to produce noxious, distracting, and misleading attack advertisements. But such messages are not good for democracy and they are not good for the supreme court. Debasing, undignified campaigns drag the entire judiciary into disrepute and make more difficult the voters' earnest efforts to elect the best-qualified justices. The establishment of a private, nonpartisan body of citizen volunteers to monitor judicial campaign advertisements would help limit the debate to those issues actually relevant to the voters making decisions.[30] This oversight committee would identify and denounce vile personal insults expressed in the guise of campaign material. Empowered by rigorous campaign-finance disclosure laws, the committee would call to the public's attention which persons or organizations were responsible for the attack ads. The oversight committee would also fact-check the misleading or out-of-context claims made in judicial campaign materials, and alert the public of its conclusions.

Journalists and opposing candidates would eagerly spread the word when the oversight committee criticizes misleading advertisements. The impartial and civic-minded character of the committee members would increase the credibility of their results. In time, candidates and their supporters would come to learn that the production of attack advertisements would bring them more embarrassment and criticism than support. The Task Force encourages nonpartisan citizens' groups to begin the formation of a campaign oversight committee.

Voter Education Guides

Races for supreme court justice rarely attract enough media attention to provide voters with the information they need to make educated choices. A short, neutral biography describing each candidate's background, judicial evaluations, and qualifying characteristics would cut through the din of negative campaigns to offer voters the useful data they need most. Voters would be most likely to trust these guides if they were to come from a neutral and expert official source. This is why the Task Force suggests that the Secretary of State develop and distribute biographical descriptions of supreme court candidates, as it has previously done for candidates for other offices. The Task Force also urges that the Legislature and judiciary put into effect existing Michigan law requiring the

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[29] See Appendix E.

[30] *See generally* Barbara Reed and Roy A. Schotland, *Judicial Campaign Conduct Committees*, 35 IND. L. REV. 781 (2002).

development and implementation of judicial performance evaluation procedures.[31] The Secretary of State should add the results from these evaluations to voter guides where sitting judges are on the ballot. If the Secretary of State were to distribute the information by way of the Secretary of State's website, which is already a popular clearinghouse for a wide variety of government information, costs would be quite low. The Task Force urges the Legislature to appropriate funds sufficient to permit the Secretary to undertake this responsibility.

Governor's Advisory Screening Commission

In addition to the public, both governors and justices suffer from the current system of unfettered gubernatorial appointment to fill mid-term judicial vacancies. Although recently Michigan's governors have considered the confidential input of the State Bar of Michigan's Judicial Qualifications Committee, this input is not public and contains only the viewpoints of lawyers. The perception that appointees won their seats by political favoritism rather than on their qualifications and abilities haunts justices throughout their careers. And most of all, the absence of transparency in the appointment process and the potential for supreme court justices to be patronage appointments harms the public. The Task Force invites Governor Snyder and future governors to cure this uncomfortable condition by voluntarily naming an advisory screening commission to weigh the merits of potential supreme court appointees and recommend the most qualified to the Governor for appointment.

The advisory screening commission would consist of twelve to fifteen volunteers, with most members non-lawyers. It would accept applications from those seeking gubernatorial appointment to the supreme court and, after reviewing their paper qualifications, would conduct open public hearings on the applicants' merits. After deliberating in public, the commission would recommend to the Governor a short list of three to five highly-qualified applicants. The Governor would pledge in advance to appoint justices only from the list presented by the advisory screening commission.

This process would leave the Governor's ultimate authority to appoint justices intact. But the Governor would make those appointments with a new confidence that he or she picks the best available candidates to fill supreme court vacancies. The justices the Governor appoints by this method would no longer need to worry about the public's perception of their qualifications, because the commission would have fully explored their professional traits in open session. And this process would assure the public that the Governor did not base his or her appointments on whim or political patronage but instead on a sound examination of each candidate's suitability for the office. The Task Force further notes that this process could provide a barometer by which the public could evaluate the full-scale appointive process that the next section describes. The Task Force respectfully asks Governor Snyder to adopt this practice in his current administration. The

[31] *See* MICH. COMP. LAWS § 600.238. The Task Force studied evidence of judicial performance evaluations being successfully implemented in Arizona, Colorado, and nine other states. *See* Institute for the Advancement of the American Legal System, "Appellate Judicial Performance Evaluation" (on file with the Task Force).

appendices to this report include a proposed executive order that would put this proposal into effect.[32]

Age 70 Limitation

Section 19(3) of the judicial article of the Michigan Constitution[33] provides that "No person shall be elected or appointed to a judicial office after reaching the age of 70 years." This provision applies only to judges and justices; no other elected officials in Michigan are subject to such an age limitation. The Task Force believes that this limitation is arbitrary in nature and serves no legitimate public interest. Based upon the sole criterion of age, it artificially ends the judicial careers of existing judges and justices who reach the age limitation and unnecessarily constricts the pool of otherwise qualified persons who might be candidates for judicial office. In the process, therefore, this provision warps the judicial selection process in our state. The Task Force recommends the removal, by constitutional amendment, of the age 70 limitation.

Judicial Nominating Commission

Finally, many members of the Task Force believe that the best method of selecting supreme court justices is by bipartisan judicial nominating commission, modeled on the processes used in Arizona[34] and Colorado, or on the federal procedure.[35] If the former were adopted, in place of popular election, supreme court justices would obtain office after nomination by the commission and appointment by the Governor. The commission would consist of a majority of non-lawyers and an equal number of Democrats and Republicans, so that elite lawyers could not use the commission as a tool to exert control over the judiciary. Its hearings and deliberations would be open to the public, and the commission would seek and welcome public comment on the potential nominees. The Governor would be bound to appoint justices from the list approved and put forward by the commission.

If the electoral reforms proposed above succeed in restoring public confidence in the supreme court, decreasing misleading attack advertisements, reducing the influence of political parties, better educating voters, and reducing undisclosed spending, then some Task Force members would view the reforms as a success. The Task Force members ultimately in support of an appointment system, however, believe that such a system would protect judicial independence more strongly than an electoral system, even with the reforms proposed above.

However, adoption of this process would require amending the Michigan constitution. In the near term, the Task Force members who support a judicial nominating commission urge immediate action to give effect to the common-sense electoral reforms

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[32] See Appendices B and C.
[33] Mich Const, Art VI, §19(3)
[34] Hon. Ruth McGregor, Presentation to the Judicial Task Force at Wayne State University Law School (May 17, 2011).
[35] Hon. Rebecca Kourlis, Presentation to the Judicial Selection Task Force at Wayne State University Law School (June 14, 2011).

proposed elsewhere in this report. In the long term, however, these members encourage the people of Michigan to reconsider the best methods of choosing our most important jurists, through a constitutional amendment.[36] These Task Force members propose the specific language of a constitutional amendment and implementing legislation in the appendices.[37]

Public Financing of Supreme Court Campaigns

A minority of Task Force members favors public financing of Supreme Court campaigns. They share the majority's view that a fundamental cause of concerns about an independent judiciary is the way Michigan's Supreme Court elections are financed. They make the following points:

The identities of those spending the most on Supreme Court elections are hidden from the public. The candidates are caught in the web of "dialing for (lots of) dollars" and/or seeking financial support from special and narrow interest groups in order to run a competitive campaign. A public funding program could ease the fundraising burden that serious and qualified candidates face. It could allow such candidates to get their messages to the voters, and it could discourage the undue influence of narrow interest groups.

These members point out that a successful model of public funding for appellate judicial campaigns exists. In North Carolina, 39 of 61 candidates have participated in that state's public finding program since 2004, challengers and incumbents, Republican-endorsed and Democratic-endorsed candidates alike. Observers across the political spectrum have observed that the North Carolina system creates an incentive for candidates to accept public funding and a disincentive for advocacy groups to blur the issues in judicial elections.

These members assert that, by establishing a Supreme Court campaign fund drawn from general state revenues, fees, surcharges, tax check-offs, and other sources, the Legislature could enable candidates to present their qualifications to the voting public without risking the taint of having accepted contributions from potential litigants or special interests. Michigan currently has a voluntary public fund to support gubernatorial campaigns. In recent years several gubernatorial candidates have declined to apply for money from the fund. It is beyond the scope of this Task Force's authority to address the viability of public funding for Michigan's gubernatorial campaigns. But concerns about the ethics of allowing campaign contributions to judicial candidates from those who might later appear as parties before the same individuals sitting as judge are clearer and more developed than concerns about gubernatorial campaign funding. Even at the inflated levels of spending in recent years, less money goes to judicial races than to gubernatorial races. The existing tax return check-off for the partial public funding of gubernatorial campaigns already provides enough revenue to support a viable fund for Michigan Supreme Court candidates. Also, polling indicates overwhelming support for public funding for Supreme Court elections. The Task Force members who favor public financing believe that establishing such a fund for Supreme Court candidates in Michigan would be an important investment in advancing an independent judiciary.

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[36] See Appendix A.

[37] See Appendices A, B and C.

Part IV: Task Force Research and Discussion

The Task Force met at Wayne State University Law School starting on December 14, 2010. The study phase proceeded on January 11, 2011 with Judge Ryan and Rich Robinson (Executive Director, Michigan Campaign Finance Network) presenting; on March 4, with presentations by Justice Kelly and Charles Hall (Communications Director, Justice at Stake Campaign); and on May 17 with addresses by Professor Melinda Gann Hall of Michigan State University and Chief Justice Ruth McGregor (Arizona Supreme Court, retired); and on July 21, with written remarks delivered from Justice Thomas E. Brennan (Michigan Supreme Court, retired).

On June 14, 2011, the Task Force and Wayne State Law hosted a major conference on alternative approaches to judicial selection. Speakers included Justice Sandra Day O'Connor (United States Supreme Court, retired), Justice Rebecca Kourlis (Colorado Supreme Court, retired), Chief Justice Clifford Taylor (Michigan Supreme Court, retired), David Rottman, Ph.D. (National Center for State Courts), Mark Brewer, Esq. (Chair, Michigan Democratic Party), Robert LaBrant, Esq. (General Counsel, Michigan Chamber of Commerce), Hugh Caperton (Plaintiff, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)), and Rich Robinson.

The deliberative phase of the Task Force's proceedings included meetings on August 26, September 27, November 4, and December 16, 2011. Throughout this phase members engaged in extensive written discussion of their preferred recommendations culminating in the adoption of this report.

In addition to the extensive presentations, meetings, and correspondence, Task Force members read and discussed a wide range of scholarly material on judicial selection. A partial bibliography follows here:

"Methods of Judicial Selection in the 50 States," *available at* http://law.wayne.edu/_new/selection_50states_revised.pdf (adapted from Am. Jur. Soc'y).

"How Michigan Supreme Court Justices First Assumed Office - Since the 1963 Constitution," *available at* http://law.wayne.edu/_new/scassumed_office_1.pdf

"How Current Michigan Court of Appeals Judges First Assumed Office," *available at* http://law.wayne.edu/_new/coaassumed_office.pdf

Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077 (2007).

Charles Gardner Geyh, *The Endless Judicial Selection Debate and its Implications for the Future of an Independent Judiciary*, 21 GEO. J. LEGAL ETHICS 1259 (2007).

Rachel Caulfield and Malia Reddick, *Judicial Selection in the United States: a Special Report*, (American Judicature Society 2010).

Brian T. Fitzpatrick, *The Fallacies and Fixables of Merit Selection and the Constituencies that Support Missouri Plan Reform: The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009).

Symposium: Options For An Independent Judiciary In Michigan, 56 WAYNE L. REV. 579 (2010)

Michigan Campaign Finance Network, *Conference Proceedings: Perspectives on Michigan Judicial Elections* (2004), *available at* http://www.mcfn.org/pdfs/reports/CFNSymposium.pdf

Citizens Research Council of Michigan, *Michigan Constitutional Issues: Article VI – Judicial Branch* (2010), *available at* http://www.crcmich.org/PUBLICAT/2010s/2010/rpt36009.pdf

Brennan Center for Justice, Justice at Stake Campaign, National Institute on Money in State Politics, *New Politics of Judicial Elections, 2000-2009* (2010).

Stephen J. Choi, Mitu Gilati, and Andrew A. Posner, *Which States Have the Best (and Worst) High Courts?*, (2008), *available at* SSRN: http://ssrn.com/abstract=1130358

National Conference of State Legislatures, *Contribution Limits in the 50 states*

Michigan Campaign Finance Network, *Special Interests v. Public Values* (2002).

National Center for State Courts *Coordination for Effective Judicial Campaign Oversight Committees: A How-To Handbook.*

West Virginia Independent Commission on Judicial Reform, *Final Report* (2009).

Ohio Forum on Judicial Selection: A Time for Action (2009).

American Judicature Society, *Methods of Judicial Selection – Judicial Nominating Commissions*

American Judicature Society, *Model Judicial Selection Provisions* (2008).

U.S. Chamber of Commerce Institute for Legal Reform, *Promoting "Merit" in Merit Selection, a Best Practices Guide to Commission-Based Judicial Selection.*

Stephen J. Choi, Mitu Gulati, and Eric A. Posner, *Judicial Evaluations And Information Forcing: Ranking State High Courts And Their Judges*, 58 DUKE L.J. 1313, 1347 (2009).

Part V: Task Force Members and Funding

All Task Force participants, including the Co-Chairs, Reporter, Project Assistant, and every Member, volunteered for service without compensation. The participants listened, read, debated, and generally immersed themselves in the details of judicial selection for nearly a full year. The participants engaged in this effort because of their uniform belief that selecting justices of the supreme court is one of the most important civic tasks we have and that Michigan must do better.

Members of the Task Force were appointed by Justice Kelly and Judge Ryan acting together. The Members are a diverse group including the full spectrum of political belief and a wide range of professions. The Task Force proceeded in two phases: during Phase I, the Members maintained open minds while they studied the various methods of judicial selection in states around the country. No Member came to the Task Force with any commitment to a particular outcome, and the Task Force did not discuss preferred recommendations until the close of Phase I in August, 2011. In Phase II, Members discussed the policy proposals that would ultimately become the conclusions presented in this Report.

The Michigan State Bar Foundation generously funded the study phase of the Task Force's work. The Task Force received in-kind assistance from Wayne State University Law School. The League of Women Voters of Michigan and the Charles Stewart Mott Foundation provided financial support for the publication and distribution of the Task Force's report.

Members' professional affiliations are given for identification purposes only. The members represent only themselves on the Judicial Selection Task Force.

Honorary Chair

SANDRA DAY O'CONNOR was the first female member of the Supreme Court of the United States. She was appointed to the Supreme Court in 1981 by President Ronald Reagan and served as Associate Justice until her retirement in 2006. Before being appointed to the U.S. Supreme Court, Justice O'Connor served in all three branches of Arizona state government, including tenure as Assistant Attorney General, Majority Leader of the Arizona Senate and Judge of the Arizona Court of Appeals. In her retirement, Justice O'Connor has been a champion for civic education and an outspoken critic of political attacks against independent courts.

Co-Chairs

MARILYN KELLY is a Justice of the Michigan Supreme Court. She was first elected to the Supreme Court in 1996, reelected in 2004, and served as Chief Justice from 2009-2011. Before being elected to the Supreme Court, she served eight years on the Michigan Court of Appeals, having first been elected to that court in 1988. Before her career on the bench, Justice Kelly was a courtroom attorney for 17 years. Her previous public service included 12 years as an elected member of the Michigan Board of Education, during the last two years of which she was its President.

JAMES L. RYAN is Senior Judge of the United States Court of Appeals for the Sixth Circuit. Judge Ryan was appointed to the Court of Appeals in 1985 by President Ronald Reagan. Before being appointed to the federal bench, Judge Ryan served on the Michigan Supreme Court, having first been appointed in 1975 by Gov. William Milliken. He was elected and reelected to the Court in 1976 and 1978. Before his tenure on the Michigan Supreme Court, he was elected judge of the 3rd Michigan Circuit Court. Judge Ryan began his legal career with the Judge Advocate General Corps in the United States Navy. He has extensive teaching experience.

Members

LORETTA M. AMES is a partner at Plunkett Cooney's Detroit office. Her law practice focuses on representing defendants in complex litigation, toxic torts and general liability matters. She is a Past President of the Michigan Chapter of the American Board of Trial Advocates (ABOTA) and a Past President of the Association of Defense Trial Counsel.

ANDREW DOCTOROFF is a partner at Honigman Miller Schwartz and Cohn LLP who specializes in commercial litigation. Andy is a member of the State Bar's Judicial Crossroads Task Force, which has recommended numerous reforms to Michigan's judicial system, and the Co-Chairperson of the Task Force's Business Impact Committee. Andy has written extensively on reforming Michigan's judiciary.

PATRICIA L. DONATH is a Past President of the League of Women Voters of Michigan and currently serves on the Board of the League of Women Voters of the United States. Ms. Donath previously served as staff attorney for the Michigan House Judiciary Committee and staff attorney for both the Senate and Assembly Judiciary Committees in New Jersey.

PETER L. DUNLAP is an attorney in private practice in Lansing. Mr. Dunlap is Past President of the Michigan Defense Trial counsel. He is a former partner/shareholder with Fraser Trebilcock Davis and Dunlap PC and now specializes in mediation and arbitration matters independently.

J. KAY FELT is a retired member of Dykema Gossett PLLC where she practiced health care law for 39 years. She is Past President of the American Health Lawyers Association and the Michigan Society of Hospital Attorneys and served on the Upper Great Lakes Study of the International Joint Commission. She teaches health care law, values and ethics at Oakland University.

ROBERT F. GARVEY is a trial lawyer. He is a Fellow of the American College Of Trial Lawyers and serves on the state committee. He is a Past President of the Michigan Chapter of the American Board of Trial Advocates and currently serves as a National Board Representative. He is a recipient of the State Bar's "Presidents Choice Award" in recognition of his work supporting the State Bar's Access to Justice effort.

W. ANTHONY JENKINS is a member and chief diversity officer with Dickinson Wright PLLC in Detroit. He is immediate Past President of the State Bar of Michigan and a member of the American Bar Association's Board of Governors and House of Delegates.

H. LYNN JONDAHL was a Michigan state representative for 22 years. After his legislative career, he served as co-director of the Michigan Political Leadership Program at Michigan State University and Executive Director of the Michigan Prospect for Renewed Citizenship. Mr. Jondahl was transition director for the administration of Gov. Jennifer M. Granholm.

JOHN H. LOGIE founded the Health Practice Law Group at Warner Norcross & Judd and managed it until becoming Mayor of Grand Rapids. He served as Mayor from 1991-2003. After 42 years in practice, he retired July 1, 2011.

OLIVIA (LIBBY) P. MAYNARD is a Regent of the University of Michigan.
She formerly headed the Michigan Office of Services to the Aging. In 1990 she was the Democratic Party candidate for Lieutenant Governor, and subsequently served two terms as Chairperson of the Michigan Democratic Party. She currently sits on the boards of the C.S. Mott Foundation and the Michigan Nature Conservancy.

TERRENCE E. NAGLE is President of M&N Plastics, a supply company in the automotive industry.

EDWARD M. PARKS is the former Managing Partner of the accounting firm Plante & Moran. He remains active there in an of-counsel role. He also serves as President of the Public School Academies of Detroit, a public board which oversees three large charter school systems in Detroit.

BRUCE D. PETERSON is Senior Vice President and General Counsel for DTE Energy, a Detroit-based diversified energy company involved in the ownership and management of energy-related businesses and services nationwide. Prior to joining DTE Energy, Mr. Peterson was a partner in the Washington, D.C. office of Hunton & Williams, a national law firm specializing in energy industry matters.

MICHAEL L. PITT is an attorney in private practice in Royal Oak who specializes in civil rights and employment discrimination litigation on behalf of individuals. He is a past president of the Michigan Association for Justice. He is a Fellow of the American College of Labor and Employment Lawyers.

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IRIS K. SALTERS is the immediate Past President of the 160,000-member Michigan Education Association. Ms. Salters was a classroom special education teacher, consultant and speech pathologist for 25 years with the Kalamazoo Public Schools before becoming President of the Kalamazoo Education Association, then Vice President and President of the MEA.

MICHAEL G. SARAFA is President and CEO of the Bank of Michigan. Before joining the Bank of Michigan, he was President of the Associated Food Dealers of Michigan, a trade association. He is an attorney who has worked in the private sector in government affairs and in state and city government.

JOHN J.H. SCHWARZ, M.D. is an otolaryngologist in practice in Battle Creek for 36 years. He has served as Mayor of Battle Creek, Michigan state Senator, and U.S. Congressman. In addition to his medical practice, he is a lecturer at the Gerald R. Ford School of Public Policy at the University of Michigan.

CHARLES R. TOY is an Associate Dean for Career and Professional Development at Thomas M. Cooley Law School. He is immediate Past President of the State Bar of Michigan. Before his career in academia, he was an attorney in private practice for 27 years focusing on environmental law.

JANET WELCH is the Executive Director of the State Bar of Michigan, a 40,000-member statewide organization. Before that, she was the State Bar's General Counsel. Her government service included four years as Counsel for the Supreme Court and five years as founding director of a nonpartisan legislative analysis office for the Michigan Senate.

WILLIAM C. WHITBECK is a judge on the Michigan Court of Appeals and served as Chief Judge of the court for six years of his tenure. He was an attorney in private practice for 20 years and has served in the administrations of three Michigan governors: George Romney, William Milliken and John Engler.

Non-Voting Members

JUSTIN R. LONG is the Reporter for the Task Force. He is an Assistant Professor of Law at Wayne State University, where he researches and teaches state constitutionalism. He holds an A.B. from Harvard University and a J.D. from the University of Pennsylvania.

RICH ROBINSON is a non-voting project assistant to the Task Force. He has been the Executive Director of the nonprofit, nonpartisan Michigan Campaign Finance Network since 2001. He holds three degrees from the University of Michigan, including a Master of Public Policy.

Appendices

Appendix A

The following examples illustrate how a ballot question could be constructed to amend the Michigan Constitution to change to a process of supreme court selection by gubernatorial appointments from nominations made by a nonpartisan commission.

Model Ballot Question

Shall Article VI, Section 2, of the Michigan Constitution regarding the method of selection of Supreme Court justices be amended to replace non-partisan election with a process by which all justices will be appointed by the governor from nominations provided by a nonpartisan commission?

Yes_____ No_____

Model Constitutional Amendment

ARTICLE VI
JUDICIAL BRANCH

Sec. 2. The supreme court shall consist of seven justices ~~elected at non-partisan elections as provided by law~~ APPOINTED BY THE GOVERNOR FROM THE RECOMMENDATIONS OF A NOMINATING COMMISSION, AS PROVIDED BY LAW. The term of office shall be eight years and not more than two terms of office shall expire at the same time. ~~Nominations for justices of the supreme court shall be in the manner prescribed by law. Any incumbent justice whose term is to expire may become a candidate for re-election by filing an affidavit of candidacy, in the form and manner prescribed by law, not less than 180 days prior to the expiration of his term.~~

Appendix B

This example statute could be used under the current Michigan Constitution to establish a nonpartisan advisory commission to nominate candidates to fill Supreme Court vacancies, or it could be adapted for an executive order for the same purpose. The example statute also could be used to implement a constitutional amendment making selection of all Supreme Court justices by a process of gubernatorial appointments from nominations provided by a nonpartisan commission.

Model Statute for a Michigan Supreme Court Nominating Commission

A. There shall be a nonpartisan commission on Supreme Court appointments which shall be composed of the Chief Justice of the Supreme Court. In addition five attorney members, who shall be nominated by the Board of Commissioners of the State Bar of Michigan and appointed by the governor shall serve on the commission. Ten nonattorney members who shall be appointed by the governor shall also serve on the commission.

Attorney members of the commission shall have resided in the state and shall have been admitted to practice for not less than five years. Not more than three attorney members shall be members of the same political party and not more than two attorney members shall be residents of any one county.

Nonattorney members shall have resided in the state for not less than five years and shall not be attorneys, judges or retired judges. Not more than five nonattorney members shall be members of the same political party. Not more than two nonattorney members shall be residents of any one county.

None of the attorney or nonattorney members of the commission shall hold any governmental office, elective or appointive. (No attorney member shall be eligible for appointment to any judicial office of the state until one year after he/she ceases to be a member.)

Attorney members of the commission shall serve staggered four year terms and nonattorney members shall serve staggered four year terms.

Vacancies that occur for nonattorney commission members shall be filled as follows. At least ninety days prior to a term expiring or within twenty-one days of a vacancy the governor shall appoint a nominating committee of nine members, not more than five of whom may be from the same political party. The makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state. Members shall not be attorneys and shall not hold any governmental office, elective or appointive, for profit. The committee shall provide public notices that a vacancy exists and shall solicit, review and forward to the governor all applications along with the committee's recommendations for appointment.

Vacancies for attorney members shall be nominated by the Board of Commissioners of the State Bar of Michigan and appointed by the governor.

B. In making or confirming appointments to the Supreme Court commission, the governor and the State Bar shall endeavor to see that the commission reflects the diversity of Michigan's population. In the event of the absence or incapacity of the chairman the Supreme Court shall appoint a justice thereof to serve in his or her place and stead.

C. Prior to making recommendations to the governor as hereinafter provided, the commission shall conduct investigations, hold public hearings and take public testimony. An executive session as prescribed by rule may be held upon a two-thirds vote of the members of the commission in a public hearing. Final decisions as to recommendations shall be made without regard to political affiliation in an impartial and objective manner. The commission shall consider the diversity of the state's population; however the primary consideration shall be merit. Voting shall be in a public hearing. The expenses of meetings of the commission and the attendance of members thereof for travel and subsistence shall be paid from the general fund of the state as state officers are paid, upon claims approved by the chairperson.

D. After public hearings the Supreme Court shall as necessary adopt rules of procedure for the commission on Supreme Court appointments.

E. Notwithstanding the provisions of section A, the initial appointments for the members of the commission shall be designated by the governor for staggered terms

F.. Within sixty days from the occurrence of a vacancy on the court, the Commission shall submit to the Governor the names of not less than three persons nominated by it to fill such vacancy, no more than two of whom shall be members of the same political party unless there are more than four such nominees, in which event not more than sixty percent of such nominees shall be members of the same political party.

Appendix C

These example rules illustrate procedures for implementing an advisory Supreme Court nominating commission to fill mid-term vacancies. They could be established by executive order or a statute under the current Michigan Constitution. The rules also could be used for a nominating commission established by statute under a constitutional amendment changing selection of all Supreme Court justices to a process of gubernatorial appointments from nominations provided by a nonpartisan commission.

Rules of Procedure for a Michigan Supreme Court Nominating Commission

INDEX:

Rule 1. Purpose

When making recommendations for judicial office, the Commission on Supreme Court Appointments shall consider the diversity of the state's population and the geographical distribution of the residences of the justices throughout the state. However, the primary consideration shall be merit. The goal, therefore, of the judicial nomination process is to select justices who have outstanding professional competence and reputation and who are also sensitive to the needs of and held in high esteem by the communities they serve and who reflect, to the extent possible, the ethnic, racial and gender diversity of those communities. Competence and diversity among our justices will enhance fairness and public confidence in judicial proceedings.

Rule 2. Commission Chair

The Chief Justice of the Michigan Supreme Court or such other Justice of the Supreme Court as shall be appointed by the Supreme Court to serve in place of the Chief Justice shall be chair of the Commission. The Chair shall preside at all meetings of the Commission.

Rule 3. Commissioner Impartiality

A. A Commissioner shall consider each applicant for the Supreme Court in an impartial, objective manner.

B. A Commissioner shall disclose to the Commission any relationship with an applicant (business, personal, attorney-client) or any other possible cause for conflict of interest, bias or prejudice. A Commissioner shall also disclose efforts to recruit an applicant. A Commissioner is disqualified from voting on the application of a family member within the third degree of consanguinity or a present co-worker in the same company or firm as the Commissioner. A Commissioner shall disqualify himself or herself from voting on an application if voting on that application would present a conflict of interest. At the commencement of any Commission meeting where qualifications of any applicant are to be considered, the Chair shall inquire as to any basis of disqualification or disclosure pursuant to the rule.

C. A Commissioner shall not be influenced other than by facts or opinions which are relevant to the judicial qualifications of the applicants. A Commissioner shall promptly report to the Chair any attempt by any person or organization to influence a Commissioner other than by fact or opinion.

D. A Commissioner shall not individually communicate verbally or in writing with an applicant, from the time the application is submitted until the Commission conducts its final vote on the nominations and is dismissed, about the application, the contents of the application, the judicial position, the Commission, the nomination process or any other matters related to the judicial vacancy which is the subject matter of the application.

Rule 4. Commission Meetings

A. Meetings of the Commission may be called by the Chair or a majority of the members upon seven (7) days notice. Emergency meetings may be held in emergency situations.

B. A Commissioner may be present at an administrative meeting or a screening meeting through electronic means such as telephone or video conferencing upon approval of the Chair. A Commissioner shall not participate in applicant interviews or voting on nominations through electronic means. To assure that a Commissioner will meet the sixty-day deadline for submitting nominations to the Governor, the Chair of the Commission shall approve requests by members to attend electronically only after confirming that a quorum plus one of the Commissioners in office at the time of the meeting will be physically present at the meeting location. A member who attends electronically accepts the risk that technical problems could occur which would prevent their actual participation and recognizes that the deadline for submitting nominations to the Governor requires that meetings be held as scheduled.

C. The Chair shall issue a call for a meeting promptly upon learning of the existence or anticipated existence of a vacancy.

D. Notice of all Commission meetings other than emergency meetings shall be posted at least seven (7) days in advance of the meeting in a location identified in a statement to the public filed by the Secretary of the Commission with the Clerk of the Supreme Court. A notice of a Commission meeting shall state the date, time and specific location of the meeting. The Commission shall provide such additional notice as is reasonable and practicable.

E. The Chair shall call at least one meeting each year of all Commissioners for the following purposes:

1. Orienting Commissioners about Commission procedures and purposes as stated in Rule 1 and a Commissioner's role in accomplishing that purpose.

2. Educating Commissioners about means of improving the judicial nominating process through presentations by knowledgeable individuals and representatives of community organizations.

Rule 5. Recruitment of Applicants

A. Commissioners shall actively seek out and encourage applications from qualified individuals who will reflect the diversity of the community they will serve.

B. A Commissioner shall under no circumstance commit in advance to vote for any applicant.

C. The Commission shall provide wide public notice by press releases and by mailing notices of vacancies designed to encourage all interested parties and groups to submit names and recommend persons for initial consideration. When feasible, such notice shall be given thirty (30) days or more before the deadline for applications. The notice of vacancy shall state that the Commission may, at its discretion, use the applications filed for the vacancy that is the subject of the announcement to nominate candidates for any additional vacancy or vacancies known to the commission before the screening meeting for the announced vacancy is held.

Rule 6. Application

A. Every applicant shall complete and file with the Administrative Office of the Supreme Court an original and at least 16 copies of the "Application for Nomination to the Supreme Court," as specified in the public announcement of each judicial vacancy. The application shall be on a form approved by the Supreme Court after opportunity for public comment.

B. Applications and documents on file for each judicial vacancy shall be provided to the members of the Commission at least seven days prior to the first Commission meeting concerning each vacancy.

C. Except as provided in subsection (2) below, information provided to the Commission by the applicant or by a third party shall be presumed to be available to the public.

1. The following shall be available to the public:

a. The applicant's name, occupation, employer, relevant work history, any other information provided in response to Section 1 of the application form, and any supplemental material submitted by the applicant relating to Section 1;

b. Any information that is specifically authorized for release by the source of the information.

2. The following information shall remain confidential throughout the nomination and appointment process until destroyed at the conclusion of the six-month period:

a. The applicant's home address, information regarding the applicant's family, and all other information that is provided to the Commission in response to questions contained in Section II of the application form;

b. Information provided in writing or orally to the Commission by third parties regarding an applicant, and the third party's identity, unless the third party specifically states in writing that the information may be made public;

c. Notes of the individual Commissioners that are generated for personal use only and not published to other members of the Commission;

d. Any information that is provided to a member of the Commission after a promise of confidentiality is properly extended to the source by the Commissioner.

e. Any information obtained by or submitted to the Commission that is made confidential by other provisions of law.

Rule 7. Screening of Applications and Selection of Interviewees

A. Public Notice and Comment: Names of applicants and the date, place and time of the Commission meeting to screen application shall be widely disseminated to the public. Comments about applicants should be made, if feasible, at least three working days before the screening meeting as follows: (1) in writing to the Judicial Nominating Commission for distribution by staff to the Commission, or (2) verbally to Commissioners.

B. Investigation of Applicants: As soon as Commissioners receive applications and documents on file, they shall begin investigating the background and qualifications of applicants. Using the application as a starting point, Commissioners shall contact as many of the individuals and institutions knowledgeable about the applicant as deemed beneficial. Commissioners shall encourage sources to allow their names to be disclosed to the commission and to the applicant, but may accept comments about an applicant from a source that requests confidentiality as to the commission and/or as to the applicant, if the commissioner believes it is in the best interests of the public to accept such comment.

When a comment given to a Commissioner concerning an applicant contains an opinion as to the applicant's character, fitness or competency, the Commissioner shall inquire as to the factual basis, circumstances and examples which support the opinion and as to names of others whom the source of the opinion believes might have knowledge about the opinion.

C. Screening Meeting

1. General: The Commission shall meet for the purpose of deciding which applicants are to be interviewed. The Commission shall hold an executive session upon two-thirds vote of Commissioners in attendance in order to promote open and frank discussion of applicant qualifications. Each Commissioner shall disclose comments and other information concerning each applicant relied upon by that Commissioner in evaluating that applicant. If confidentiality has been promised to a source, commission members shall consider whether less weight should be given to the information. Information received in the course of the investigation that is material and adverse and is reasonably presumed to have a potential to influence the decision of the Commission shall be treated in accordance with paragraphs 3 and 4 below. The qualifications of each applicant shall be discussed and evaluated.

2. Public Comment: Members of the public are invited to comment orally at the screening meeting. The Chair shall allocate equal time at the screening meeting for relevant comment on each applicant. The Chair may terminate comments which exceed the time allocated or which are irrelevant to the qualifications of applicants. The Chair may also limit duplicative comments regarding an applicant.

3. Opinion Comments: Opinions that are not supported with factual basis, or circumstances, or a second source shall not be disclosed at the Commission meeting. Opinions that are supported with factual basis or circumstances or a second source may be shared with the Commission at the meeting provided that the supporting information is also disclosed.

4. Anonymous Comments: No information from an anonymous source shall be considered by any Commissioner or shared with any other Commissioner or the Commissioner at any point in the screening process.

5. Selection of Applicants for Interviews: Upon returning to public session, the Chair shall invite Commissioners to nominate applicants to be placed on a tentative list of those to be interviewed. Such a nomination requires the concurrence of one additional Commissioner. The name of each applicant who receives a vote of the majority of Commissioners present and voting shall be placed on a tentative list of applicants to be interviewed. Following this procedure and with or without an additional executive session or sessions, the tentative list of interviewees may be added to or subtracted from by public vote until a final list of applicants to be interviewed is determined.

Rule 8. Interviews of Applicants and Selection of Nominees

A. Public Notice and Comment: Names of applicants selected for interview and the date, place and time of the Commission meeting to interview applicants shall be widely disseminated to the public. The public, the judiciary and bar associations shall be invited to provide comments regarding these applicants. Comments about applicants should be made, if feasible, at least three working days before the interview meeting as follows: (1) in writing to the Judicial Nominating Commission for distribution by staff to the Commission, or (2) verbally to Commissioner(s).

B. Investigation of Applicants Selected for Interviews: Commissioners shall further evaluate selected applicants by contacting as many individuals, community groups and other sources as deemed reasonable to obtain information on the applicants' life experiences, community activities and background. Commissioners shall encourage sources to allow their names to be disclosed to the Commission and to the applicant, but may accept comments about an applicant from a source that requests confidentiality as to the Commission and/or as to the applicant, if the Commissioner believes it is in the best interests of the public to accept such comment.

When a comment given to a commissioner concerning an applicant contains an opinion as to the applicant's character, fitness or competency, the commissioner shall inquire as to the factual basis, circumstances and examples which support the opinion and as to names of others whom the source of the opinion believes might have knowledge about the opinion.

C. Communication with Applicants: Nothing in this rule prohibits the Chair of the Commission from contacting an applicant if he or she determines that it is in the best interest of the public, the Commission, and the applicant, to make such contact.

D. Interview Meeting

1. General: The Commission shall meet for the purpose of interviewing selected applicants in order to compile a list of nominees to be forwarded to the Governor. The qualifications of each applicant shall be discussed and evaluated. The Commissioner shall disclose comments and other information concerning each applicant relied upon by the

Commissioner in evaluating that applicant. If confidentiality has been promised to a source, commission members shall consider whether less weight should be given to the information. The Commission shall schedule sufficient time prior to the interview of each applicant to discuss the results of Commissioners' investigations and to determine whether any matters that were disclosed in the course of the investigation should be discussed with the applicant at the interview. Information received in the course of the investigation that is material and adverse and is reasonably presumed to have a potential to influence the decision of the commission shall be treated in accordance with paragraphs 3 and 4 below.

2. Public Comment: Members of the public are invited to comment at the interview meeting. The Chair shall allocate equal time for relevant comment on each applicant. The Chair may terminate comments which exceed the time allocated or which are irrelevant to the qualifications of applicants. The Chair may also limit duplicate comments regarding an applicant.

3. Opinion comments: Opinions that are not supported with factual basis, or circumstances, or a second source shall not be disclosed at the Commission meeting. Opinions that are supported with factual basis or circumstances or a second source may be shared with the Commission at the meeting provided that the supporting information is also disclosed.

4. Anonymous comments: No information from an anonymous source shall be considered by any commissioner or shared with other Commissioners or the Commission at the interview meeting.

5. Conduct of Interviews. Selected applicants shall be publicly interviewed by Commissioners. A Commissioner may question an applicant about comments made about the applicant for which confidentiality has been requested so long as the source of comment is not identified. Upon motion and a two-thirds vote of the Commission, a portion of the interview may occur in executive session, in which case the applicant shall have the right to disclose in public session the content of the executive session.

6. Deliberations of the Commission. The Commission shall hold an executive session upon two-thirds vote of the members of the Commission in attendance in order to promote open and frank discussion regarding the qualifications of applicants interviewed. No material and adverse information about an applicant that is known to a Commissioner prior to the interview may be disclosed to the Commission after the interview occurs. Whether in public or in executive session, the Chair shall read the names of the applicants in alphabetical order and open the meeting to a discussion of that particular applicant's qualifications for judicial office. After this procedure has been followed for each applicant, the Chair shall open the meeting to a general discussion of the relative qualifications of all the applicants. To encourage frank discussion, the substance of deliberations in executive sessions shall not be disclosed.

7. Selection of Nominees for Submission to the Governor. All voting by the Commission on the number of nominees to be forwarded to the Governor and on the applicants nominated shall be in public session. Upon returning to or continuing in public session, the Chair shall invite Commissioners to nominate applicants interviewed for consideration for referral to the Governor for appointment. Such a nomination requires the concurrence of one additional Commissioner. Each applicant who receives a vote of the majority of Commissioners may return to executive session to further discuss the applicants under consideration. The above process may be repeated until the resulting list of nominees satisfies constitutional requirements and is approved for referral to the Governor by a public vote of the Commission.

E. Communication after Interview Meetings: The Commission may designate a member or members to communicate with applicants not nominated to the Governor. If a Commissioner receives new written information about a person nominated to the Governor after the interview meeting has adjourned, the Commissioner shall forward the information to the Chair of the Commission and the Chair shall forward the information to the Governor's office, with a cover memorandum explaining that the information was not submitted in time for consideration by the Commission and the applicant had neither been questioned about nor responded to the information. If the information is verbal, the Commissioner shall advise the source about his or her right to contact the Governor's office.

Rule 9. Transmittal to the Governor

The names of the nominees, listed in alphabetical order, shall be delivered to the Governor as directed by the Chair. The Chair shall thereafter promptly inform the public of the names of the nominees.

In order to facilitate the Governor's selection of the appointee, the Commission file concerning each nominee shall be provided to the Governor with the list containing that nominee's name unless the Commission directs otherwise.

Appendix D

In general, the proposed amendment to the Michigan Campaign Finance Act seeks to accomplish disclosure of the sources of all spending associated with Michigan political campaigns. Specifically, it would do the following:

- Require disclosure of sources of funds for all paid communications directed to the public within 90 days of an election that feature the name or image of a candidate standing in that election, whether they are express advocacy, its equivalent, or not. The Supreme Court of the United States has stated explicitly that this is constitutionally permissible.[1] The draft does not seek to require disclosure for internal communications within associations.
- Require disclosure of sources of funds for electioneering communications that are spent or contributed by nonprofit corporations, which frequently have been used to aggregate funds and provide a shell of anonymity for donors. The draft does not seek to require disclosure of sources of a nonprofit's funds that are not used for electioneering communications, such as members' dues.
- Require uniform timely reporting of all political spending by committees or individual persons.

MICHIGAN CAMPAIGN FINANCE ACT (EXCERPT)
Act 388 of 1976

169.203 Definitions; C.

Sec. 3.

(1) "Candidate" means an individual: (a) who files a fee, affidavit of incumbency, or nominating petition for an elective office; (b) whose nomination as a candidate for elective office by a political party caucus or convention is certified to the appropriate filing official; (c) who receives a contribution, makes an expenditure, or gives consent for another person to receive a contribution or make an expenditure with a view to bringing about the individual's nomination or election to an elective office, whether or not the specific elective office for which the individual will seek nomination or election is known at the time the contribution is received or the expenditure is made; or (d) who is an officeholder who is the subject of a recall vote. Unless the officeholder is constitutionally or legally barred from seeking reelection or fails to file for reelection to that office by the applicable filing deadline, an elected officeholder shall be considered to be a candidate for reelection to that same office for the purposes of this act only.

For purposes of sections 61 to 71, "candidate" only means, in a primary election, a candidate for the office of governor and, in a general election, a candidate for the office of governor or lieutenant governor. However, the candidates for the office of governor and lieutenant governor of the same political party in a general election shall be considered as 1 candidate.

[1] Citizens United v. Federal Election Commission, 558 U.S. at 55 (2010)

(2) “Candidate committee” means the committee designated in a candidate's filed statement of organization as that individual's candidate committee. A candidate committee shall be under the control and direction of the candidate named in the same statement of organization. Notwithstanding subsection (4), an individual shall form a candidate committee pursuant to section 21 when the individual becomes a candidate under subsection (1).

(3) “Closing date” means the date through which a campaign statement is required to be complete.

(4) “Committee” means a person who receives contributions or makes expenditures for the purpose of MAKING AN ELECTIONEERING COMMUNICATION, influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question, if contributions received total $500.00 or more in a calendar year or expenditures made total $500.00 or more in a calendar year. An individual, other than a candidate, does not constitute a committee. A person, other than a committee registered under this act, making an expenditure to a ballot question committee shall for that reason not be considered a committee for the purposes of this act unless the person solicits or receives contributions for the purpose of making an expenditure to that ballot question committee.

169.204 Definitions; C.

Sec. 4.

(1) “Contribution” means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of MAKING AN ELECTIONEERING COMMUNICATION, influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.

(2) Contribution includes the full purchase price of tickets or payment of an attendance fee for events such as dinners, luncheons, rallies, testimonials, and other fund-raising events; an individual's own money or property other than the individual's homestead used on behalf of that individual's candidacy; the granting of discounts or rebates not available to the general public; or the granting of discounts or rebates by broadcast media and newspapers not extended on an equal basis to all candidates for the same office; and the endorsing or guaranteeing of a loan for the amount the endorser or guarantor is liable.

(3) Contribution does not include any of the following:

(a) Volunteer personal services provided without compensation, or payments of costs incurred of less than $500.00 in a calendar year by an individual for personal travel expenses if the costs are voluntarily incurred without any understanding or agreement that the costs shall be, directly or indirectly, repaid.

(b) Food and beverages, not to exceed $100.00 in value during a calendar year, which are donated by an individual and for which reimbursement is not given.

(c) An offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded in whole or in part within 30 business days after receipt.

169.205 Definitions; D, E.

Sec. 5.

(1) "Domestic dependent sovereign" means an Indian tribe that has been acknowledged, recognized, restored, or reaffirmed as an Indian tribe by the secretary of the interior pursuant to chapter 576, 48 Stat. 984, 25 U.S.C. 461 to 463, 464 to 465, 466 to 470, 471 to 472, 473, 474 to 475, 476 to 478, and 479, commonly referred to as the Indian reorganization act, or has otherwise been acknowledged by the United States government as an Indian tribe.

(2) "Election" means a primary, general, special, or millage election held in this state or a convention or caucus of a political party held in this state to nominate a candidate. Election includes a recall vote.

(3) "Election cycle" means 1 of the following:

(a) For a general election, the period beginning the day following the last general election in which the office appeared on the ballot and ending on the day of the general election in which the office next appears on the ballot.

(b) For a special election, the period beginning the day a special general election is called or the date the office becomes vacant, whichever is earlier, and ending on the day of the special general election.

(4) "ELECTIONEERING COMMUNICATION" MEANS ANY PAID COMMUNICATION, TRANSMITTED TO THE PUBLIC BY ANY MEDIUM, WITHIN 90 DAYS PRIOR TO A STATE ELECTION, THAT FEATURES THE NAME OR IMAGE OF A CANDIDATE FOR ELECTIVE OFFICE WHO IS ON THE BALLOT IN THAT FORTHCOMING ELECTION.

~~(4)~~ (5) "Elective office" means a public office filled by an election. A person who is appointed to fill a vacancy in a public office that is ordinarily elective holds an elective office. Elective office does not include the office of precinct delegate. Except for the purposes of sections 47, 54, and 55, elective office does not include a school board member in a school district that has a pupil membership of 2,400 or less enrolled on the most recent pupil membership count day. However, elective office includes a school board member in a school district that has a pupil membership of 2,400 or less, if a candidate committee of a candidate for the office of school board member in that school district receives an amount in excess of $1,000.00 or expends an amount in excess of $1,000.00. Elective office does not include a federal office except for the purposes of section 57.

69.206 "Expenditure" defined.

Sec. 6.

(1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in SUPPORT OF ELECTIONEERING COMMUNICATIONS, assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes, but is not limited to, any of the following:

(a) A contribution or a transfer of anything of ascertainable monetary value for purposes of MAKING ELECTIONEERING COMMUNICATIONS, influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.

(b) Except as provided in subsection (2)(~~f~~) (E) or (~~g~~) (F), an expenditure for voter registration or get-out-the-vote activities made by a person who sponsors or finances the activity or who is identified by name with the activity.

(c) Except as provided in subsection (2)(~~f~~) (E) or (~~g~~) (F), an expenditure made for poll watchers, challengers, distribution of election day literature, canvassing of voters to get out the vote, or transporting voters to the polls.

(2) Expenditure does not include any of the following:

(a) An expenditure for communication by a person with the person's paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under section 55.

~~(b) An expenditure for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference.~~

(~~c~~) (B) An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund or independent committee.

(~~d~~) (C) An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for a news story, commentary, or editorial in support of or opposition to a candidate for elective office or a ballot question in the regular course of publication or broadcasting.

(~~e~~) (D) An offer or tender of an expenditure if expressly and unconditionally rejected or returned.

(~~f~~) (E) An expenditure for nonpartisan voter registration or nonpartisan get-out-the-vote activities made by an organization that is exempt from federal income tax pursuant to section 501(c)(3) of the internal revenue code of 1986, 26 U.S.C. 501, or any successor statute.

(~~g~~) (F) An expenditure for nonpartisan voter registration or nonpartisan get-out-the-vote activities performed pursuant to chapter XXIII of the Michigan election law, 1954 PA 116, MCL 168.491 to 168.524, by the secretary of state and other registration officials who are identified by name with the activity.

(~~h~~) (G) An expenditure by a state central committee of a political party or a person controlled by a state central committee of a political party for the construction, purchase, or renovation of 1 or more office facilities in Ingham county if the facility is not constructed, purchased, or renovated for the purpose of influencing the election of a candidate in a particular election. Items excluded from the definition of expenditure under this subdivision include expenditures approved in federal election commission advisory opinions 1993-9, 2001-1, and 2001-12 as allowable expenditures under the federal election campaign act of 1971, Public Law 92-225, 2 U.S.C. 431 to 434, 437, 437c to 439a, 439c, 441a to 441h, and 442 to 455, and regulations promulgated under that act, regardless of whether those advisory opinions have been superseded.

169.225 Campaign statement; filing; period covered.

Sec. 25.

A committee MAKING ELECTIONEERING COMMUNICATIONS, supporting or opposing a candidate or the qualification, passage, or defeat of a ballot question shall file a legibly printed or typed campaign statement. The period covered by a campaign statement is the period beginning with the day after the closing date of the most recent campaign statement filed pursuant to this act, and ending with the closing date of the campaign statement in question. If the committee filing the campaign statement has not previously filed a campaign statement, the period covered shall begin on the date on which the committee was formed.

169.226 Campaign statement of committee other than political party committee; contents; report; list of expenditures; bundled contribution.

Sec. 26.

(1) A campaign statement of a committee, other than a political party committee, required by this act shall contain all of the following information:

(a) The filing committee's name, address, and telephone number, and the full name, residential and business addresses, and telephone numbers of the committee treasurer or other individual designated as responsible for the committee's record keeping, report preparation, or report filing.

(b) Under the heading “receipts”, the total amount of contributions received during the period covered by the campaign statement; under the heading “expenditures”, the total amount of expenditures made during the period covered by the campaign statement; and the cumulative amount of those totals. Forgiveness of a loan shall not be included in the totals. Payment of a loan by a third party shall be recorded and reported as an in-kind contribution by the third party. In-kind contributions or expenditures shall be listed at fair market value and shall be reported as both contributions and expenditures. A contribution or expenditure that is by other than completed and accepted payment, gift, or other transfer, that is clearly not legally

enforceable, and that is expressly withdrawn or rejected and returned before a campaign statement closing date need not be included in the campaign statement and if included may, in a later or amended statement, be shown as a deduction, but the committee shall keep adequate records of each instance.

(c) The balance of cash on hand at the beginning and the end of the period covered by the campaign statement.

(d) The following information regarding each fund-raising event shall be included in the report:

(i) The type of event, date held, address and name, if any, of the place where the activity was held, and approximate number of individuals participating or in attendance.

(ii) The total amount of all contributions.

(iii) The gross receipts of the fund-raising event.

(iv) The expenditures incident to the event.

(e) The full name of each individual from whom contributions are received during the period covered by the campaign statement, together with the individual's street address, the amount contributed, the date on which each contribution was received, and the cumulative amount contributed by that individual. The occupation, employer, and principal place of business shall be stated if the individual's cumulative contributions are more than $100.00.

(f) The cumulative amount contributed and the name and address of each individual, except those individuals reported under subdivision (e), who contributed to the committee. The occupation, employer, and principal place of business shall be stated for each individual who contributed more than $100.00.

(g) The name and street address of each person, other than an individual, from whom contributions are received during the period covered by the campaign statement, together with an itemization of the amounts contributed, the date on which each contribution was received, and the cumulative amount contributed by that person.

(h) The name, address, and amount given by an individual who contributed to the total amount contributed by a person who is other than a committee or an individual. The occupation, employer, and principal place of business shall be stated if the individual contributed more than $100.00 of the total amount contributed by a person who is other than a committee or an individual.

(i) The cumulative total of expenditures of $50.00 or less made during the period covered by the campaign statement except for expenditures made to or on behalf of another committee, candidate, or ballot question.

(j) The full name and street address of each person to whom expenditures totaling more than $50.00 were made, together with the amount of each separate expenditure to each person during the period covered by the campaign statement; the purpose of the expenditure; the full name and street address of the person

providing the consideration for which any expenditure was made if different from the payee; the itemization regardless of amount of each expenditure made to or on behalf of another committee, candidate, or ballot question; and the cumulative amount of expenditures for or against that candidate or ballot question for an election cycle. An expenditure made in support of more than 1 candidate or ballot question, or both, shall be apportioned reasonably among the candidates or ballot questions, or both.

(2) A candidate committee or ballot question committee shall report all cumulative amounts required by this section on a per election cycle basis. Except for subsection (1)(j), an independent committee or political committee shall report all cumulative amounts required by this section on a calendar year basis.

(3) A campaign statement of a committee, in addition to the other information required by this section, shall include an itemized list of all expenditures during the reporting period for election day busing of electors to the polls, get-out-the-vote activities, slate cards, challengers, poll watchers, and poll workers.

(4) For a reporting period in which a contribution is received that is to be part of a bundled contribution or a reporting period in which a bundled contribution is delivered to the candidate committee of a candidate for statewide elective office, a bundling committee shall report to the secretary of state, on a form provided by the secretary of state, all of the following information, as applicable, about each contribution received or delivered as part of a bundled contribution, and about each bundled contribution delivered, in the reporting period:

(a) The amount of each contribution, the date it was received by the bundling committee, and the candidate for statewide elective office whom the contributor designated as the intended recipient.

(b) Each contributor's name and address and, for each contribution exceeding $100.00, the contributor's occupation, employer, and principal place of business.

(c) The date each contribution is delivered to the candidate's statewide elective office candidate committee.

(d) The total amount of bundled contributions delivered to that candidate committee during the reporting period and during the election cycle.

(5) With its delivery of a bundled contribution to the candidate committee of a candidate for statewide elective office, a bundling committee shall deliver a report to that candidate committee, on a form provided by the secretary of state, that includes all of the following information, as applicable, about each contribution delivered as part of the bundled contribution, and about all bundled contributions delivered to that candidate committee in the election cycle:

(a) The amount of each contribution, the date it was received by the bundling committee, and the statewide elective office candidate the contributor designated as the intended recipient.

(b) Each contributor's name and address and, for each contribution exceeding $100.00, the contributor's occupation, employer, and principal place of business.

(c) The total amount of bundled contributions delivered to that candidate committee during the reporting period and during the election cycle.

(6) For a reporting period in which a bundled contribution is received, a candidate committee of a candidate for statewide elective office shall report to the secretary of state, on a form provided by the secretary of state, all of the following information, as applicable, about each contribution delivered as part of a bundled contribution received in the reporting period and about all bundled contributions received by that candidate committee:

(a) The amount of each contribution, the date it was received by the candidate committee, and the name of the bundling committee that delivered the contribution.

(b) Each contributor's name and address and, for each contribution exceeding $100.00, the contributor's occupation, employer, and principal place of business.

(c) The total amount of bundled contributions received by that candidate committee during the reporting period and during the election cycle.

(7) A COMMITTEE THAT IS A NONPROFIT CORPORATION MAKING ELECTIONEERING COMMUNICATIONS OR INDEPENDENT EXPENDITURES, OR CONTRIBUTING DIRECTLY, OR INDIRECTLY, TO ANOTHER COMMITTEE THAT IS MAKING ELECTIONEERING COMMUNICATIONS OR INDEPENDENT EXPENDITURES, IS REQUIRED TO REPORT INDIVIDUAL CONTRIBUTIONS THAT ARE USED TO PAY FOR ELECTIONEERING COMMUNICATIONS OR INDEPENDENT EXPENDITURES MADE BY THE COMMITTEE, OR ANY CONTRIBUTION MADE TO ANOTHER COMMITTEE THAT IS USED TO PAY FOR ELECTIONEERING COMMUNICATIONS OR INDEPENDENT EXPENDITURES.

(a) CONTRIBUTIONS MUST BE FULLY AND COMPLETELY ASCRIBED TO INDIVIDUAL PERSONS, COMMITTEES THAT REPORT INDIVIDUAL CONTRIBUTORS OF ALL THEIR RECEIPTS OR PROFIT MAKING CORPORATIONS.

(b) DISCLOSURE OF CONTRIBUTIONS IS REQUIRED ONLY FOR THOSE FUNDS THAT ARE USED DIRECTLY, OR INDIRECTLY, TO PAY FOR ELECTIONEERING COMMUNICATIONS OR INDEPENDENT EXPENDITURES.

(c) IT IS IMPERMISSIBLE FOR A COMMITTEE MAKING ELECTIONEERING COMMUNICATIONS OR INDEPENDENT EXPENDITURES TO ACCEPT A CONTRIBUTION FROM A NONPROFIT CORPORATION UNLESS THE CONTRIBUTION IS FULLY AND COMPLETELY ASCRIBED TO CONTRIBUTIONS FROM INDIVIDUAL PERSONS, COMMITTEES THAT REPORT INDIVIDUAL CONTRIBUTORS OF ALL THEIR RECEIPTS OR PROFIT MAKING CORPORATIONS.

169.229 Campaign statement filed by political party committee; contents; identification of expenditure; designation of contribution to candidate committee or ballot question

committee; designation of independent expenditure; apportionment of expenditure; list of expenditures.

Sec. 29.

(1) A campaign statement filed by a political party committee shall contain all of the following information:

(a) The full name and street address of each person from whom contributions are received in a calendar year, the amount, and the date or dates contributed; and, if the person is a committee, the name and address of the committee and the full name of the committee treasurer, together with the amount of the contribution and the date received. The occupation, employer, and principal place of business, if any, shall be listed for each person from whom contributions totaling more than $100.00 are received in a calendar year.

(b) Accompanying a campaign statement reporting the receipt of a contribution from a committee or person whose treasurer does not reside in, whose principal office is not located in, or whose funds are not kept in this state, and whose committee has not filed a statement of organization as required in section 24, shall be a statement setting forth the full name and address of the treasurer of the committee.

(c) An itemized list of all ELECTIONEERING COMMUNICATIONS, expenditures, including in-kind contributions and expenditures and loans, made during the period covered by the campaign statement that were contributions to a candidate committee of a candidate for elective office or a ballot question committee; or independent expenditures in support of the qualification, passage, or defeat of a ballot question or in support of the nomination or election of a candidate for elective office or the defeat of any of the candidate's opponents.

(d) The total expenditure by the committee for each candidate for elective office or ballot question in whose behalf an independent expenditure was made or a contribution was given for the election cycle.

(e) The filer's name, address, and telephone number, if available, if any, and the full name, address, and telephone number, if available, of the committee treasurer.

(2) The committee shall identify an expenditure listed under subsection (1)(c) as an independent expenditure or as a contribution to a candidate committee or a ballot question committee.

(3) The committee shall designate for a contribution to or on behalf of a candidate committee or ballot question committee listed under subsection (1)(c) the name and address of the committee, the name of the candidate and the office sought, if any, the amount contributed, and the date of contribution.

(4) The committee shall designate for an independent expenditure listed under subsection (1)(c) either the name of the candidate for whose benefit the expenditure was made and the office sought by the candidate, or a brief description of the ballot question for which the expenditure was made; the amount, date, and purpose of the expenditure; and the full name and address of the person to whom the expenditure was made.

(5) The committee shall apportion an expenditure listed that was made in support of more than 1 candidate or ballot question, or both, reasonably among the candidates or ballot questions, or both.

(6) A campaign statement of a committee, in addition to the other information required by this section, shall include an itemized list of all expenditures during the reporting period for election day busing of electors to the polls, get-out-the-vote activities, slate cards, challengers, poll watchers, and poll workers.

169.233 Campaign statements; filing schedule; report; late filing fee; violation as misdemeanor; penalty; prohibitions; filing incomplete or inaccurate statement or report; civil fine.

Sec. 33.

(1) A committee, other than an independent committee or a political committee required to file with the secretary of state, supporting or opposing a candidate shall file complete campaign statements as required by this act and the rules promulgated under this act. The campaign statements shall be filed according to the following schedule:

(a) A preelection campaign statement shall be filed not later than the eleventh day before an election. The closing date for a campaign statement filed under this subdivision shall be the sixteenth day before the election.

(b) A postelection campaign statement shall be filed not later than the thirtieth day following the election. The closing date for a campaign statement filed under this subdivision shall be the twentieth day following the election. A committee supporting a candidate who loses the primary election shall file closing campaign statements in accordance with this section. If all liabilities of such a candidate or committee are paid before the closing date and additional contributions are not expected, the campaign statement may be filed at any time after the election, but not later than the thirtieth day following the election.

(2) For the purposes of subsection (1):

(a) A candidate committee shall file a preelection campaign statement and a postelection campaign statement for each election in which the candidate seeks nomination or election, except if an individual becomes a candidate after the closing date for the preelection campaign statement only the postelection campaign statement is required for that election.

(b) A committee other than a candidate committee shall file a campaign statement for each period during which expenditures are made for the purpose of influencing the nomination or election of a candidate or for the qualification, passage, or defeat of a ballot question.

(3) An independent committee or a political committee other than a house political party caucus committee or senate political party caucus committee required to file with the secretary of state shall file campaign statements as required by this act according to the following schedule:

(a) In an odd numbered year:

(i) Not later than January 31 of that year with a closing date of December 31 of the previous year.

(ii) Not later than July 25 with a closing date of July 20.

(iii) Not later than October 25 with a closing date of October 20.

(b) In an even numbered year:

(i) Not later than April 25 of that year with a closing date of April 20 of that year.

(ii) Not later than July 25 with a closing date of July 20.

(iii) Not later than October 25 with a closing date of October 20.

(4) A house political party caucus committee or a senate political party caucus committee required to file with the secretary of state shall file campaign statements as required by this act according to the following schedule:

(a) Not later than January 31 of each year with a closing date of December 31 of the immediately preceding year.

(b) Not later than April 25 of each year with a closing date of April 20 of that year.

(c) Not later than July 25 of each year with a closing date of July 20 of that year.

(d) Not later than October 25 of each year with a closing date of October 20 of that year.

(e) For the period beginning on the fourteenth day immediately preceding a primary or special primary election and ending on the day immediately following the primary or special primary election, not later than 4 p.m. each business day with a closing date of the immediately preceding day, only for a contribution received or expenditure made that exceeds $1,000.00 per day.

(f) For the period beginning on the fourteenth day immediately preceding a general or special election and ending on the day immediately following the general or special election, not later than 4 p.m. each business day with a closing date of the immediately preceding day, only for a contribution received or expenditure made that exceeds $1,000.00 per day.

(5) Notwithstanding subsection (3) or (4) or section 51, if an ELECTIONEERING COMMUNICATION OR AN independent expenditure is made within 45 days before ~~a special~~ AN election by an independent committee or a political committee required to file a campaign statement with the secretary of state, a report of the expenditure shall be filed by the committee with the secretary of state within 48 hours after the expenditure. The report shall be made on a form provided by the secretary of state and shall include the date of the independent expenditure, the amount of the expenditure, a brief description of the nature

of the expenditure, and the name and address of the person to whom the expenditure was paid. The brief description of the expenditure shall include either the name of the candidate and the office sought by the candidate or the name of the ballot question and shall state whether the expenditure supports or opposes the candidate or ballot question. This subsection does not apply if the committee is required to report the independent expenditure in a campaign statement that is required to be filed before the date of the election for which the expenditure was made.

(6) A candidate committee or a committee other than a candidate committee that files a written statement under section 24(5) or (6) need not file a campaign statement under subsection (1), (3), or (4) unless it received or expended an amount in excess of $1,000.00. If the committee receives or expends an amount in excess of $1,000.00 during a period covered by a filing, the committee is then subject to the campaign filing requirements under this act.

(7) A committee, candidate, treasurer, or other individual designated as responsible for the committee's record keeping, report preparation, or report filing who fails to file a statement as required by this section shall pay a late filing fee. If the committee has raised $10,000.00 or less during the previous 2 years, the late filing fee shall be $25.00 for each business day the statement remains unfiled, but not to exceed $500.00. If the committee has raised more than $10,000.00 during the previous 2 years, the late filing fee shall not exceed $1,000.00, determined as follows:

(a) Twenty-five dollars for each business day the report remains unfiled.

(b) An additional $25.00 for each business day after the first 3 business days the report remains unfiled.

(c) An additional $50.00 for each business day after the first 10 business days the report remains unfiled.

(8) If a candidate, treasurer, or other individual designated as responsible for the committee's record keeping, report preparation, or report filing fails to file 2 statements required by this section or section 35 and both of the statements remain unfiled for more than 30 days, that candidate, treasurer, or other designated individual is guilty of a misdemeanor, punishable by a fine of not more than $1,000.00, or imprisonment for not more than 90 days, or both.

(9) If a candidate is found guilty of a violation of this section, the circuit court for that county, on application by the attorney general or the prosecuting attorney of that county, may prohibit that candidate from assuming the duties of a public office or from receiving compensation from public funds, or both.

(10) If a treasurer or other individual designated as responsible for a committee's record keeping, report preparation, or report filing knowingly files an incomplete or inaccurate statement or report required by this section, that treasurer or other designated individual is subject to a civil fine of not more than $1,000.00.

169.247 Printed matter or radio or television paid advertisement having reference to election, candidate, or ballot question; names and addresses; rules; exemptions; statement that payment made “with regulated funds”; violation as misdemeanor; penalty.

Sec. 47.

(1) Except as otherwise provided in this subsection and subject to subsections (3) and (4), a billboard, placard, poster, pamphlet, or other printed matter having reference to an election, a candidate, or a ballot question, shall bear upon it the name and address of the person paying for the matter. Except as otherwise provided in this subsection and subject to subsections (3) and (4), if the printed matter relating to a candidate is an independent expenditure that is not authorized in writing by the candidate committee of that candidate, the printed matter shall contain the following disclaimer: "Not authorized by any candidate committee". An individual other than a candidate is not subject to this subsection if the individual is acting independently and not acting as an agent for a candidate or any committee.

(2) A radio or television paid advertisement having reference to an election, a candidate, or a ballot question shall identify the sponsoring person as required by the federal communications commission, shall bear the name of the person paying for the advertisement, and shall be in compliance with subsection (3) and with the following:

(a) If the radio or television paid advertisement relates to a candidate and is an ELECTIONEERING COMMUNICATION OR AN independent expenditure, the advertisement shall contain the following disclaimer: "Not authorized by any candidate".

(b) If the radio or television paid advertisement relates to a candidate and is not an independent expenditure but is paid for by a person other than the candidate to which it is related, the advertisement shall contain the following disclaimer:

"Authorized by .....".
(name of candidate or name of candidate committee)

(3) The size and placement of an identification or disclaimer required by this section shall be determined by rules promulgated by the secretary of state. The rules may exempt printed matter and certain other items such as campaign buttons or balloons, the size of which makes it unreasonable to add an identification or disclaimer, from the identification or disclaimer required by this section.

(4) Except for a candidate committee's printed matter or radio or television paid advertisements, each identification or disclaimer required by this section shall also indicate that the printed matter or radio or television paid advertisement is paid for "with regulated funds". Printed matter or a radio or television paid advertisement that is not subject to this act shall not bear the statement required by this subsection.

(5) A person who knowingly violates this section is guilty of a misdemeanor punishable by a fine of not more than $1,000.00, or imprisonment for not more than 93 days, or both.

169.251 Independent expenditure of $100.01 or more; report; copies.

Sec. 51.

A person, other than a committee, who makes an ELECTIONEERING COMMUNICATION OR AN independent expenditure, advocating the election of a candidate or the defeat of a candidate's opponents or the qualification, passage, or defeat of a ballot question, in an amount of $100.01 or more in a calendar year shall file a report of the independent expenditure, within ~~10 days~~ 48 HOURS, with the clerk of the county of residence of that person. The report shall be made on an independent expenditure report form provided by the secretary of state and shall include the date of the expenditure, a brief description of the nature of the expenditure, the amount, the name and address of the person to whom it was paid, the name and address of the person filing the report, together with the name, address, occupation, employer, and principal place of business of each person who contributed $100.01 or more to the expenditure. The filing official receiving the report shall forward copies, as required, to the appropriate filing officers as described in section 36.

Appendix E

The people of Michigan have elected their judges and justices for over 150 years.[1] The 1908 Michigan Constitution stated that nominations of Supreme Court justices were to be "made as now or hereafter provided by law[.]"[2] However, the process of nominating judges and justices has varied over time. The Michigan Legislature passed, and the Governor signed, 1954 PA 116, which provided that "each political party may nominate 2 candidates for the office of justice of the supreme court." The 1963 Michigan Constitution carried forward the language of the 1908 Michigan Constitution pertaining to the nomination of Supreme Court justices, stating, "Nomination for justices of the supreme court shall be in the manner prescribed by law[,]"[3] and the Michigan Legislature passed, and the Governor signed, 1963 PA 61[4] that amended the 1954 law to provide, "At its fall state convention, each political party may nominate the number of candidates for the office of justice of the supreme court as are to be elected at the next ensuing general election."

Thus, as Judge Robert J. Danhof (Judge of the Michigan Court of Appeals, ret.) has emphasized, the procedure of nomination by political party convention is not in the Michigan Constitution. Rather a statute sets the nominating procedure, and the Legislature may change that procedure at any time. As Judge Danhof points out, "If [the legislature] want[s] to go to nominating Supreme Court justices by petition, all the legislature has to do is adopt the same procedure used for the court of appeals. If you want to run for the court of appeals, you circulate a petition."[5]

Set out below is a proposed amendment to the election law that would accomplish precisely that: it substitutes for the current statutory provisions a procedure for nominating Supreme Court justices substantially comparable to the current procedure for nominating Court of Appeals judges. It thereby:

- Eliminates the nomination of candidates for justice of the Supreme Court at political party conventions.
- Provides for the nomination of such candidates at the August nonpartisan primary elections through two devices: the filing of nominating petitions for non-incumbent candidates and the filing of affidavits of candidacy for incumbent candidates.
- Requires that nominating petitions contain the signatures, addresses, and dates of signing of a minimum of 30,000 and a maximum of 60,000 qualified and registered voters in order to place such candidates on the August nonpartisan primary election ballot.
- Contains procedures for the withdrawal of nominating petitions and affidavits of candidacy.

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[1] See Const 1835, art 6, §4; Const 1850, art 6, §§2, 6; Const 1908, art 7, §§2, 8; Const 1963, art 6, §§ 2, 8, 11, 12, 16.

[2] Const 1908, art 7, §23.

[3] Const 1963, art 6, §2.

[4] MCL 168.392.

[5] Judge Robert J. Danhof, *Shaping the Michigan Judiciary: A Framer Traces the Constitutional Origins of Selecting Michigan's Supreme Court Justices*, 80 MI Bar Jnl 15, 18 (May 2001).

- Provides that the two top vote getters in the primary for each position as justice of the Supreme Court that is up for election will be the nominees on the November nonpartisan general election ballot.
- Otherwise conforms the procedure for nominating Supreme Court Justices to the procedure for electing Court of Appeals judges and other judges in Michigan.

MICHIGAN ELECTION LAW (EXCERPT)
Act 116 of 1954

168.391 Office of justice of supreme court; eligibility; violation of MCL 38.412a.

Sec. 391.

(1) A person shall not be eligible for the office of justice of the supreme court unless the person is a registered and qualified elector of this state by the filing deadline or the date the person files the affidavit of candidacy, is licensed to practice law in this state, and at the time of election or appointment is less than 70 years of age.

(2) A person who has been convicted of a violation of section 12a(1) of 1941 PA 370, MCL 38.412a, shall not be eligible for election or appointment to the office of justice of the supreme court for a period of 20 years after conviction.

168.392 Candidates for justice of supreme court~~; nomination at fall state convention~~ .

Sec. 392.

~~At its fall state convention, each political party may nominate the number of candidates for the office of justice of the supreme court as are to be elected at the next ensuing general election.~~ (1)~~–~~EXCEPT AS PROVIDED IN SUBSECTION (2), ON THE TUESDAY SUCCEEDING THE FIRST MONDAY IN AUGUST BEFORE EACH GENERAL NOVEMBER ELECTION AT WHICH A JUSTICE OF THE SUPREME COURT IS TO BE ELECTED, A GENERAL NONPARTISAN PRIMARY ELECTION SHALL BE HELD AT WHICH THE QUALIFIED AND REGISTERED ELECTORS MAY VOTE FOR NONPARTISAN CANDIDATES FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT.

(2)IF, UPON EXPIRATION OF THE TIME FOR FILING A NOMINATING PETITION FOR THE PRIMARY ELECTION OF SAID JUSTICE OF THE SUPREME COURT, THERE ARE NOT MORE THAN TWICE THE NUMBER OF CANDIDATES AS THERE ARE PERSONS TO BE ELECTED, A PRIMARY ELECTION FOR THAT OFFICE SHALL NOT BE HELD AND IT SHALL BE OMITTED FROM THE PRIMARY BALLOT. IN THAT CASE, THE SECRETARY OF STATE SHALL CERTIFY TO THE BOARD OF STATE CANVASSERS AND THE COUNTY BOARD OR BOARDS OF ELECTION COMMISSIONERS THE NAMES OF THE CANDIDATES FOR JUSTICE OF THE SUPREME COURT WHOSE NOMINATING PETITIONS, FILING FEE OR AFFIDAVIT OF CANDIDACY HAVE BEEN PROPERLY FILED.

THESE CANDIDATES SHALL BE THE NOMINEES FOR JUSTICE OF THE SUPREME COURT.

168.392a Candidates for justice of supreme court; incumbents, affidavit of candidacy for re-election.

Sec. 392a.

(1) Any incumbent justice of the supreme court may become a candidate for re-election as a justice of the supreme court by filing with the secretary of state an affidavit of candidacy not less than 180 days prior to the expiration of ~~his~~ THAT JUSTICE'S term of office.

(2) The affidavit of candidacy shall contain statements that the affiant is an incumbent supreme court justice, that he OR SHE is domiciled within the state, that he OR SHE will not have attained the age of 70 years prior to the date of election and a declaration that he OR SHE is a candidate for election to the office of supreme court justice.

168.393 Candidates for justice of supreme court~~; canvass by state central committee of each political party;~~ NOMINATING PETITIONS.

Sec. 393.

~~Not more than 24 hours after the conclusion of the fall state convention, the state central committee of each political party shall convene and canvass the proceedings of the convention and determine the nominee or nominees of the convention for the office or offices of justice of the supreme court. Not more than 1 business day after the conclusion of the state convention, the chairperson and secretary of the state central committee shall forward by registered or certified mail to the secretary of state a typewritten or printed list of the names and residence, including the street address if known, of the candidate or candidates nominated at the convention for the office or offices of justice of the supreme court.~~

(1)A QUALIFIED PERSON SHALL HAVE HIS OR HER NAME PRINTED ON THE NONPARTISAN PRIMARY BALLOT AS A CANDIDATE FOR NOMINATION FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT IF NOMINATING PETITIONS CONTAINING THE SIGNATURES, ADDRESSES, AND DATES OF SIGNING OF A MINIMUM OF 30,000 AND A MAXIMUM OF 60,000 QUALIFIED AND REGISTERED ELECTORS RESIDING IN THIS STATE SHALL BE FILED WITH THE SECRETARY OF STATE. THE PETITIONS AND FILING SHALL COMPLY WITH THE PROVISIONS OF SECTIONS 544A AND 544B(1). THE SECRETARY OF STATE SHALL NOT ACCEPT NOMINATING PETITIONS UNDER THIS SECTION AFTER 4 P.M. ON THE FOURTEENTH TUESDAY PRECEDING THE PRIMARY.

(2) THE SECRETARY OF STATE SHALL ISSUE AN OFFICE DESIGNATION OF INCUMBENT POSITION FOR OFFICE OF SUPREME COURT JUSTICE FOR WHICH THE INCUMBENT JUSTICE IS ELIGIBLE TO SEEK REELECTION. IF AN INCUMBENT JUSTICE DOES NOT FILE AN AFFIDAVIT OF CANDIDACY BY THE DEADLINE SET FORTH IN SECTION 392A, THE SECRETARY OF STATE SHALL NOTIFY ALL CANDIDATES FOR THAT OFFICE

THAT A NONINCUMBENT POSITION EXISTS. A NOMINATING PETITION CIRCULATED FOR THE NONINCUMBENT POSITION AFTER THE DEADLINE SHALL BEAR AN OFFICE DESIGNATION OF NONINCUMBENT POSITION. SIGNATURES COLLECTED BEFORE THE AFFIDAVIT OF CANDIDACY FILING DEADLINE MAY BE FILED WITH THE NONINCUMBENT NOMINATING PETITIONS.

(3) IN THE PRIMARY AND GENERAL NOVEMBER ELECTION FOR 2 OR MORE JUSTICES OF THE SUPREME COURT, EACH OF THE FOLLOWING CATEGORIES OF CANDIDATES SHALL BE LISTED SEPARATELY ON THE BALLOT, CONSISTENT WITH SUBSECTION(4):

(a) THE NAMES OF CANDIDATES FOR OFFICE OF JUSTICE OF THE SUPREME COURT FOR WHICH THE INCUMBENT IS SEEKING ELECTION.

(b) THE NAMES OF CANDIDATES FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT FOR WHICH THE INCUMBENT IS NOT SEEKING ELECTION.

(4) IN A PRIMARY AND GENERAL ELECTION FOR 2 OR MORE POSITIONS AS JUSTICE OF THE SUPREME COURT IN WHICH EITHER OF THE CATEGORIES IN SUBSECTION (3) COULD BE SELECTED, A CANDIDATE SHALL APPLY TO THE BUREAU OF ELECTIONS FOR A WRITTEN STATEMENT OF OFFICE DESIGNATION TO CORRESPOND TO THE OFFICE OF JUSTICE OF THE SUPREME COURT THAT CANDIDATE SEEKS. THE OFFICE DESIGNATION PROVIDED BY THE SECRETARY OF STATE SHALL BE INCLUDED IN THE HEADING OF THAT CANDIDATE'S NOMINATING PETITIONS. NOMINATING PETITIONS CONTAINING AN IMPROPER OFFICE DESIGNATION ARE INVALID.

(4) FOR THE PURPOSES OF SUBSECTION (3), IF SECTION 395(2) APPLIES BECAUSE OF THE DEATH, DISQUALIFICATION OR WITHDRAWAL OF AN INCUMBENT JUSTICE, THE OFFICE OF JUSTICE OF THE SUPREME COURT FOR THAT JUSTICE SHALL BE REGARDED AS A POSITION FOR WHICH AN INCUMBENT IS NOT SEEKING ELECTION. THE APPLICATION OF THIS SUBSECTION INCLUDES, BUT IS NOT LIMITED TO, CIRCUMSTANCES IN WHICH THE GOVERNOR APPOINTS AN INDIVIDUAL TO FILL THE VACANCY AND THAT INDIVIDUAL SEEKS TO QUALIFY AS A NOMINEE UNDER SUBSECTION 404(2).

~~The secretary of state shall forward a copy of a list received under this section to the board of election commissioners of each county, in care of the county clerk at the county seat. The name of each nominee on the list shall be printed upon a nonpartisan judicial ballot containing no party designation together with the names of incumbent justices filing an affidavit under section 392a.~~

168.394 Candidates for justice of supreme court; withdrawal~~; notice~~.

Sec. 394.

~~Any person who has been certified by the state central committee of any party as nominated for the office of justice of the supreme court or who filed an affidavit according to section 392a may withdraw by filing a written notice of withdrawal with the secretary of state or his or her duly authorized agent and a copy with~~

~~the chairperson and secretary of the state central committee of the party not later than 4 p.m., eastern standard time, of the fourth business day following the conclusion of the convention.~~ AFTER A PROPOSED CANDIDATE FILES NOMINATING PETITIONS OR AN AFFIDAVIT OF CANDIDACY FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT, THE PROPOSED CANDIDATE CAN WITHDRAW ONLY BY FILING A WRITTEN NOTICE OF WITHDRAWAL ON THE SECRETARY OF STATE OR HIS OR HER DULY AUTHORIZED AGENT. IF NOMINATING PETITIONS WERE FILED, THE NOTICE MUST BE SERVED NOT LATER THAN 3 DAYS AFTER THE LAST DAY FOR FILING NOMINATING PETITIONS. IF AN AFFIDAVIT OF CANDIDACY WAS FILED, THE NOTICE MUST BE SERVED NOT LATER THAN 3 DAYS AFTER THE LAST DAY FOR FILING AFFIDAVITS OF CANDIDACY. IF THE THIRD DAY FALLS ON A SATURDAY, SUNDAY, OR LEGAL HOLIDAY, THE NOTICE OF WITHDRAWAL MAY BE SERVED ON THE SECRETARY OF STATE OR HIS OR HER DULY AUTHORIZED AGENT AT ANY TIME ON OR BEFORE 4 P.M., EASTERN STANDARD TIME, ON THE NEXT SECULAR DAY

168.395 Candidates for justice of supreme court; NOMINEES, DECLARATION, CERTIFICATE, death, WITHDRAWAL, OR DISQUALIFICATION OF A CANDIDATE, ~~withdrawal, disqualification; selection of new candidate, certification; ballots~~.

Sec. 395.

~~Whenever a candidate of a political party, after having been nominated to the office of justice of the supreme court or having filed an affidavit according to section 392a, shall die, withdraw, remove from the state, or become disqualified for any reason, the state central committee of any party which is thereby left without a candidate nominated or indorsed by that party shall meet forthwith and, by a majority vote of the members thereof, shall select a candidate to fill the vacancy thereby caused. The name of the candidate so selected shall be immediately certified by the chairman and the secretary of said committee to the secretary of state and to the board of election commissioners for each county, whose duty it is to prepare the official ballots, and said board shall cause to be printed or placed upon said ballots, in the proper place, the name of the candidate so selected to fill the vacancy~~

(1) THE CANDIDATES FOR OFFICE OF JUSTICE OF THE SUPREME COURT RECEIVING THE LARGEST NUMBER OF VOTES AT A PRIMARY ELECTION, TO A NUMBER EQUAL TO TWICE THE NUMBER OF PERSONS TO BE ELECTED AS SET FORTH IN THE REPORT OF THE BOARD OF STATE CANVASSERS, BASED ON THE RETURNS FROM THE VARIOUS BOARDS OF COUNTY CANVASSERS AND ELECTION PRECINCTS, OR AS DETERMINED BY THE BOARD OF STATE CANVASSERS AS THE RESULT OF A RECOUNT, SHALL BE DECLARED THE NOMINEES FOR THE OFFICE AT THE NEXT GENERAL NOVEMBER ELECTION. THE BOARD OF STATE CANVASSERS SHALL CERTIFY THE NOMINATION TO THE COUNTY ELECTION COMMISSIONS.

(2) IF, AFTER THE DEADLINE FOR FILING NOMINATING PETITIONS UNDER SECTION 393, THERE ARE FEWER CANDIDATES FOR NOMINATION OR NOMINEES FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT THAN THERE ARE PERSONS TO BE ELECTED AT THE GENERAL NOVEMBER ELECTION BECAUSE OF THE DEATH,

DISQUALIFICATION, OR WITHDRAWAL OF A CANDIDATE MORE THAN 65 DAYS BEFORE THE GENERAL NOVEMBER ELECTION, THEN A PERSON, WHETHER OR NOT AN INCUMBENT, MAY QUALIFY AS A NOMINEE FOR THAT OFFICE AT THE GENERAL NOVEMBER ELECTION BY FILING NOMINATING PETITIONS AS REQUIRED BY SECTION 393. HOWEVER, THE SECRETARY OF STATE SHALL NOT ACCEPT A PETITION UNDER THIS SUBSECTION AFTER 4 P.M. ON THE TWENTY-FIRST DAY FOLLOWING THE DEATH, DISQUALIFICATION, OR WITHDRAWAL OF THE CANDIDATE OR 4 P.M. ON THE SIXTIETH DAY BEFORE THE GENERAL NOVEMBER ELECTION, WHICHEVER IS EARLIER, AND THE MINIMUM NUMBER OF SIGNATURES REQUIRED SHALL BE 1/2 THE MINIMUM NUMBER REQUIRED UNDER SECTION 393.

(3) THE SECRETARY OF STATE SHALL CERTIFY THE NOMINATION OF EACH PERSON WHO QUALIFIES AS A NOMINEE UNDER SUBSECTION (2) TO THE BOARD OF ELECTION COMMISSIONERS OF EACH COUNTY IN THE STATE FOR THE GENERAL NOVEMBER ELECTION.

168.396 Supreme court justices; election.

Sec. 396.

(1) Subject to section 6 of the schedule to the state constitution, 2 justices of the supreme court shall be elected at the general election in 1966 and at the general election every 2 years thereafter.

(2) EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, A JUSTICE OR JUSTICES SHALL BE ELECTED AT THE GENERAL NOVEMBER ELECTION IN WHICH JUSTICES OF THE SUPREME COURT ARE TO BE ELECTED AS PROVIDED BY LAW.

(2) IF THERE ARE FEWER NOMINEES FOR THE OFFICE OF JUSTICE OF THE SUPREME COURT THAN THERE ARE PERSONS TO BE ELECTED AT THE GENERAL NOVEMBER ELECTION BECAUSE OF THE DEATH, DISQUALIFICATION, OR WITHDRAWAL OF A NOMINEE LESS THAN 66 DAYS BEFORE THE GENERAL NOVEMBER ELECTION, THEN NO PERSON SHALL BE ELECTED AT THAT GENERAL NOVEMBER ELECTION TO AN OFFICE OF JUSTICE OF THE SUPREME COURT FOR WHICH THERE IS NO NOMINEE.

168.397 Supreme court justices; certificate of determination by board of state canvassers.

Sec. 397.

The board of state canvassers shall determine which candidates for justices of the supreme court have received the greatest number of votes and shall declare such candidates to be duly elected. The said board shall forthwith make and subscribe on its statement of returns a certificate of such determination and deliver the same to the secretary of state.

168.398 Supreme court justices; certificate of election.

Sec. 398.

The secretary of state shall file in his OR HER office and preserve the original statement and determination of the board of state canvassers of the result of the election and shall forthwith execute and cause to be delivered to the persons thereby declared to be elected to the office of justice of the supreme court a certificate of election, certified by him OR HER under the great seal of the state.

168.399 Supreme court justices; term of office.

Sec. 399.

The term of office of justice of the supreme court shall be 8 years, beginning on the first day of January next following the election and shall continue until a successor is elected and qualified.

168.400 Supreme court justices; oath of office, deposit.

Sec. 400.

Every person elected to the office of justice of the supreme court, before entering upon the duties of his OR HER office, shall take and subscribe to the oath as provided in section 1 of article 11 of the state constitution, and shall deposit said oath with the secretary of state.

168.401 Supreme court justices; resignation, notice.

Sec. 401.

Any person duly elected to the office of justice of the supreme court who desires to resign shall file a written notice containing the effective date of such resignation with the court administrator and a copy with the governor and secretary of state.

168.402 Supreme court justices; vacancy, creation.

Sec. 402.

The office of justice of the supreme court shall become vacant upon the happening of any of the following events: Death of the incumbent; his OR HER resignation; his OR HER removal from office for cause; his OR HER ceasing to be a resident of the state; his OR HER conviction of an infamous crime, or an offense involving the violation of his OR HER oath of office; the decision of a competent tribunal declaring his election or appointment void; or his OR HER neglect or refusal to take and subscribe to the constitutional oath of office and deposit the same in the manner and within the time prescribed by law.

168.403 Supreme court justices; impeachment; removal from office, service of charges, hearing.

Sec. 403.

Any person holding the office of justice of the supreme court may be removed from office by impeachment for the reasons and in the manner set forth in section 7 of article 11 of the state constitution, or the governor shall remove any justice of the supreme court upon a concurrent resolution of 2/3 of the members elected to and serving in each house of the state legislature, and the cause for such removal shall be stated at length in such resolution, as provided in the constitution of this state. Such person shall be served with a written notice of the charges against him OR HER and be afforded an opportunity for a hearing thereon. When a vacancy shall occur in any of the said offices, a notice of such vacancy and the reason why the same exists shall, within 10 days after such vacancy occurs, be given in writing by the secretary of state to the court administrator with a copy to the governor.

168.404 Office of supreme court justice; vacancy; appointment; election.

Sec. 404.

(1) The governor shall appoint a successor to fill the vacancy in the office of justice of the supreme court. The person appointed by the governor shall be considered an incumbent for purposes of this act and shall hold office until 12 noon of January 1 following the next general election, at which a successor is elected and qualified.

(2) At the next general November election held at least 105 days after the vacancy occurs, a person nominated under sectionS 392 AND 393 shall be elected to fill that office. The person elected shall hold the office for the remainder of the unexpired term.

(3) A candidate receiving the highest number of votes for that office who has subscribed to the oath as provided in section 1 of article XI of the state constitution is considered to be elected and qualified even though a vacancy occurs before the time he or she has entered upon the duties of his or her office.

168.405 Supreme court justices; election, recount of votes.

Sec. 405.

The votes cast for any candidate for justice of the supreme court at any election shall be subject to recount as provided in chapter 33 of this act.

168.406 Supreme court justices; not subject to recall.

Sec. 406.

Judicial officers are not subject to recall as provided in section 8 of article 2 of the state constitution.

168.544b Candidates for judicial office; affidavit of qualifications to be filed with nominating petitions

Sec 544b

~~(1) Except as provided in subsection (2), a person shall not qualify~~ A PERSON IS NOT QUALIFIED as a candidate for ~~any~~ a judicial office of this state unless the person files an affidavit with his or her nominating petitions on a form prescribed by the secretary of state stating that ~~he or she~~ THE PERSON possesses the constitutional qualifications set forth in section 19 of article VI of the state constitution.

~~(2) In cases where candidates for judicial office are nominated at political party conventions, he chairperson and secretary of the party shall file the affidavit with the secretary of state not more than 1 business day after the conclusion of the convention.~~

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2012, the Year of the Ballot Proposal

While most voters will be showing up to vote for candidates at the top of the ticket, this year in Michigan they will also get to vote "yea" or "nay" on a half dozen ballot proposals that could have a huge impact on public policy. Since most readers of this column will be well versed on the federal and state candidates they will see on their ballot (and better versed than most on the judicial candidates, too!), I chose to devote this space to summarizing the 6 ballot proposals.

Proposal 1 – "Stand Up for Democracy"

This proposal seeks to repeal PA 4 of 2011, commonly known as the Emergency Financial Manager Law. The law as it was enacted grants broad and sweeping powers to Emergency Financial Managers who are appointed by the Governor to oversee cities or schools that are considered to be in a financial crisis. These powers include the ability to tear up collective bargaining agreements and other contractual obligations held by the entity in question. The referendum to repeal the law was strongly backed by public employee unions such as AFSCME and SEIU.

A "Yes" vote will affirm the law.
A "No" vote will repeal the law.

Proposal 2 – "Protect our Jobs (Protect Working Families)"

This proposed constitutional amendment would place the right to collective bargaining into the Michigan Constitution. The proposal is mainly in response to a large number of new laws recently enacted by the Michigan Legislature which restrict the ability of workers to collectively bargain for wages, hours and working conditions. The AFL-CIO chose to spend a lot of money on this effort with the thought that only a constitutional amendment would protect against further attacks on collective bargaining rights. Detractors claim that the constitutional amendment would impact a large number of existing statutes.

A "Yes" vote will adopt the proposal and make the change to the Michigan Constitution.
A "No" vote will reject the proposal.

Proposal 3 – "Michigan Energy, Michigan Jobs"

Under current state law, electric utilities in Michigan must derive a certain percentage of their overall load from renewable sources by 2015 (specifically, they must obtain 15% of the electricity from "green" sources, including wind, solar, hydroelectric or other renewable sources). This proposed constitutional amendment would increase the current "Renewable Portfolio Standard" from the 15% by 2015 contained in state law, to 25% by 2025. Further, it would enshrine the new standard into the Michigan Constitution, making it next to impossible for the Michigan Legislature to alter it.

A "Yes" vote will adopt the 25% by 2025 standard into the constitution.
A "No" vote will reject the new standard, thereby retaining the current 15% by 2015.

Proposal 4 – "Citizens for Affordable Quality Home Care"

This proposal stems from the ongoing legal and legislative battle over the rights of certain home care workers to collectively bargain. This proposal is strongly backed by AFSCME and the SEIU and would amend the Michigan Constitution to firmly settle the question and grant limited collective bargaining rights to certain classes of home health care workers. Current efforts by the Michigan Legislature and the Michigan Attorney General would prevent these workers from collectively bargaining.

A "Yes" vote will grant home health care workers collective bargaining rights.
A "No" vote will maintain current law which disallows home health care workers collective bargaining rights.

Proposal 5 – "Michigan Alliance for Prosperity"

This proposal would amend the Michigan Constitution to prohibit the Legislature from enacting a tax increase with less than a 2/3 vote of the House and Senate. The proposal is modeled after a similar constitutional amendment passed in California in the 1970's. Backers claim that the amendment will protect taxpayers. However, the proposal, if passed, would also protect tax loopholes. The proposal would create a "minority rule" for any taxation issues, and would make it all but impossible to eliminate existing tax breaks for special interests.

A "Yes" vote would amend the Michigan constitution to require a 2/3 vote of the House and Senate to pass any tax increase or eliminate any tax exemption.
A "No" vote would reject the proposal and maintain the current majority rule for tax legislation.

Proposal 6 – "The People Should Decide"

This constitutional amendment would require a vote of the citizens of Michigan before the state could construct or finance a new international bridge or tunnel crossing. It is funded by Manuel "Matty" Maroun, the owner of the Ambassador Bridge. It is aimed at stopping the construction of the New International Trade Crossing – a bridge that would compete with the Ambassador for traffic.

A "Yes" vote would require all future international bridge or tunnel projects to be approved by a statewide vote (although it is unclear whether this would affect the current NITC project).
A "No" vote would reject the proposal and leave decisions on new international bridge and tunnel projects in the hands of the Legislature and Governor.