



To: Representative Assembly

From: Nathan A. Triplett, Director of Governmental Relations

Date: July 25, 2022

Re: Family Law Section Inconsistent Advocacy Request; HJR Q (Judicial Age Limit)

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### Synopsis

The Family Law Section (“FLS”) has requested permission to advocate a public policy position on House Joint Resolution (“HJR”) Q that is inconsistent with State Bar policy, as provided for in Article 8, Section 7(2) of the State Bar of Michigan (“SBM”) Bylaws. Based on a 2015 position adopted by the Representative Assembly (“RA”), the Bar supports HJR Q. FLS wishes to oppose HRJ Q and advocate an alternative approach to judicial age limitations. This request was originally considered by the SBM Board of Commissioners (“Board”) at its July meeting. Rather than acting on the request, the Board opted to refer the matter to the RA for consideration.

### Background & Prior Action by Representative Assembly

Article VI, §19 of Michigan’s 1963 Constitution provides, in relevant part, that: “No person shall be elected or appointed to a judicial office after reaching the age of 70 years.” In April 2013, the RA adopted a resolution supporting a constitutional amendment to remove the judicial age limitation.<sup>1</sup> Then, at its October 5, 2015 meeting, the RA was asked to consider the judicial age limitation issue again and approved two additional resolutions. The first resolution proposed that the Constitution be amended to “remove the age limitation from eligibility criteria for judicial office.”<sup>2</sup> The RA voted 71 to 37 (with 2 abstentions) to support this resolution. The second resolution proposed to “increase the age limitation for election or appointment to judicial office from 70 years to 75 years of age.”<sup>3</sup> The RA voted 57 to 49 (with 3 abstentions) to support this resolution. Each of these resolutions and their supporting materials are attached to this memorandum.

In March 2022, [HJR Q](#) was introduced. This latest proposal would amend the Constitution to prohibit a person from being elected or appointed to a judicial office after reaching the age of 80 years. In reviewing HJR Q, SBM staff construed the RA-approved resolutions, when taken together, as adopting a State Bar policy of supporting any increase in the judicial age limit to at least 75 years of age, up to and including the elimination of any limit. Understood as such, the 2015 RA-adopted

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<sup>1</sup> This resolution reflected the language of then-pending [Senate Joint Resolution \(“SJR”\) F of 2013](#). As this resolution is not the RA’s most recent action on the issue, it is not cited as a basis for current State Bar policy on similar constitutional amendments.

<sup>2</sup> The first resolution reflected language then pending in the Legislature as [2015 SJR J](#).

<sup>3</sup> The second resolution reflected language then pending in the Legislature as [2015 HJR S](#).

position was applied to HJR Q and, when the House Judiciary Committee held a hearing on HJR Q in April 2022, SBM staff submitted a card in support of the measure.

At its June 2022 meeting, the FLS Council voted to approve a public policy position opposing HJR Q and instead proposed a “straight mandatory retirement age of 76.” In compliance with Article 8, Section 7(1) of the SBM Bylaws, FLS submitted its position to SBM and included the following explanation:

This resolution seeks to amend the State Constitution by raising the age limit for judges seeking election, reelection or appointment from age 70 to 80. The current amendment does result in the loss of some good judges perhaps earlier than necessary because of the absurdity of the current amendment, which results in a “birthday lottery” of sorts, whereby some judges are forced to retire at age 69, whereas other judges can serve until 76, just because of their birthdate in relation to the election or date of appointment. Under the proposed amendment, the same absurd outcomes can occur, but it would permit judges to serve potentially until age 86 (or 88 for Supreme Ct justices). The concern over judges’ health, longevity and consistency were significant in opposing HJR Q. Judges serving into their mid to late 80’s is certain to result in many more judges becoming disabled, dealing with illness, or passing away during their term. This creates chaos within the court, including shuffling of dockets, delays in hearing matters, etc. The Family Law Section voted to oppose the resolution, and further voted that it would support a Constitutional amendment establishing a straight mandatory retirement age of 76. This would limit the concerns created by allowing judges to serve into their mid-80's, while at the same time eliminate the absurd outcomes under the current system.

Article VIII of the SBM Bylaws establishes the procedures that sections must adhere to if they wish to engage in public policy activity. Section 7(2) provides that: “A State Bar Section may not advocate a policy position on behalf of the Section that is inconsistent with State Bar policy, unless expressly authorized to do so by a majority vote of the Board of Directors or Representative Assembly.” SBM staff responded to the FLS submission noting that it was inconsistent with State Bar policy and that the Section was, therefore, prohibited from publicly advocating its position without permission from SBM. FLS thereafter requested that SBM grant such permission or, alternatively, that the SBM’s position on the matter be reconsidered.

The Board considered this issue at its July 22, 2022 meeting. The Board had a robust discussion about both the FLS position and the broader procedural/governance issues that the position implicated before the Board approved a motion to refer the inconsistent advocacy request to the RA for consideration.

Issue<sup>4</sup>

**STATE BAR OF MICHIGAN POSITION**  
**By vote of the Representative Assembly on September 17, 2022**

Should the Family Law Section be authorized, as provided for in Article VIII, § 7(2) of the SBM Bylaws, to advocate a public policy position that is inconsistent with State Bar policy on House Joint Resolution Q?

(a) Yes

or

(b) No

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<sup>4</sup> The Board has referred the FLS inconsistent advocacy request to the RA for consideration. Alternatively, the RA may wish to reconsider existing State Bar policy on the issue of judicial age limitations, as construed and applied by State Bar staff.

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**Public Policy Position  
HJR Q**

**Oppose with Recommended Amendments**

**Explanation**

This resolution seeks to amend the State Constitution by raising the age limit for judges seeking election, reelection or appointment from age 70 to 80. The current amendment does result in the loss of some good judges perhaps earlier than necessary because of the absurdity of the current amendment, which results in a “birthday lottery” of sorts, whereby some judges are forced to retire at age 69, whereas other judges can serve until 76, just because of their birthdate in relation to the election or date of appointment. Under the proposed amendment, the same absurd outcomes can occur, but it would permit judges to serve potentially until age 86 (or 88 for Supreme Ct justices). The concern over judges’ health, longevity and consistency were significant in opposing HJR Q. Judges serving into their mid to late 80’s is certain to result in many more judges becoming disabled, dealing with illness, or passing away during their term. This creates chaos within the court, including shuffling of dockets, delays in hearing matters, etc. The Family Law Section voted to oppose the resolution, and further voted that it would support a Constitutional amendment establishing a straight mandatory retirement age of 76. This would limit the concerns created by allowing judges to serve into their mid-80's, while at the same time eliminate the absurd outcomes under the current system.

**Position Vote:**

Voted for position: 16

Voted against position: 1

Abstained from vote: 1

Did not vote: 3

**Keller Permissibility Explanation:**

The improvement of the functioning of the courts

The availability of legal services to society

The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Mandatory retirement of judges, and the system implementing such mandatory retirement, is directly tied to the functioning of court. The death, illness, or incapacity of judges clearly can lead to hearing delays, judicial reassignments, etc.

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**PROPOSED RESOLUTIONS TO AMEND THE MICHIGAN CONSTITUTION TO DELETE OR MODIFY THE PROHIBITION ON BEING APPOINTED OR ELECTED TO JUDICIAL OFFICE AFTER AGE 70**

**Issue**

Should the State Bar of Michigan adopt one or both of the following resolutions calling for an amendment to section 19 of article VI the Michigan Constitution of 1963 to remove and/or increase the age limitation eligibility criteria for judicial office?

RESOLVED, that section 19 of article VI of the Michigan Constitution of 1963 be amended to remove the age limitation from eligibility criteria for judicial office, as follows:

ARTICLE VI

Sec. 19.

(1) The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state.

(2) To be qualified to serve as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court, a person shall have been admitted to the practice of law for at least 5 years. This subsection shall not apply to any judge or justice appointed or elected to judicial office prior to the date on which this subsection becomes part of the constitution.

~~(3) No person shall be elected or appointed to a judicial office after reaching the age of 70 years.~~

AND/OR

RESOLVED, that section 19 of article VI of the Michigan Constitution of 1963 be amended to increase the age limitation for eligibility criteria for judicial office, as follows:

ARTICLE VI

Sec. 19.

(1) The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state.

(2) To be qualified to serve as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court, a person shall have been admitted to the practice of law for at least 5 years. This subsection shall not apply to any judge or justice appointed or elected to judicial office prior to the date on which this subsection becomes part of the constitution.

(3) No person shall be elected or appointed to a judicial office after reaching the age of ~~70~~75 years.

## **Synopsis**

The Representative Assembly adopted a resolution in April 2013 to amend the Michigan constitution to delete the prohibition on being appointed or elected to judicial office after age 70. Since that resolution was adopted, the Representative Assembly has adopted more rigorous procedures to affirm that issues before the Representative Assembly are allowed under *Keller v. State Bar of California*. There is currently a proposal in the Michigan legislature (Senate Joint Resolution J) to remove the judicial age limit from the constitution. Before advocating the position adopted in 2013, the issue must be reviewed under these new procedures adopted in April 2015. In addition, a related constitutional amendment (House Joint Resolution S) has been proposed in the Michigan legislature that would raise the age prohibition from 70 to 75 years.

## **Background**

Section 19(3) of the judicial article of the Michigan Constitution 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. In 2012 the Michigan Judicial Selection Task Force, led by Justice Marilyn Kelly and Judge James L. Ryan, stated in their final report that this limitation is arbitrary in nature and serves no legitimate public interest. (See [http://iaals.du.edu/sites/default/files/documents/publications/mi\\_judicial\\_selection\\_task\\_force\\_report.pdf](http://iaals.du.edu/sites/default/files/documents/publications/mi_judicial_selection_task_force_report.pdf)). 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 Judicial Selection Task Force recommended the removal, by constitutional amendment, of the age 70 limitation.

The limitation of age 70 for appointment or election of a supreme court justice or circuit judge goes back as far as the Michigan Constitution of 1908 and was broadened in the Constitution of 1963 to apply to all judicial offices. Given the increase in life expectancy and the universal existence of laws prohibiting age discrimination, section 19 of article VI of the Michigan Constitution of 1963 should be amended, to remove the age limitation from eligibility criteria for judicial office.

As this Proposal is being written, the Michigan Senate is considering Senate Joint Resolution J (2015) which would accomplish the proposal supported by the Representative Assembly in 2013. On June 3, 2015, Senate Joint Resolution J was reported favorably without amendment to the Committee of the Whole. Meanwhile, the Michigan House is considering House Joint Resolution S (2015) which would raise the age prohibition from 70 to 75 years, and was just introduced on June 11, 2015. If either joint resolution is passed by both the Senate and the House, the amendment will be submitted for a vote of the people in November 2016.

## **Opposition to the Proposal**

The vote on the April 27, 2013 proposal by the Representative Assembly was 59 to 41. At the April 2013 meeting, opponents expressed concern that the quality of the judging of some judges declines during a long tenure and that eliminating the age requirement would create a “de facto lifetime appointment” (See <http://www.michbar.org/file/generalinfo/pdfs/4-27-13transcript.pdf>).

**Fiscal Impact on State Bar of Michigan**

None known.

**Keller Vote as Required by Rules of Procedure 5.1.1.**

Is this proposal permissible for a vote on the merits by the Representative Assembly under *Keller v. State Bar of California*?

(a) Yes

or

(b) No

**STATE BAR OF MICHIGAN POSITION  
By vote of the Representative Assembly on October 8, 2015**

Should the State Bar of Michigan adopt the following resolution calling for an amendment to section 19 of article VI of the Michigan Constitution of 1963 to remove the age limitation from eligibility criteria for judicial office?

RESOLVED, that section 19 of article VI of the Michigan Constitution of 1963 be amended, to remove the age limitation from eligibility criteria for judicial office.

(a) Yes

or

(b) No

AND/OR

RESOLVED, that section 19 of article VI of the Michigan Constitution of 1963 be amended, to increase the age limitation of eligibility for judicial office from 70 years to 75 years.

(a) Yes

or

(b) No



To: Members of the Representative Assembly

From: Janet Welch, Executive Director  
Peter Cunningham, Director of Governmental Relations

Date: October 8, 2015

Re: Amending Article VI, Section 19(3) of the Michigan Constitution (SJR J and HJR S)

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### **Background**

SJR J and HJR S are an amendment to section 19 of article VI the Michigan Constitution. Currently the constitution prohibits any person from being either elected or appointed to judicial office after reaching the age of 70 years.

At the April 2013 meeting, the Representative Assembly adopted a resolution supporting an amendment that would remove the age restriction from the Michigan Constitution. No formal review or vote by the Representative Assembly on the Keller-permissibility of taking a position on this amendment was required or undertaken at the time. Both the Board of Commissioners and the Representative Assembly have adopted procedures requiring a written Keller analysis and separate voting consideration of a policy's Keller-permissibility. Pursuant to our understanding of the intent of these changes, staff is not advocating any State Bar positions that has not been subject to the separate Keller analysis and separate vote process. Because the Representative Assembly is the final public policy-making body of the State Bar, the Board of Commissioners cannot reconsider the position of the Representative Assembly, but the Board could review whether or not the amendment is Keller-permissible, which could allow the advocacy of the Representative Assembly's position. Alternatively, the question of advocacy of this position could be deferred for Representative Assembly consideration in October.

### **Keller Considerations**

One of the primary reasons to either support or oppose changing the current age restriction on holding judicial office is a determination that the change would improve (or degrade) the functioning of the judiciary. Proponents of having an age restriction argue that there is an increased likelihood that someone's capacity to perform competently in judicial office diminishes significantly once a certain age is reached. Proponents of having the age restriction removed (or altered) argue that the current age restriction can prohibit competent and experienced members of the judiciary from continuing their service on the bench, and the problem of removing incompetent judges is not primarily age-related but should be addressed more comprehensively.



**Keller Quick Guide**

<b>THE TWO PERMISSIBLE SUBJECT-AREAS UNDER <i>KELLER</i>:</b>	
<b>Regulation of Legal Profession</b>	<b>Improvement in Quality of Legal Services</b>
<b>As interpreted by AO 2004-1</b> Regulation and discipline of attorneys Ethics Lawyer competency Integrity of the Legal Profession Regulation of attorney trust accounts	✓ Improvement in functioning of the courts Availability of legal services to society

**Staff Recommendation**

SJR J and HJR S satisfy the requirements of Keller and may be considered on their merits.

**THE STATE BAR OF MICHIGAN REPRESENTATIVE ASSEMBLY**

**PROPOSED RESOLUTION TO AMEND THE MICHIGAN CONSTITUTION TO  
DELETE THE PROHIBITION ON BEING APPOINTED OR ELECTED TO  
JUDICIAL OFFICE AFTER AGE 70**

**Issue**

Should the State Bar of Michigan adopt the following resolution calling for an amendment to section 19 of article VI the Michigan Constitution of 1963 to remove the age limitation from eligibility criteria for judicial office.

RESOLVED, that section 19 of article VI of the Michigan Constitution of 1963 be amended to remove the age limitation from eligibility criteria for judicial office, as follows:

**ARTICLE VI**

Sec. 19. (1) The supreme court, the court of appeals, the circuit court, the probate court and other courts designated as such by the legislature shall be courts of record and each shall have a common seal. Justices and judges of courts of record must be persons who are licensed to practice law in this state.

(2) To be qualified to serve as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court, a person shall have been admitted to the practice of law for at least 5 years. This subsection shall not apply to any judge or justice appointed or elected to judicial office prior to the date on which this subsection becomes part of the constitution.

~~(3) No person shall be elected or appointed to a judicial office after reaching the age of 70 years.~~

**Synopsis**

The Michigan Judicial Selection 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. The Report and Recommendations may be found at <http://mi-judicialselection.com/2012/04/24/michigan-judicial-selection-task-force-report-and-recommendations/>

**Background**

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 L. 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 make judicial selection in this state more democratic and more effective. The Report and Recommendations covers a wide range of topics relating to judicial selection in Michigan. *This Proposal deals only with the recommendation to remove the age limitation for appointment or election to judicial office from the Michigan Constitution.*

Section 19(3) of the judicial article of the Michigan Constitution 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.

Further background: The Representative Assembly has approved resolutions relating to judicial selection on two previous occasions. On September 26, 2002, the Assembly approved a resolution supporting the public funding of judicial elections, consistent with the position of the American Bar Association, stating that public funding of judicial elections serves the best interest of the public, the judiciary and the justice system. (See §20 in <http://www.michbar.org/generalinfo/pdfs/9-26-02Minutes.pdf>. On September 30, 2010, the Assembly approved a resolution supporting amendment of the Michigan Campaign Finance Act requiring disclosure prior to a judicial election of the source of the funding for all expenditures for campaign advertising. (See: <http://www.michbar.org/generalinfo/pdfs/9-30-10AmendmentCampaignFinanceAct.pdf>

### **Summation**

The limitation of age 70 for appointment or election of a supreme court justice or circuit judge goes back as far as the Michigan Constitution of 1908 and was broadened in the Constitution of 1963 to apply to all judicial offices. Given the increase in life expectancy and the universal existence of laws prohibiting age discrimination, section 19 of article VI of the Michigan Constitution of 1963 should be amended, to remove the age limitation from eligibility criteria for judicial office.

As this Proposal is being written, the Michigan Senate is considering Senate Joint Resolution F (2013) which would accomplish the amendment recommended by the Task Force. On January 31, 2013, Senate Joint Resolution F (2013) was reported favorably without amendment to the Committee of the Whole. If passed by both the Senate and the House, the amendment will be submitted for a vote of the people in November 2014.

### **Opposition to the Proposal**

None known.

### **Fiscal Impact on State Bar of Michigan**

None known.

## STATE BAR OF MICHIGAN POSITION

**By vote of the Representative Assembly on April 27, 2013**

Should the State Bar of Michigan adopt the following resolution calling for an amendment to section 19 of article VI of the Michigan Constitution of 1963 to remove the age limitation from eligibility criteria for judicial office.

RESOLVED, that section 19 of article VI of the Michigan Constitution of 1963 be amended, to remove the age limitation from eligibility criteria for judicial office.

(a) Yes

or

(b) No