

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). 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)

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

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER <i>KELLER</i>:	
Regulation of Legal Profession	Improvement in Quality of Legal Services
As interpreted by AO 2004-1 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.