

November 30, 2021

VIA ELECTRONIC TRANSMISSION ONLY

The attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions. It is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything, bad as well as good. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, CA L Rev (1978)

Dear MICRC Members,

Your legal team strongly encourages the MICRC to preserve and protect its ability to have and retain the "pivotal element" of a lawyer's professional functions: confidential communications between lawyer and client by maintaining the confidentiality of all privileged communications to date and protecting future confidential communications. As a multi-member public body, the Commission's ability to receive and discuss legal advice, risk mitigation, and legal strategy in anticipation of and during litigation or connected to it is a critical right that should not be abrogated. The goal of this writing is to provide a fuller discussion of not only the context but the impact and consequences if the attorney-client privilege is waived or eroded by action of a majority of MICRC members.

The context is clear: the MICRC is facing strong pressure from the public, advocacy groups and the media to release communications protected by the attorney-client privilege. Your legal team understands this is an uncomfortable position. The MICRC has operated in a transparent and open fashion and will continue to do so. It has held over 100 public meetings where live public participation was available and welcomed remotely or in person. It continues to hold public meetings, review and consider draft maps, written comment and feedback submitted via the public comment portal, MyDistricting, as well as electronic and traditional mail. This has resulted in the most transparent redistricting process in Michigan's history.

Privilege has been invoked intentionally and sparingly as part of our ethical obligation to represent the commission zealously and effectively. The vast majority of communications your counsel has provided either occurred in open session or in materials posted on the MICRC website. What is being asked of the MICRC now is to release confidential communications with your attorneys that discuss legal strategies such as the applicability and impact of caselaw as well as legal risks inherent in redistricting. Waiving the privilege on two of ten privileged documents will not reduce the pressure being placed on the MICRC. Indeed, to the contrary, the pressure will grow and will likely result in additional efforts to invade the confidential relationship between you and your attorneys, a relationship designed to give you the best confidential, privileged legal advice in furtherance of our obligations as your attorneys, obligations that the entire legal team takes very seriously. The MICRC has already received records requests for all of the privileged communications between the MICRC and its attorneys and it is reasonable to expect requests for

any future privileged communications if the Commission acts to release privileged information now. Making confidential, privileged materials available now also is likely to result in a future claim that this release constitutes a waiver of the Commission's attorney client privilege beyond the documents released.

These issues are first impressions of law, exacerbated by the imprecision of the constitutional amendment as drafted, inviting numerous interpretations based on alternative desired outcomes or advocacy, and ultimately thrust into the inaugural process by the census delay. Your legal team has consistently counseled that some of these issues can only be appropriately resolved by a court of law, which could provide guidance to you and to future commissions.

The Department of Attorney General (AG) has issued an advisory opinion that underscores the need for clarity from a court. Nothing that the MICRC has done is unreasonable or indefensible. The AG Opinion, which is not legally binding on the Commission is based, in part, on inferences about the content of the privileged memoranda based on document titles. That Opinion appropriately acknowledges that the documents may or may not fall under the privilege depending on content. It recognizes the appropriateness and significant nature of confidential attorney-client communications and underscores the open questions surrounding closed sessions. The ability of your attorneys to discuss privileged matters with the MICRC as a body and to represent the MICRC effectively is at stake – whether it be personnel issues, privileged information, prospective litigation risks or pending lawsuits. We strongly advise that any limitation of that privilege should come from a court of law, after proper briefing, not from self-imposed restrictions based on external pressures.

Your legal team urges each of you to consider the impact on the MICRC of releasing privileged attorney-client communications. The ability of your legal team to provide full, frank, and candid legal advice, consistent with their ethical obligations, is under direct threat. It would be unwise and detrimental to the MICRC and Commissioners to acquiesce at this juncture, with the adoption of final maps and threat of litigation so close. Numerous individuals, advocacy groups and media have expressed their intent to file litigation on a variety of issues since the MICRC was formed. This adversarial context has been present for some time and your lawyers' ability to outline litigation risk, litigation strategy and planning to address these threats will be significantly if not irreparably impaired if our privileged communications are released or your legal team is forced to operate under the severe constraint that any ostensibly privileged communication could be released. Indeed, the constitutional amendment itself was subject to a rigorous, lengthy, and ultimately unsuccessful legal challenge. Your legal team's collective goal is to defend the work of the MICRC, and the ability to provide privileged communications to freely advise our client is a critical component of our relationship with the MICRC.

These questions and issues will not go away. The pressure will only intensify for the release of additional privileged information, and the stakes will only increase, as we move closer to potential challenges to the adopted maps.



MICRC

Re: Attorney Client Privilege

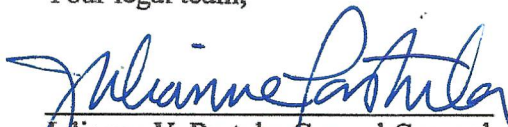
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The MICRC has worked tirelessly to bring life to the text of the constitutional amendment, respecting the hard work and dedication of those who brought Proposal 18-2 forward and the 61% of Michiganders that supported it at the polls. Requesting reciprocity of that respect and recognition that the MICRC's relationship with its legal team is consistent with the long established and customary attorney-client relationship is not unreasonable or unwarranted. The preservation of the attorney-client relationship is a key component of your lawyers' ability to fulfill our role and rigorously support and defend the work of the MICRC. As the U.S. Supreme Court opined: "The attorney client privilege is one of the oldest recognized privileges for confidential communications. The privilege is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interest." *Swidler & Berlin v. United States*, 524 US 399; 118 S Ct 2081; 141 L Ed 2d 379 (1998) (quotation marks and citations omitted)

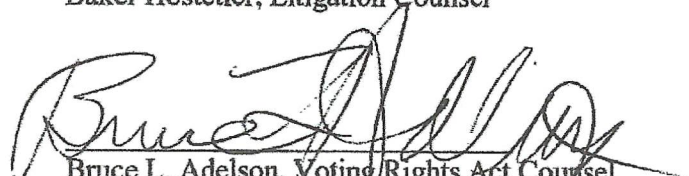
We look forward to the discussion on December 2<sup>nd</sup> and remain committed to the success of the MICRC.

Your legal team,

  
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