



## MEMORANDUM

TO: Michigan Independent Citizens Redistricting Commission (MICRC)

FROM: Julianne V. Pastula *JVP*  
General Counsel, MICRC

DATE: December 25, 2021

RE: **Guidance from Michigan Supreme Court in Docket No. 163823**

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This memorandum provides guidance to the Michigan Independent Citizens Redistricting Commission (MICRC) as set forth by the Michigan Supreme Court (Court) in *The Detroit News, Inc. v Independent Citizens Redistricting Commission*.<sup>1</sup> The Commission has complied with the Court's directive to release seven (7) memoranda as well as the recording from the October 27<sup>th</sup> closed session. The Opinion was issued on December 20, 2021 and is attached for your convenience. With respect to the following issues, the Court held:

Transparency. "In placing the redistricting power with an independent body of unelected officials, the voters chose to ring the body with transparency requirements, forcing much, if not all, of the Commission's work into the daylight."<sup>2</sup>

Attorney-Client Privilege/Work Product Doctrine. "In Michigan, privilege is governed by the common law, except as modified by statute or court rule. In general, the attorney-client privilege attaches to communications made to the attorney by the party or client, as legal adviser, and for the purpose of obtaining the attorney's legal advice and opinion relative to some legal right or obligation." Noting the roots of the attorney work-product doctrine are also derived from common law, the Court concluded "nothing in Const 1963, art 4, § 6 refers to any attorney-client privilege or protections; rather, these are governed by the common law. Accordingly, they must give way to the Constitution to the extent they are "repugnant" to it, meaning "incompatible" or "inconsistent." Therefore, to the extent the attorney-client privileges or protections under the common law "would shield something the Constitution requires to be disclosed, there is a repugnance and the Constitution must prevail."

The Court provides the following clarification in footnote 4 on page 9: "This is because public bodies work on behalf of the public rather than private interests, and a broad application of the privilege would impede the flow of information to the public, on whose behalf the work is being

<sup>1</sup> *The Detroit News, Inc. v Independent Citizens Redistricting Commission*, \_\_\_ Mich \_\_\_ (2021) (Docket No. 163823).

<sup>2</sup> *Id.* at 2.

undertaken. This concern would be especially acute with regard to the Commission, which is unelected and unaccountable to the public through the democratic process.”

Conduct of Business at Open Meetings. Section 6(10) of Article 4 of Michigan’s 1963 Constitution requires, in part, that the commission “conduct all of its business at open meetings.” Noting that “[b]ecause the actions of a public body are at issue, “business” is a term of art with a specialized meaning, specifically: “the matters that come before a deliberative assembly for its consideration and action, or for its information with a view to possible action in the future.”<sup>3</sup> The commission’s core business is the development and adoption of redistricting plans, and the resulting maps must comply with certain legal requirements.” The Court noted that “[l]egal advice on how to draw a map is akin to statistical advice on demographics or other expert counsel.” Therefore, consistent with the Court’s guidance relative to attorney-client privilege and protections, those privileges “must yield to the requirement in Const 1963, art 4, § 6(10) that the commission “conduct *all* of its business at open meetings.”<sup>4</sup>

The Court also clarified that “anticipation of likely litigation was not enough to overcome the constitutional mandate that business be conducted in the open.”

- Building on its analyses of privilege and “supporting materials,” the Court provides the following guidance relative to closed sessions in footnote 7 on page 14: “A different calculus may occur after litigation has commenced. If the subject matter of the litigation involves the business of the Commission—because it concerns the Commission’s ongoing efforts to develop and adopt the maps—then the text of the Constitution must prevail and the “business” must be conducted in open meetings. But by definition, if the litigation involves matters other than those falling within the Commission’s “business,” then that litigation would not come within the constitutional requirement in Const 1963, art 4, § 6(10).”
- The Court stated that disclosure of memoranda related to specific litigation is not precluded “if they were materials that supported the development of a map” but not if “the action itself did not directly involve either the substance of the maps or the actual mechanics for drawing the maps.”<sup>5</sup> The Court expanded its discussion in footnote 11 on page 21: “In a similar vein, it appears to us that a strong argument could be made that materials produced to defend a map in court would not be “supporting materials.” By the time a map is challenged in court, it will likely be the case that the Commission will have already voted to adopt the map and thus its formal opportunity to revise the map will have passed. In those cases, the litigation materials will almost certainly not be used to determine the content of the map or the process by which it was drawn.” FN 11 p21

The Court notes that “[t]he question we are presented with here is whether obtaining legal advice with respect to the validity of the plans is part of the Commission’s “business,” i.e., the development and adoption of the plans. As a general matter, it seems obvious that such advice is

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<sup>3</sup> *Id.* at 10.

<sup>4</sup> *Id.* at 13.

<sup>5</sup> *Id.* at 21.



part of the Commission's "business." After all, the Commission is not charged with drawing illegal maps, but it necessarily must draw legal ones."<sup>6</sup>

Publication of "Data" and "Supporting Materials" Under Const 1963, art 4, § 6(9). The Court observed that "the common quality of the terms "data" and "supporting materials" is that they are things used in the development of the maps, not that they limit the materials that must be disclosed to factual information as opposed to advice or opinion." Therefore, "to fall within the publication requirement, the materials must "support" the development of a plan. To "support" the plan's development means "to hold up or serve as a foundation or prop for" the plans. Thus, there must be some connection between the material and the plan's development. Because the business of the commission is to develop and adopt redistricting plans, any materials related to the plans' substance would be supporting, as would a memorandum containing legal advice about how a district needs to be constructed in order to comply with the law. But the connection between the materials and the plan's development must not be too attenuated to justify the conclusion that the materials provided a foundation for, i.e., supported, the plan's development. In general, the further the materials stray from the content of the plan or the process by which that content was developed, the less likely it is that they can be said to support the plan's development."<sup>7</sup>

In dissent, Justice WELCH, joined by Chief Justice MCCORMACK and Justice CAVANAGH wrote that the constitution guarantees the commission legal representation and "that this representation necessarily includes the common-law attorney-client and work-product privileges." The dissent observed that voters would have included explicit language in the constitution if they intended to "deprive the commission of this fundamental part of legal representation" and that "until now, no court in a state that has an independent redistricting commission had decided that its commission's right to legal representation encompasses something less than what would be enjoyed by any other public body." The dissent further notes an *in camera* review of the materials at issue should have been conducted. It also disagrees with the majority's interpretation of the publication requirements and notes the constitution "explicitly defines" what must be published, when it must be published and that those requirements do not include privileged material. To conclude, the dissent states that the "Constitution unambiguously affords the commission 'legal representation'" and, by depriving the commission of the common-law right to attorney-client and work-product privileges that are generally understood as defining an attorney-client relationship, "the majority has put its own views above those of the voters, [who] wanted the Commission to draw fair and legal maps [and] knew legal representation was important to do so successfully."

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<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 19-20.