PRISONS & CORRECTIONS SECTION
Respectfully submits the following position on:

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Parole Board and Commutation Process

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The Prisons & Corrections Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Prisons & Corrections Section only and is not the position of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter.

The total membership of the Prisons & Corrections Section is 153.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 11. As to Issue 1, the number who voted in favor of the position was 8; the number who voted against the position was 2; one person abstained. As to Issue 5, the number who voted in favor of the position was 10; the number who voted against the position was 1. As to Issues 2, 3, 4,6, 7, and 8, the number who voted in favor of the position was 11; the number who voted against the position was 0.

Report on Public Policy Position

Name of section:
Prisons and Corrections Section

Contact person:
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Regarding:
Parole Board and Commutation Process

Date position was adopted:
January 8, 2011

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
11

Number who voted in favor and opposed to the position:
As to Issue 1:
8 Voted for position
2 Voted against position
1 Abstained from vote
As to Issue 5:
10 Voted for position
1 Voted against position
As to Issues 2, 3, 4, 6, 7, 8:
11 Voted for position

Position:
See below

STATEMENTS OF THE PRISONS AND CORRECTIONS SECTION
OF THE STATE BAR OF MICHIGAN
CONCERNING THE PAROLE AND COMMUTATION PROCESS

1. Establish Rebuttable Presumption of Parole at Minimum Sentence

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 8 yes, 2 no, 1 abstention.

***Issue*:** The Michigan Parole Board ("Board") has discretion in determining when a prisoner should be released. At least 17 states have adopted determinate or "flat' sentences and eliminated parole board discretion altogether. Those that retain indeterminate sentencing typically have less of a spread between the minimum and the maximum terms. Michigan's low parole grant rates, particularly for assaultive and sex offenders, have contributed to the state's relatively long length of stay and, thus, to the size and cost of our prisoner population.

Currently, the judge imposes the minimum based on sentencing guidelines devised by the Legislature, but the Board is free to hold someone to their maximum. Prisoners with excellent institutional records who have completed all required programs are not guaranteed release, even though research shows there is little or no gain to public safety by not granting parole at the minimum.

Parole grant rates have fluctuated dramatically over the last two decades. While the current Board is now increasing the grant rate, it requires a statute to ensure the standard for parole is an objective one. A rebuttable statutory presumption specifying when a prisoner can be continued beyond his or her minimum would make the decision-making process more consistent and objective and would restore the meaning of the minimum sentence, so long as the presumption can actually be enforced.

The Council of State Governments (CSG) has recommended a presumption of parole. Its position was incorporated in SB 827 (2009-2010). The CSG proposal raises a number of concerns.

First, the CSG presumption would be prospective, applying only to people sentenced after it was enacted. This would delay its utility. Prosecutors may prefer this because it would not affect cases where they negotiated pleas on the assumption that release would not actually occur at the minimum. Nonetheless, broader and retroactive application could have certain benefits, including by not incarcerating prisoners longer than necessary it would reduce fiscal expenditures and treat each incarcerated offender fairly for the type of crime committed.

Second, the CSG would not apply its presumption to people convicted of offenses carrying a maximum penalty of life or any term. Approximately one-third of all prisoners serving indeterminate terms were convicted of such offenses. It would not matter whether a life sentence was actually imposed; the exclusion would be for everyone convicted of all the most serious offenses. These prisoners are also often at the lowest risk of re-offending. Their minimum sentences may be longer because of the nature of their crimes, but there is no principled basis for not considering them for parole once they have served their minimums.

Third, the CSG also suggested that even those to whom its presumption of parole would apply could be kept for up to 120% of their minimum sentences in order to complete treatment or because of institutional misconduct. The use of the 20% mark-up rather than a set number of months allows for disparate treatment depending on how long a minimum is being served. Twenty percent of a one-year minimum is 2.4 months while 20% of a ten-year minimum is two years. Thus, identical misconduct histories or identical needs for treatment could bring very different results. There is also concern about how much institutional misconduct and what kind of failure to complete required programs would permit the denial of parole.

***Position*:** The Section supports a statutory presumption of parole when the person has served his or her minimum sentence. The presumption should apply to all prisoners, current and future. The presumption would be rebuttable and would not control if the person has a poor institutional record or if objective factors demonstrate that the person poses a current threat to society. The Board could defer a prisoner's parole for the amount of time minimally necessary to complete a program to reduce the prisoner's risk to the community.

2. Restore Right to Appeal Parole Denials

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 11 yes, 0 no, 0 abstentions.

***Issue*:** The right of prisoners to appeal parole denials by leave to circuit court was abolished in 1999. Prosecutors and victims can still appeal grants of parole. Individual prisoners have no recourse. Broad Board policies cannot be readily challenged, and there is little oversight of the Board's decision-making process. The existing statutory presumption that people with high parole guidelines scores will be released absent "substantial and compelling reasons" has not been enforced, leading many low risk offenders with good institutional records to be continued based solely on their original offense. These offenders are typically serving for assaultive and sex offenses. Any new statutory presumption would be similarly unenforceable. In the meantime, prosecutors are more actively appealing grants of parole.

MCL 791.235(12) requires that prisoners be given reasons why parole is being denied. These reasons are commonly based on the interviewer's conclusion that the prisoner failed to show adequate insight, empathy or remorse. Such conclusions often contradict the evaluations of therapists who oversaw the person's participation in year-long group therapy sessions. Oftentimes, the reasons for parole denial are not adequately stated in the Board's written decision.

An additional statutory change made in 1999 would have to be reversed in order to afford parolable lifers meaningful appeals. For a lifer, the first decision the Board must make is whether to proceed to a public hearing. If the Board has "no interest" in proceeding, the prisoner is not considered again for another five years. Functionally, the decision not to proceed to public hearing is the equivalent of a parole denial.

MCL 791.234 (8)(c) previously stated that "a decision to grant parole" to a lifer "shall not be made until after a public hearing…" The 1999 amendment added two words: "A decision to grant or deny parole to the prisoner shall not be made until after a public hearing…" (emphasis added). That is, technically no final decision about a lifer's release occurs until after a public hearing. Thus, even if the prisoner's right to appeal was restored, it would not apply to decisions not to proceed to public hearing. A lifer who received a decision of "no interest" would not be entitled to a written explanation of reasons because that decision would not qualify as a "final determination" under subsection (12).

Position: The Section supports restoring the right of all prisoners to appeal parole denials in order to ensure fairness in individual cases, permit any statutory presumption of release to be enforced and allow a body of law governing the release decision-making process to develop. MCL 791.234(8) should be amended to recognize that a decision not to proceed to public hearing on a lifer is a denial of release.

3. Provide Prisoners with Timely Opportunity to Respond to Negative Information Material to Parole or Commutation Decision

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 11 yes, 0 no, 0 abstentions.

Issue: MCL 791.235(1)(b) prohibits the Board from making a parole decision based on information the Board determines "to be inaccurate or irrelevant after a challenge and presentation of relevant evidence by a prisoner who has received notice of intent to conduct an interview…" Prisoners are permitted to review parole eligibility reports prepared by institutional staff in order to check them for errors or omissions.

Other information affecting the decision to grant parole or commutation, such as letters from prosecutors, victims or other interested parties and pre- and post-interview summaries prepared by the Board's own staff, may also be inaccurate or incomplete. These documents are not provided to the prisoner, so he or she has no opportunity to make a challenge and present relevant evidence as the statute contemplates. Erroneous or incomplete material may influence Board members, judges deciding whether to object to a parole or the Governor in deciding whether to grant a commutation. Information provided to judges and the Board can be requested (by someone other than the prisoner) under the Freedom of Information Act but will not be made available until after the release decision is final. The prisoner may never know what actually prompted the decision if the critical material is exempt under FOIA or if the decision is a commutation denial for which no reason must be given.

Position: The Section supports legislative or other action to require that any substantive communications to or from the Board regarding parole or commutation be timely provided to the prisoner or his or her representative with a reasonable opportunity to respond. Where protection of the victim requires confidentiality, the Board must provide the prisoner with information about the substance of negative information without revealing the source.

4. Apply Parole Guidelines and Other Risk Assessment Instruments to Lifers

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 11 yes, 0 no, 0 abstentions.

Issue: The Board's use of parole guidelines has been required by statute since 1992. Over the last several years, the Board has also relied on various additional risk assessment instruments in an effort to make "evidence-based" decisions about who presents a current threat to public safety. Historically, the Board has not calculated guidelines scores for lifers. It therefore lacked any proven, objective basis for assessing a lifer's actual risk of reoffending. Risk is logically related to various characteristics of the offender, not to the nature of the sentence, so a risk instrument is no less valid for lifers than for any other offender.

Position: The Section supports requiring the Board to apply the parole guidelines and other appropriate risk assessment instruments to lifers in the same fashion and to the same extent as it applies them to other prisoners being considered for parole or commutation.

5. Eliminate Judicial Vetoes of Lifer Paroles or Require Procedural Safeguards

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 10 yes, 1 no, 0 abstentions.

***Issue*:** Until 1941, all life sentences in Michigan were non-parolable and release could only occur by commutation. When the "lifer law", MCL 791.234, was enacted, three procedural requirements were added to the parole process for lifers. The Board must conduct a public hearing, the parole period must be at least four years, and the sentencing judge must be given the opportunity to object. In 1953, the statute was amended so that the objection could be filed by the successor to a sentencing judge who was retired or deceased.

Currently, if the judge objects in writing within 30 days of receiving notice that the Board intends to conduct a public hearing, the Board loses jurisdiction to grant parole and the scheduled public hearing is canceled. There are no procedural safeguards. The judge is not required to hold a hearing or solicit input from the prisoner, but can speak off the record to the prosecutor, the victim or anyone else. The judge does not have to state a reason for objecting and the judge's decision is not subject to appellate review. The result is a lack of consistency statewide in parole outcomes and, in many cases, significant added expense to the Michigan Department of Corrections.

Statistics available for the period from January 2007 through February 2010 show that of 25 judicial objections, 16 were based in whole or in part on the offense or effect on the victim, seven were based, at least in part, on current information about the prisoner, and six gave no reason at all. These statistics demonstrate arbitrariness in the process, which can be compounded by the fact that a majority of the objections are not by the sentencing judge, but the second or third successor judge.

***Position*:** The Section believes that the opportunity to exercise a judicial objection should be abolished, especially as applied to successor judges who had no involvement with the trial or sentence.

If the opportunity to object is to remain, the Section recommends amending the statute to require that: 1) a judge who is considering objecting to a lifer parole must give the prisoner notice and an opportunity to present positive information and to respond to negative information on which the judge may rely; 2) a judicial objection must be supported by substantial and compelling reasons; and 3) the judge's objection be subject to appellate review.[1]

[1] On September 3, 2010 the Council took a position supporting the recommendations in this paragraph.

6. Create a Specialized Board for Public Hearing Cases

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 11 yes, 0 no, 0 abstentions.

***Issue*:** Cases that must go through the public hearing process, whether lifer paroles or commutations, are different from those that are more routine. The public hearing cases typically involve people who have been convicted of very serious offenses for which they have served decades in prison. The files are often large and complex. The decisions are often controversial. If a commutation is being considered on medical grounds, the cost of care, the impact of the health issue on risk, and compassion for the prisoner must be balanced against how much of the sentence has not been served. By statute and practice, the review process is complex and time-consuming, with multiple decisions to be made along the way.

Although the Board and the Governor are now willing to grant commutations and lifer paroles, a large backlog of cases has accrued over the 18 years when they were very rare. Given the limited resources the Board has to devote, lifers who have been parole-eligible for decades continue to stand in line behind cases of medical urgency and the thousands of people who annually reach their earliest release dates on indeterminate terms. The difficulty is compounded as the administrative law judges who have traditionally conducted parole revocation hearings are leaving by attrition and not being replaced. Board members are being used to handle these hearings, increasing their work load.

It has been suggested in the past that either a separate board or a sub-entity of the existing Board be established to concentrate on the public hearing cases. Such a board might consist of five members, which was the size of the entire board in the early 1970s, when many lifers were sentenced. Among the various proposals were 1) adding parole board members and using 5 in the sub-board, and 2) creating a separate civil service board. A specialized board could develop expertise in these cases and produce efficient, consistent results while the other Board members decide the high volume of non-public hearing cases. The specialized board could be made permanent and given other non-routine tasks, such as deciding parole revocations. In the alternative, it could be created with a sunset provision and be used to work through the backlog of cases.

***Position*:** The Section supports the creation of a specialized parole board devoted to "public hearing" cases, *i.e,* commutations and lifer paroles.

7. Public Hearings: Enforcement of Right to Representation and Presentation of Evidence

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 11 yes, 0 no, 0 abstentions.

***Issue*:** Administrative Rule 791.7760(5) states:

> At a public hearing on the applicant's petition for pardon, reprieve, or commutation, the applicant may testify and present relevant witnesses and oral documentary [sic] evidence. The applicant may be represented by retained or appointed counsel. The public shall be represented by the department of attorney general. The presiding parole board member shall summarize all statements and documents presented both for and against the application for clemency.

While the rule on its face applies to pardons, reprieves and commutations, it also applies to parolable lifers pursuant to MCL 791.234(8)(c). The statute provides:

A decision to grant or deny parole to the prisoner shall not be made until after a public hearing held in the manner prescribed for pardons and commutations in sections 44 and 45.

Thus, the public hearing process is the same for a pardon, commutation or lifer parole.

Prisoners are informed of their rights in advance of the hearing. However, while they are generally aware that they may have supporting witnesses testify in their behalf, the right to be represented by retained counsel is less well-known. Nor is the role of the prisoner's counsel clearly acknowledged by the Board during the hearings.

Representation by retained counsel, whenever possible, is desirable. Most prisoners need guidance in preparing for a hearing and arranging for the presentation of favorable witnesses and evidence. The Department of the Attorney General, which represents the public and not the Board**,** typically questions the prisoner at length about the details of the offense. When the prisoner does not recall or admit to facts as the AG asserts them, the prisoner may appear to be dishonest, even when the record may not, in fact, support the AG's allegations. Victims and others who oppose the prisoner's release may also make statements that the prisoner cannot, oftentimes, respond to adequately without appearing to be insensitive or lack remorse. The presence of counsel who is familiar with the prisoner's entire history, including the trial court record, can best protect the prisoner's interests and the integrity of the proceedings.

***Position*:** The Section supports including in the notice to applicants for a pardon, reprieve, commutation or lifer parole that a public hearing has been scheduled, information about their rights to be represented by retained counsel and to present evidence and witnesses. It further supports ensuring that prisoners are afforded a full opportunity to exercise these rights during public hearings so that the process is thorough, accurate and fair to all parties.

8. Expedite the Public Hearing Process for Medically Fragile Prisoners and Waive it for Those Who Are Terminally Ill

Disclosure pursuant to Administrative Order 2004-1: The Prisons and Corrections Section is a voluntary section of the State Bar, not the State Bar itself. The position expressed here is that of the Section. The State Bar has no position on the issues regarding the parole and commutation process discussed herein. The Prisons and Corrections Section has a membership of approximately 140. The Section's governing body, a Council elected by the membership, is composed of 15 voting members. This policy position was adopted, after due notice, at a meeting of the Section's Council on January 8, 2011. The vote was 11 yes, 0 no, 0 abstentions.

***Issue*:** The public hearing process includes two notices to the trial court and the county prosecutor, each with a 30-day response period. Public hearings are required even for people who are terminally ill. In these cases, the hearing may delay or even prevent the person's transfer to outside nursing home or hospice care. It burdens the limited resources of MDOC health care providers, the Board and the Attorney General. The public must continue to pay for the prisoner's medical needs and for custody costs that may no longer be warranted.

HB 4509 and 4510 (2009-2010), passed by the House, would make modest changes to the public hearing process that would expedite the release of people being considered on medical grounds. In medical cases, two separate notices to the trial judge and prosecutor (one advising that commutation is being considered and one setting the date for the public hearing) could be sent simultaneously and the response time would be reduced from 30 days to 14. If two physicians (one MDOC, one independent) anticipate a life expectancy of six months or less, the public hearing requirement would be waived. Sex offenders are excluded from this waiver.

Position: On February 6, 2010, the Section took a position supporting HB 4509 and 4510 (2009-2010). The Section reaffirms its support for legislation that would expedite the public hearing process for medically fragile prisoners and waive altogether the hearing requirement for prisoners who are terminally ill. The Section sees no basis for excluding seriously ill or dying sex offenders from these provisions based solely on their offense.