TESTIMMONY OF CARL J. MARLINGA
CHAIR OF THE ELDER ABUSE TASK FORCE
REGARDING POWER OF ATTORNEY REFORM LEGISLATION

I offer my testimony in support of proposed legislation to reform the laws governing powers of attorney in Michigan.

In January of this year Attorney General Dana Nessel appointed me the chair of the Michigan Elder Abuse Task Force. In that position I am honored to be the spokesperson for over one hundred dedicated, knowledgeable activists who, with the leadership of the Attorney General, are seeking to reform Michigan law regarding the treatment of elderly persons and to assure their health, happiness, and freedom from physical and financial abuse.

In prior years I have served as a prosecuting attorney, a probate court judge, and a circuit court judge. Based on the knowledge that I have gained from working with the members of the Elder Abuse Task Force, coupled with my experience as a prosecutor, probate court judge, and circuit court judge, I wholeheartedly urge adoption of the reform legislation.

As a former probate judge, I agree with a of the basic goal of the EATF – which is to as much as possible, consistent with the health, safety, and well-being of affected individuals, reduce the number of times that alleged incapacitated individuals are subjected to guardianships and conservatorships. A petition for guardianship or conservatorship may be well intentioned, and, admittedly, in some cases, a guardianship or conservatorship is warranted; but, as is required in the Estates and Protected Individuals Code, a guardianship or conservatorship should be the remedy of last resort when all other alternatives have been exhausted. As Americans, with our proud tradition of individual liberty, and as caring, compassionate human beings, we must not deprive any person of the right to manage his or her own life absent the most compelling circumstances where not to do so would subject the person to serious and irreparable harm. These are values and principles which we cherish without regard to political party. That is why it is so refreshing that people of every political stripe have come together to propose and support this non-partisan/bi-partisan reform package.

One of the questions a probate judge must answer before appointing a guardian or conservator under existing law is whether an alleged incapacitate person has a power of attorney in place – executed prior to any alleged disability – which grants to another person the right and power to act on the individual's behalf. Unfortunately, this question is often answered with a "no." Wealthy individuals have sophisticated trust documents in place, but for the majority of the residents of our state, the expense of such complex legal plans is often seen as prohibitive. Even when individuals do try to plan for possible future incapacitation by using powers of attorney, the lack of a statute mandating acceptance of such documents often thwarts their best efforts.

As a probate judge I have sometimes been forced to appoint a guardian or a conservator where powers of attorney have been rejected by banks, nursing homes, landlords, real estate brokers, and myriads of business and agencies. Sometimes the rejecting entity is just plain stubborn, insisting on its own pre-approved form, but sometimes there are deficiencies and

ambiguities that justify the rejection of the proffered power of attorney. Of course, since the affected principal is now alleged to be incapacitated, it is too late for the individual to sign a new document.

With the reforms offered by the new legislation, the acceptance of powers of attorneys will be greatly increased, and, as a consequence, more and more people will see the advantages of creating their own "mini-trust" to name the person or persons to take charge of their life if they become incapacitated.

The proposed legislation would provide the following much need reforms and safeguards:

A. The bill would standardize the form of a power of attorney, leading to its greater use and acceptance.

B. The bill would allow for recovery of damages and attorney fees for a frivolous rejection of a power of attorney.

C. The bill would subject an agent who uses a power of attorney to exploit the principal to civil and criminal liability, including treble damages.

D. The bill would authorize a wide range of persons to come into probate court to seek removal of an exploitive agent; the list of people or entities to challenge an agent include a guardian, conservator, a person named as an advocate in a health care advance directive, an heir at law, or any beneficiary named in a trust, or the personal representative named in a person's will or Adult Protective Services.

I cannot emphasize too strongly how vital these reforms are. It is far better to have an alleged incapacitated person have the dignity of naming the person he or she wants to be in charge of his or her affairs instead of leaving that momentous decision in the hands of a probate court judge – and to do so in private instead of in a public courtroom where one's entire life is spread out on the public record for all to see.

The passage of this legislation is a giant step in assuring the rights, privacy, dignity, and protection of the people of Michigan.