

2020 MSBA State Legislative Program



Maryland State Bar Association, Inc.

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PREFACE

The purpose of the State Legislative Program is to provide the Board of Governors of the Maryland State Bar Association with an opportunity to establish the legislative priorities of the MSBA in advance of the annual session of the Maryland General Assembly. For the 2015 Legislative Session, the materials have been revised, reorganized, and condensed into a more user-friendly reference tool. The detailed history of many issues appears in prior versions of the State Legislative Program, which are available on the MSBA website under the link to the Committee on Laws.

Legislative Matters—Guiding Principles

1. It is important for the MSBA to take an active role and participate in the formulation of legislation of concern to the membership and to the general legal community. It is equally important to establish guidelines that will enable the MSBA to participate in the legislative process in the most effective manner possible.

The Board of Governors shall pursue these two objectives in the following manner:

- (a) With input from the sections and committees through the Committee on Laws and its liaison, determine issues of concern that may be appropriate for inclusion in a preliminary legislative program that contains general issue areas and general legislative goals;
 - (b) Review the preliminary legislative program and provide direction to the Committee on Laws and its liaison for inclusion in a final legislative program;
 - (c) Approve a final legislative program in advance of the legislative session, which authorizes the Association to take action on general issue areas with specific legislative goals;
 - (d) Approve additional issues for inclusion in the final legislative program during the legislative session.
2. When the membership of the Association or the Board of Governors takes action on a legislative matter in anticipation of, or during, a Legislative Session, the action shall be deemed to apply specifically to the terms of the legislative matter on which action is expressed and to expire upon the date of the Governor's deadline for signing or vetoing legislation enacted by the General Assembly, unless the action of the membership or the Board of Governors expressly provides otherwise.
3. In all cases where the Board of Governors takes action on a legislative matter in the interim between meetings of the membership, it shall conform to the provisions of Article IV, Section 5, of the Bylaws.

4. The Executive Committee is authorized and empowered to adopt positions on behalf of the Board of Governors with respect to legislation pending before the Maryland General Assembly during the legislative session, provided that:
 - (a) the position receives the affirmative vote of a majority of the members of the Executive Committee; and
 - (b) a copy of the bill and the position taken by the Executive Committee is promptly transmitted to each member of the Board of Governors.

If time constraints make polling the Executive Committee impracticable, the President is authorized to adopt positions on behalf of the Executive Committee. The President-Elect is authorized to act, if the President is unavailable.

**Article VII of MSBA Policies and Procedures Governing the Legislative
Activities of the Committee on Laws and the Sections
Bylaws 6/93**

Committees

Section 5. A Committee on Laws shall consist of at least fourteen members, not less than two from each of the first five Appellate Circuits and four from the Sixth Appellate Circuit, approximately one-third of whom shall be appointed annually by the President to serve for a term of three years or until a successor is appointed. It shall be the duty of this Committee to review proposed legislation before the General Assembly of Maryland in which the Association or its sections may be interested, and it shall refer such legislation to appropriate sections or committees of the Association. Any such legislation which in the opinion of the Committee is not pertinent to the jurisdiction of any section or committee or which should be considered and acted upon by the Association as a whole shall be submitted to the Board of Governors with the Committee's recommendation. In any areas of concern to the Association in which it may wish to express an opinion, take a position or present proposed legislation, the Committee shall confer with other committees, with sections and with legislators, and provide the Board of Governors with recommendations for affirmative legislative activity by the Association.

Section 15. Any committee may, within its area of responsibility, express its opinion on any legislative matter before the General Assembly of Maryland, and may appear, provided it is clearly stated as the opinion of the committee only and is not in conflict with a stated position of the Association. A committee shall advise the Board of Governors, in writing, of its intention to express an opinion and of its position prior to the expression of such opinion.

Article VIII Sections

Section 4. Any section may within its area of responsibility express its opinion on any legislative matter before the United States Congress or the General Assembly of Maryland, provided that it is clearly stated as the opinion of the section only, and is not in conflict with the position of the Association. Such expression of opinion may be superseded at any time by action of the membership or the Board of Governors. A section shall advise the Board of Governors, in writing, of its intention to express an opinion and of its position prior to the expression of such opinion.

POSITION CATEGORIES

The MSBA uses 5 categories of involvement with State legislative issues:

Category 1 – Support – Full MSBA support for an issue. Activities include, but are not limited to, testimony, membership and/or specialty bar association alerts, press activities, and direct contact with individual members of the General Assembly.

Category 2 – Oppose – Full MSBA opposition to an issue. Normal activities include testimony and participation in coalition efforts with other interested groups.

Category 3 – Refer to Section or Committee – Issue is referred to the Section or Committee concerned with the subject matter.

Category 4 – Monitor – Activity is deferred until a later date with close attention paid to specific legislation.

Category 5 – No position – No activities.

GENERAL INFORMATION

ORGANIZATION OF BILLS: Legislative issues are divided into 4 general categories:

CORE ISSUES—Bills that concern core issues or issues that are not controversial within the MSBA membership.

MIDDLE-RANGE ISSUES—Bills that are appropriate for MSBA involvement but may have some controversy over general approaches or specific provisions.

CONTROVERSIAL ISSUES—Bills that involve topics of interest to the legal profession but affect groups of attorneys with diametrically opposed views of what the law should

be.

DORMANT ISSUES—Issues that arise from time to time, but are not necessarily active during the Legislative Session.

CORE ISSUES



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: TAXATION

ISSUE: TAXING LEGAL SERVICES

State government presently relies on two taxes—the personal income tax and the retail sales and use tax—to raise most General Fund revenues. Other sources of state income include franchise and insurance taxes, alcohol and tobacco taxes, estate taxes, and the State lottery. In addition, dedicated taxes (revenue sources levied to fund specific purposes defined by law) include transportation taxes (motor vehicle fuel tax, title tax and registration revenues), a percentage of corporate income tax receipts, and the State property tax. Maryland also receives revenue from the federal government, although the percentage of the state budget funded by this source has been decreasing in recent years. Finally, the receipt of billions of dollars from the lawsuit against tobacco companies will be used over the next 25 years to fund specified programs.

Periodically, the Legislature explores imposing a tax on legal services as part of the revenue-raising measures associated with other taxes.

See HB 755 (1997), HB 1 (2002), HB 448 (2007).

POSITION: OPPOSE

REASON: General negative impact on access to the courts.

A legal services tax is a disincentive for citizens to seek legal advice and falls on the clients—not the lawyers. The MSBA places a high value upon access to justice for all citizens. A levy on legal services would hit low- and moderate-income taxpayers hardest, especially those who do not qualify for public assistance, yet cannot afford to devote a significant percentage of their income to pay for legal advice. Many legal transactions, such as property transfers and administration of estates, require payment of taxes. A legal services tax would impose an additional tax on the same transaction. In addition, clients seeking legal advice on dissolution of marriage, bankruptcy, child support, debt collection and similar matters would pay the tax, but are those who can least afford to pay an additional charge. Moreover, an audit of client fund accounts in order to administer the tax may violate the attorney/client privilege. In some instances, a legal services tax could be a tax on tax advice. And taxing a person's ability to defend himself or herself in a criminal proceeding could be challenged as unconstitutional.



MARYLAND STATEBARASSOCIATION, INC.

CORE ISSUE: TAXATION

ISSUE: ATTORNEY ADMISSION AND RENEWAL FEES

Maryland's fiscal crisis in the early 1990's prompted some lawmakers to propose new revenue- generating ideas as a means of chipping away at budget shortfalls. One of these proposals appeared in a bill, and later a budget amendment, to establish an admission and biennial renewal fee for all Maryland lawyers.

Maryland lawyers already pay substantial amounts to provide for regulation and maintenance of professional standards. Applicants to the bar exam must pay a fee to take the test. Once admitted, each attorney must pay an annual fee for the Attorney Grievance Commission and the Client Protection Fund of the Bar of Maryland to support the disciplinary and public protection infrastructure of the State's legal profession. The MSBA, although a voluntary bar, provides many of the services supplied by government agencies and unified bars in other states. MSBA annual dues are \$150 per year. The Continuing Legal Education Committee of the MSBA includes additional fees and costs for programs, materials, and webinars.

See SB 544 (1992), HB 16 (1999), HB 56 (2003), HB 523 (2011)

POSITION: OPPOSE

REASON: Professional service fees should apply to all professions.

Additional professional service fees, if enacted, must include all professions, not just the legal profession. Consideration also must be given to the impact of the additional fee on efforts to encourage attorneys to devote more time to pro bono activities.



MARYLAND STATEBARASSOCIATION, INC.

CORE ISSUE: REGULATION OF THE LEGAL PROFESSION

ISSUE: GENERALLY—REGULATION OF THE LEGAL PROFESSION

The Legislature regulates the legal profession through the Business Occupations and Professions Article of the Maryland Annotated Code. Within that Article are sections regulating admission to the Bar, misconduct of attorneys, unauthorized practice of law, the state prosecutor, state's attorneys, attorney escrow funds, and attorney liens, as well as authorizations for the Client Protection Fund and the Maryland Legal Services Corporation.

Judicial oversight of the legal profession is much more extensive, consisting of a variety of offices and agencies including the Attorney Grievance Commission, the Client Protection Fund, the Maryland Judicial Conference, the Maryland Professionalism Center, the Court of Appeals Standing Committee on Rules of Practice and Procedure, and the State Board of Law Examiners. The Judicial Branch has primary responsibility for regulating the practice of law, admitting new members to the Bar, and disciplining attorneys who fail to meet the standards of professional conduct.

See HB 1292 (1993), HB 2 (1994), HB 165 (1995), HB 184 (1995), HB 16 (1999), HB 1398 (2002), HB 426 (2003), HB 1108 (2004), HB 792 (2007), SB 493 (2008), SB 389 (2008),

POSITION: OPPOSE

REASON: The Judicial Branch has primary responsibility for regulating the practice of law.

To the extent the Legislature has the ability to regulate the legal profession, it should do so consistently with its regulation of other professions.



MARYLAND STATEBARASSOCIATION, INC.

CORE ISSUE: REGULATION OF THE LEGAL PROFESSION

ISSUE: ATTORNEY DISCIPLINE

It is the policy of the MSBA that attorney discipline is within the sole jurisdiction of the Judiciary, and that the Legislature should not dilute the authority of the Judiciary in this area.

See SB 466 (1994), SB 76 (1996), HB 792 (2007), HB 949 (2018)

POSITION: OPPOSE

REASON: The Judiciary has the primary responsibility for regulating the practice of law.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: FUNDING THE JUSTICE SYSTEM

ISSUE: THE JUSTICE SYSTEM MUST HAVE ADEQUATE FUNDING FOR ITS PROGRAMS AND SERVICES

Cuts in funding some programs within the justice system during recent years have prompted state and local officials to look at ways to reduce costs without sacrificing the quality of services or changing public policy.

The justice system in Maryland is financed by a combination of State and local funds. In general, the State pays for the courts and indigent defense while the subdivisions support the police and prosecutorial functions. There are exceptions to this rule. For example, local governments pay for the support staff for the circuit courts, and the Maryland State Police Department does not receive any local expenditures. The correctional systems are financed by a blend of State and local funds. The legislation requiring legal counsel for bail hearings compounded this issue. Similar issues arise with the new electronic case management and establishment of the Family Courts.

See SB 197 (1995), SB 133 (1999), HB 913 (2000), SB 66 (2014), HB 51 (2015), HB 54 (2015), HJ 3 (2018)

POSITION: SUPPORT

REASON: The MSBA has an interest in ensuring that Maryland's courts are adequately funded, and that other components of the justice system are not subject to unfunded mandates.

The Legislature often enacts laws that promote services or require infrastructure that it does not fund either at the State or local levels. These initiatives impact the justice system when the program either is delayed in implementation due to the cost or requires elimination of other valid programs to fund the initiative.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: FUNDING THE JUSTICE SYSTEM

ISSUE: MARYLAND LEGAL SERVICES CORPORATION, INC.

The Maryland Legal Services Corporation (MLSC) was established by statute in 1982 as a means of expanding the availability of legal services to those Maryland citizens who were unable to afford adequate legal counsel. The primary function of the MLSC has been to fund providers of legal services to the poor in non-criminal proceedings. While the MLSC is not an agency of the State, its governing board is appointed by the Governor and confirmed by the Senate, it is required to submit an annual report and audit to the Executive and Legislative branches of government, and it must have statutory approval of its funding sources. Also specified within the MLSC's enabling statute are restrictions on spending MLSC funds for use in fee-generating cases, criminal proceedings or civil cases arising out of criminal convictions, lobbying or political activities, and class action suits. MLSC funding is provided primarily by a \$500,000 annual appropriation from the State abandoned property fund, from proceeds of the Interest on Lawyer Trust Accounts (IOLTA) program, and from surcharges on circuit and district court filing fees.

In 2008, the Maryland Access to Justice Commission was created to develop, consolidate, coordinate, and implement policy initiatives to expand access to and enhance the quality of justice in civil legal matters for persons who encounter barriers in gaining access to the State's civil justice system. In 2011, the Commission published a report entitled *Implementing a Civil Right to Counsel in Maryland*, which made recommendations on implementation strategies, including specifying the types of cases for which the right to civil counsel should attach. Similar efforts are expected in the future.

See SB 280 (2012), HB 265 (2012), SB 640 (2013), HB 1303 (2013), SB 262 (2013), HB 1291 (2017)

POSITION: SUPPORT

REASON: The MSBA supports legal services for all Maryland residents.

The MSBA has been a strong advocate for the MLSC in the Maryland General Assembly, supporting its goals and fighting for passage of both the voluntary and comprehensive IOLTA statutes. The MLSC provides a significant resource for legal services in Maryland.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: FUNDING THE JUSTICE SYSTEM

ISSUE: OFFICE OF THE PUBLIC DEFENDER

The Office of the Public Defender (OPD) was created in 1971 to provide legal representation for indigent defendants in criminal or juvenile proceedings. The OPD has three divisions: Mental Health; Inmate Services; and Appellate. Recent legislation expanding the services of the OPD without necessarily including an adequate increase in the budget has created concern over implementation of the requirement that all individuals are entitled to legal representation at bail reviews.

The Court of Appeals ended the discussion by deciding in *DeWolfe v. Richmond* and *Clyburn v. Richmond* that defendants are entitled to legal representation at bail hearings. Recognizing the economic impact on the Office of the Public Defender, the Court issued several stays of the decision's implementation. As of July 1, 2014, no further stays exist. The Chief Judge of the District Court and the local bar associations have collaborated on establishing supplemental services for ensure the representation, because the OPD continues to have insufficient funding to perform these new responsibilities.

POSITION: SUPPORT

REASON: The MSBA has an interest in ensuring that the OPD can fulfill its statutory mandate.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: FUNDING THE JUSTICE SYSTEM

ISSUE: PUBLIC DEFENDERS AT BAIL REVIEW HEARINGS

One of the chronic problems in detention facilities is the number of inmates who have been incarcerated for relatively minor offenses because they were unable to pay bail. In many of the cases, the defendants are released with no punishment other than time served, but their incarceration has deprived the jurisdiction of valuable jail space that could have been used to house those accused of more serious crimes. Often defendants lose jobs and suffer significant personal difficulties during and after even a brief detention, consequences that may increase the likelihood of lawbreaking by these individuals in the future. The Commission on the Future of Maryland Courts (CFMC) reviewed this situation during its tenure (1995-1996) and recommended involvement in criminal cases by defense counsel soon after arrest as a means of resolving many of these cases earlier in the process. The most significant hurdle in implementing the recommendation has been funding.

In 2013 and 2014, a series of reviews by the Court of Appeals resulted in a requirement that a defendant have legal counsel at an initial appearance before a District Court Commissioner. See *DeWolfe v. Richmond* and *Clyburn v. Richmond*. Recognizing the economic impact on the Office of the Public Defender, the Court issued several stays of the decision's implementation. As of July 1, 2014, no further stays exist. The Chief Judge of the District Court and the local bar associations have collaborated on establishing supplemental services for ensure the representation, because the OPD continues to have insufficient funding to perform these new responsibilities.

During the 2014 legislative session the General Assembly considered measures to either provide representation at initial appearances, or to replace those appearances with a computerized risk-assessment tool. Each of the bills failed.

See HB 1186, HB 1232, SB 973, SB 170 – The Budget Bill (2014), HB 494 (2015), HB 596 (2015)

POSITION: MONITOR

REASON: The MSBA has an interest in avoiding conscription of attorneys while supporting that the Office of the Public Defender has the funding and resources to comply with the requirement.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: COURT OVERLOAD

ISSUE: INCREASED NUMBER OF JUDGESHIPS

Among the methods suggested for reducing clogged court dockets is to increase the number of judgeships in some jurisdictions. The decision of which jurisdictions require additional judgeships relies on a statistical analysis that takes into account several variables, including actual and projected filings; the number of pending cases per judge; the ratio of attorneys to judges; the time required from the filing of the case through its disposition (divided by criminal, civil and juvenile); and the population per judge for each jurisdiction. In addition, each circuit administrative judge, along with others in the jurisdiction familiar with the courts, are consulted. Once the Chief Judge has considered all of the responses and statistics, a decision is made regarding which jurisdictions require new judges.

Due to the costs associated with additional judgeships, a variety of steps are taken on an administrative level prior to the request for a new position. These interim steps include: temporary recall of retired judges; the assignment of active judges from other areas and other courts of the State; and, procedural management adjustments, if necessary. If it is clear that these measures will not result in a permanent decrease in the caseloads, then a new judgeship is requested.

The past few years have seen a number of new judgeships at the district, circuit, and appellate levels of the court system.

See HB 111 (2015), HB 83 (2013), HB 513 (2018), SB 205 (2019)

POSITION: SUPPORT

REASON: Additional judges may be necessary to handle overwhelming workloads.

The MSBA is committed to finding immediate and long-range solutions to the problem of overburdened court dockets where they exist. The MSBA will support legislation that will add judges in jurisdictions identified by the Administrative Office of the Courts.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: CLIENT PROTECTION

ISSUE: UNAUTHORIZED PRACTICE OF LAW

Challenges to the exclusive privilege of attorneys to practice law have been an ongoing concern that raises two conflicting ideals: preservation of high-quality legal services (professionalism) versus provision of affordable legal advice (consumerism). Many non-lawyer professionals have sought and obtained permission to perform legal transactions. For example, insurance companies, banks, real estate brokers, financial services, and title companies have competed with attorneys for the right to serve the public in specific areas of the law.

The issue has grown to include paralegals and legal assistants. Undergraduate training and new computer software packages enable paralegals to provide legal assistance to consumers at reduced prices. Among the services that have been marketed by paralegals are:

- preparation of documents for uncontested divorces, probate proceedings, tax matters, residential real estate transactions, name changes, powers of attorney, living wills, revocable living trusts, incorporations, and stepparent or agency adoptions; and
- representation of others before administrative agencies or boards, including public utility commissions, workers' compensation boards, motor vehicle administrations, environmental permit bodies, landlord-tenant court, and public assistance entities.

The legal community has criticized the use of non-lawyers to perform these tasks by focusing on the poorer quality of the services and the lack of protection of the public when the services are inadequate. The MSBA has viewed immigration consultants as an acceptable service that does not amount to the practice of law.

POSITION: OPPOSE

REASON: Non-lawyers should not be permitted to provide legal services.

Legislation that would expand the rights of non-lawyers to perform those services that have been provided by attorneys in the past weakens the legal system and fails to protect the clients from malpractice and misfeasance.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: CLIENT PROTECTION

ISSUE: LAWYER/CLIENT CONFIDENTIALITY

One of the key elements in a lawyer's effective representation of a client's interests is the confidentiality of client information. A lawyer may reveal information without the client's consent only in limited circumstances:

- to prevent fraudulent or criminal acts by the client;
- to rectify the consequences of criminal and fraudulent acts by a client with the lawyer's assistance;
- to protect a lawyer's rights in a controversy or disciplinary proceeding; or
- to comply with other rules, court orders, or statutes.

See Rules of Professional Responsibility, Rule 1.6, Confidentiality of Information. The movement toward multi-professional practices creates a challenge to the attorney confidentiality principle.

POSITION: OPPOSE

REASON: Protect attorney/client privilege.

Any change to the confidentiality of information exchanged between lawyers and clients should be accomplished by amending the Maryland Rules, not through legislation. This would be consistent with the oversight of the legal profession by the Judiciary.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: JUDICIAL DISABILITIES

The Maryland Constitution requires judges to retire when they reach 70 years of age. Prior to retirement, a judge may be removed by a vote of two-thirds of the General Assembly, with the approval of the Governor, if the judge is unable to discharge his or her duties with efficiency because of physical or mental illness. The Constitution requires the Governor to remove judges when convicted by a court or jury, of incompetency, willful neglect of duty, misbehavior in office, or any other crime. Elected judges also may be suspended from office upon conviction or entering a *nolo contendere* plea for a felony or a misdemeanor related to his or her public duties.

A less extreme method of disciplining and removing Maryland judges is exercised by the Commission on Judicial Disabilities. The Commission was established in 1966 by constitutional amendment to investigate complaints against judges. The Commission conducts hearings and exerts substantial informal influence to modify inappropriate judicial behavior. As a means of determining whether to initiate formal proceedings against a member of the Judiciary, the Commission may undertake an investigation, which may involve hearings regarding the alleged disability or misconduct. If a majority of the Commission determines that a judge should be retired, removed, censured, or publicly reprimanded, a recommendation for action is sent to the Court of Appeals. The Commission also has the power to issue private reprimands.

POSITION: OPPOSE

REASON: Changes should be made only through Court Rule.

The Judicial Disabilities Commission was established in the Maryland Constitution as a judicial agency. Any changes to the scope or responsibilities of the Commission should be achieved by Court Rule, not by legislation.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: JUDICIAL INDEPENDENCE

Periodically, the Legislature files bills to overturn or nullify court decisions through retroactive application. When that is the sole goal of a bill, it reflects a dramatic disconnect in the legislative/judicial relationship. A certain level of conflict often exists between these branches of government and is expected during most General Assembly sessions where legislators file bills in response to court rulings on specific public policy issues. When the Legislature has passed laws and the courts then interpret these statutes in the constitutional context, some friction often has developed. As long as the focus remains on the issues, they can avoid usurping each other's authority. The most recent example of this friction arose in the recent redistricting cases.

POSITION: OPPOSE

REASON: The roles of the Legislature and the Judiciary must remain separate under the Constitution.

The MSBA opposes any bill that threatens judicial independence or weakens the Judiciary's status as a co-equal branch of government with the Legislature.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: THE INITIATIVE

The initiative is a method of lawmaking by which citizens circumvent the legislative process to place proposals directly before the voters. The initiative and the referendum were enacted in an era when political corruption was rampant and when few methods existed by which to expose and effectively prosecute misdeeds by public officials. The initiative served a means of limiting the abuse of power by elected leaders.

During the 20th century, greater citizen participation in the legislative and electoral process, along with more extensive coverage by the mass media, diminished the value of the initiative. Although some special interests that have been thwarted by the legislature still advocate the initiative as the only available means of enacting their programs into law, most of those familiar with the lawmaking process oppose it. These critics recognize that most public policy issues are too complicated to be condensed into ballot questions requiring yes or no votes.

Proposals to place the initiative on the ballot have been filed in the Maryland General Assembly many times and have been unsuccessful. The Constitution of Maryland provides for the Referendum (Article XVI), but it has been used infrequently at the State level.

POSITION: OPPOSE

REASON: The initiative is no longer needed to address abuse and the issues are more complex than ever before.

The MSBA supports pursuing legislative change through the legislative process and not based on the initiative process, which may not evaluate the issues properly.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: RETROACTIVE LEGISLATION

Up until the 2000 General Assembly, it had been generally accepted that legislation should have prospective effect, and not apply retroactively. Constitutionally, the Legislature must begin its session on the second Wednesday of January and conclude on the second Monday in April. In most circumstances, bills that are passed during the Legislative Session take effect on one of three future dates:

- June 1st (constitutional date),
- July 1st (customary date for budget items), or
- October 1st (customary date for all other legislation).

Exceptions to these effective dates include:

- vetoed bills (which do not go into effect unless the General Assembly overrides the veto),
- emergency legislation (which take effect upon the Governor's signature), and
- constitutional amendments (which are effective upon approval by registered voters on Election Day and certification of the results).

POSITION: OPPOSE

REASON: Retroactive effective dates of legislation are unfair and may deny due process.



MARYLAND STATE BAR ASSOCIATION, INC.

CORE ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: ELIMINATION OF CONTESTED ELECTIONS

In Maryland, only circuit court judges are appointed by the Governor, and then must run in a contested election within two years following the first year of service. Judges of the appellate courts are appointed by the Governor, confirmed by the Senate, and subject to retention elections. District court judges are appointed by the Governor and confirmed by the Senate, but do not have to stand for election at all (contested or retention).

Several reasons justify an end to contested elections for circuit court judges:

- Many of the best-qualified candidates for the circuit court do not apply, because they must leave their practices with the risk losing their judicial seat in a contested election.
- The appearance of sitting judges accepting campaign donations from contributors, including those who have cases before them, undermines public trust in an independent judiciary.
- The Code of Judicial Conduct prohibits a sitting judge from taking positions as to how he or she would decide certain cases. As a consequence, a key element of the contested election process—debating the issues—is removed and the judicial campaign process becomes an inherently unfair process, because a challenger to a sitting judge does not have to comply with these restrictions.
- The contested election threatens the independence, integrity, and competence of the circuit court.

See HB 450 (2004), SB 647 (2004), HB 271 (2005), SB 206 (2006), SB 647 (2006), HB 1363 (2007), HB 1275 (2008), SB 367 (2015), HB 548 (2015), HB 582, HB 1071 (2015), HB 513 (2018), SB 236 (2019), HB 487 (2019)

POSITION: SUPPORT

REASON: The contested election for sitting circuit court judges creates an unfair system and reduces the incentive for qualified individuals to apply.

MIDDLE RANGE ISSUES



MARYLAND STATEBARASSOCIATION, INC.

MIDDLE-RANGE ISSUE: PUBLIC INTEREST AND CONSUMER PROTECTION

ISSUE: LICENSURE OF PRIVATE PROCESS SERVERS

Process servers have an important role in the legal system by providing a reliable method of delivering papers and documents from one party to another party in civil actions. Service of process may be made in person by sheriffs or by any other competent adult, or by registered mail. Regulations on service of process are specified in the Maryland Rules, Title 2. The amount of fees charged for service of process varies across the state. Some process servers charge a fee, plus expenses, while other providers have a flat schedule of costs.

See SB 554 (2013), SB 838 (2014)

POSITION: OPPOSE

REASON: The current system of private process service functions adequately.



MARYLAND STATEBARASSOCIATION, INC.

MIDDLE-RANGE ISSUE: PUBLIC INTEREST AND CONSUMER PROTECTION

ISSUE: CLIENT PROTECTION FUND

The Clients' Security Trust Fund was created in 1965 to protect the integrity of the legal profession by reimbursing losses caused by attorney misconduct. Legislation passed in the 2002 session changed the name of the Clients' Security Trust Fund to the Client Protection Fund (CPF). Attorneys pay an annual fee to support the fund.

See SB 118 (2000), SB 493 (2008)

POSITION: SUPPORT

REASON: The MSBA has an interest in ensuring the protection of clients and agrees that insurers should notify third-party claimants that payment has been delivered to their attorneys.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: PUBLIC INTEREST AND CONSUMER PROTECTION

ISSUE: CAMERAS IN THE COURTROOM

In 1980, the Court of Appeals adopted a Rule to permit extended media coverage of court proceedings on an experimental basis. A few months later, however, the General Assembly passed legislation prohibiting extended coverage of criminal proceedings in trial courts (Criminal Procedure Article, Section 1-201). Over the next two years, experiments were conducted with greater media coverage of civil cases in the Circuit Courts and a permanent rule permitting this type of access was approved in 1984. This Rule was expanded to allow coverage of the appellate courts in 1992.

Requests from the broadcast media for access must be filed on a timely basis, written consent must be obtained from all parties involved in the case, and the coverage may not place a burden on courtroom equipment or personnel. See Rule 16-109. The Court of Appeals has video-streamed oral arguments since 2006 and maintains an archive of past arguments for viewing. As technology improves, the ability to record court proceedings could expand, but should remain within the discretion of the courts.

See HB 207 (2007), HB 77 (2008), HB 8 (2016), HB 756 (2019)

POSITION: OPPOSE

REASON: The Court should have the ability to regulate broadcasting and recording of court proceedings.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: PUBLIC INTEREST AND CONSUMER PROTECTION

ISSUE: VICTIM'S RIGHTS

The approval by Maryland voters of a constitutional amendment regarding victim's rights in 1994 was the culmination of a lengthy campaign by supporters of the proposal. It also set the stage for refinements in applicable statutes to ensure that victims will have a role in a variety of criminal justice proceedings.

The 1995, the General Assembly enacted two laws concerning the rights of victims. The first required the registration of sex offenders, both those who were convicted of sex crimes and those who received probation before judgment, if registration was a condition of probation. The second measure added mechanisms for increasing state funds to the Maryland Victims of Crime Fund, the Criminal Injuries Compensation Fund, and the Victim and Witness Protection and Relocation Program.

Since then, advocates have shifted their attention to the courts, enforcement agencies, and Congress for additional relief, rather than the State Legislature.

See HB 624 (1995), SB 508 (2006),

POSITION: MONITOR

REASON: The MSBA will review all legislation concerning the rights of victims to ensure that the rights of defendants are protected and that the proposals do not violate constitutional principles.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE RANGE ISSUE: PUBLIC INTEREST AND CONSUMER PROTECTION

ISSUE: LAWYER-LEGISLATORS REPRESENTING CLIENTS

The Maryland General Assembly is a part-time legislature, with a membership from a broad array of professions. Most legislators must have another source of income to supplement their salary. It is the second source of income that has aroused concerns that special interest groups may be hiring legislators and paying their salaries in return for favors from these elected officials.

Lawyer-legislators also have been subjected to criticism from groups who charge that their votes have been affected by clients who compensate them for their legal services. Some critics have sought to curb the ability of these attorneys to practice law before Executive Branch agencies and the Judiciary. Because legislators must vote on bills that impact virtually every economic activity in the State, and lawyers often represent clients from many of these same concerns, it leaves the lawyer-legislators open to criticism that the competing interests have an adverse effect on their performance in both professions.

Public concern over potential conflicts of interest of members of the General Assembly prompted calls for restrictions on the activities of lawmakers. Restrictions now exist on a legislator's representation of clients for compensation before State agencies in any matter involving procurement or the adoption of regulations. This law excludes judicial, quasi-judicial, or administrative hearings (contested cases) from coverage. An ongoing issue involves the propriety of lawyer-legislators voting on bills that would benefit their law practices. Members of the General Assembly who practice law must have a clear understanding of their legislative role and their legal role and avoid the appearance of impropriety.

See HB 1198 (1995)

POSITION: MONITOR

REASON: The MSBA includes members who serve as lawyers and legislators.

To preserve the integrity of both groups, the MSBA has an interest in monitoring legislation that might affect the legal profession unduly.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: PUBLIC INTEREST AND CONSUMER PROTECTION

ISSUE: ALTERNATIVE DISPUTE RESOLUTION (ADR)

The frustration over the perceived litigiousness of American society has resulted in a variety of proposals to move some of these disputes out of the courts and into alternative forums for settling differences. During many sessions of the General Assembly, suggestions for other avenues of dispute resolution are reflected in specific bills designed to enact these ideas into law. Many levels of court now implement a mediation system to encourage settlement prior to trial or further judicial action.

See HB1043 (1997), SB 792 (2013), HB 456 (2017)

POSITION: SUPPORT

REASON: The MSBA supports alternatives to litigation for dispute resolution.

The MSBA supports the unrestricted access to the judicial system, including legislation that would make ADR available to the parties, but does not necessarily agree that legislation should require ADR as a condition for filing lawsuits. The success of ADR depends upon flexibility and innovation. Simply entrenching a particular method or program into a statute will not achieve the goals of ADR.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: CRIMINAL PROCEEDINGS

ISSUE: SENTENCING GUIDELINES

Maryland relies upon recommended guidelines that have a range of sentences depending upon the severity of the offense and the offender's criminal history. This method of using voluntary guidelines was approved by the General Assembly in 1983 (Criminal Procedure Article, § 6-216), and applies the Maryland Sentencing Guidelines as developed by the Sentencing Guidelines Advisory Board, which consists of circuit court judges, criminal justice agency officials, and members of the Bar.

The key elements of Maryland's policy with regard to sentencing are:

- training for judges, court personnel, public defenders, state's attorneys, and parole and probation officers in the application of the guidelines;
- a Maryland Sentencing Guidelines Manual with matrices to aid judges in the application of appropriate sentences; and
- a data collection unit within the Administrative Office of the Courts that maintains statistics to track sentencing patterns, inconsistent sentencing, and compliance rates.

These elements are intended to be flexible to accommodate changing circumstances.

See SB 222 (1996), HB 1143 (2002), HB 918 (2004)

POSITION: MONITOR

REASON: Sentencing guidelines should remain references, but should not become mandatory requirements.



MARYLAND STATEBARASSOCIATION, INC.

MIDDLE-RANGE ISSUE: JUDICIAL PROCEEDINGS

ISSUE: CHANGES IN THE JURY TRIAL SYSTEM

Critics of the present system claim that requests for jury trials often are used to obtain delays, to inconvenience unfavorable witnesses, to wait until a more lenient judge is available, or to improve the defendant's plea bargaining position. Several jurisdictions have used "instant jury trials" to reduce the number of jury trials in their courts. The "Settlement Week" concept also has been implemented with a high success rate in those cases considered. Changes to the dollar thresholds for the amount in controversy within the jurisdiction of the circuit and district courts also have been made.

See HB 614 (2004), SB 796 (2006), HB 1108 (2007)

POSITION: MONITOR

REASON: The MSBA has an interest in protecting the integrity of the jury trial system without overburdening either the district or circuit court systems.



MARYLAND STATEBARASSOCIATION, INC.

MIDDLE-RANGE ISSUE: JUDICIAL PROCEEDINGS

ISSUE: JURISDICTIONAL AMOUNTS

Dollar thresholds and ceilings for determining the jurisdiction for hearing cases and the right to demand a jury trial are a topic of discussion in many sessions of the Maryland General Assembly. Currently, the claim must exceed \$15,000 to establish jurisdiction for a jury trial.

See HB 413 (2006), HB 427 (2006), HB 1109 (2007), SB 403 (2008), SB 404 (2008), SB 474 (2015), SB 475 (2015)

POSITION: MONITOR

REASON: The MSBA has an interest in the jurisdictional thresholds that apply to district court and circuit court matters, especially when they affect the constitutional right to a jury trial.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: JUDICIAL PROCEEDINGS

ISSUE: ACCESS TO COURT RECORDS

The burgeoning growth in the amount of information received and stored in the judicial system, and calls for greater public access to this data, has prompted the Courts and the Maryland General Assembly to review policies on how these records are disseminated. The pivotal issue in the debate over the openness of court records pits the right of the public to obtain access to information against the right of individuals to privacy. Courts in Maryland acquire and maintain extensive files on individuals and entities involved in the judicial system—extremely personal information may be collected for criminal investigations, civil cases gather details about individual lives that the general public does not need to see, and corporations need to protect confidential financial information and proprietary information.

Some situations may appear reasonable, such as releasing criminal records to employers who are hiring applicants for positions of trust, but they present questions concerning the range of information actually necessary for distribution or review. Increasing electronic storage of information brings with it unauthorized access issues. Protecting against security breaches compounds the difficulty of balancing access to public information with protection of individuals from identity theft. The ability to seal court records provides some relief but is not a routine practice except in matters involving minors.

Recent changes to the Maryland Rules and State laws have tried to address these concerns. See Md. Rules 16-1001 through 16-1011, which prohibit certain personal information from being included in documents filed with the court. For example, social security numbers must be redacted from all documents submitted to the court. The Maryland Public Information Act identifies specific personal proprietary information that must not be disclosed when that information is held by a government entity. As recently as July 1, 2014, the State Gov't Article began protecting certain combinations of personal information when held by a government or a contractor working for the government as a means of reducing the threat of identity theft.

POSITION: MONITOR

REASON: Recognition that, while most court records are and should be available to the public, some personal and proprietary information requires protection, especially when a risk of identity theft exists.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: FEES

ISSUE: LIMITS ON CONTINGENCY FEES

Some tort reform advocates have suggested that one of the ways to curb the filing of non-meritorious lawsuits is to place strict percentage limits on lawyer contingency fees. This idea is based on the belief that the open-ended contingency fee method encourages plaintiffs' attorneys to inflate the size of settlements and awards in order to collect higher fees. Critics of the present system also contend that allowing contingency fees in the punitive damages context creates a windfall for both the plaintiffs and the plaintiffs' attorneys and should be handled differently than the fees for compensatory awards.

See HB 1215 (2005), HB 673 (2011)

POSITION: OPPOSE

REASON: The Court of Appeals—not the Legislature—should discipline attorneys who charge excessive fees, and the Court has shown a willingness to limit abuses.

Many injured parties cannot afford to pay legal expenses prior to a settlement, making contingency fees useful to enable poorer clients to receive competent legal assistance on complicated cases that involve months of preparation and research. A flexible contingency fee system allows attorneys to assume responsibility and take the risks in deserving cases. Imposing strict percentage formulas to limit lawyer fees would not recognize that some cases require enormous amounts of research and preparation, while others need only minimal effort.



MARYLAND STATE BAR ASSOCIATION, INC.

MIDDLE-RANGE ISSUE: EMPLOYMENT

ISSUE: EMPLOYMENT DISCRIMINATION

Maryland employees asserting claims and employers defending discrimination charges face a collection of sometimes contradictory procedural avenues and substantive remedies depending upon the jurisdiction where the complaint is filed and the size of the employer's workforce. Over the years, the General Assembly has considered a number of bills designed to authorize the Maryland Human Relations Commission the authority to grant additional remedies in employment discrimination cases, but none were enacted into law.

The MSBA has supported an anti-discrimination bill if it would include the following elements:

- A private right of action in the state courts;
- The right to trial by jury;
- Meaningful compensatory damages;
- The right to private counsel;
- The right of a prevailing party to recover attorney's fees, expenses and costs; and
- Elimination of provisions in the bill requiring administrative hearings at the Office of Administrative Hearings.

In 2007, the General Assembly addressed these elements in legislation enacted to allow an individual to file a civil employment action in circuit court alleging that an employer has committed an unlawful act of employment discrimination. The legislation also provided for remedies that may include:

- compensatory damages based on the size of the employer;
- punitive damages, if the respondent is a non-governmental entity and was found to have engaged in an unlawful practice with actual malice; and
- reasonable attorney's fees, expert witness fees, and costs.

Moreover, when compensatory or punitive damages are sought, under the provisions of the bill, any party may demand a jury trial.

See SB 2 (2001), HB 314 (2007), HB 283 (2015), HB 393 (2016)

POSITION: SUPPORT

REASON: The 6 elements noted above reflect the MSBA's interests.

CONTROVERSIAL ISSUES



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: CLIENT PROTECTION

ISSUE: IN-HOUSE COUNSEL

A key issue in legislation affecting the authority of attorneys admitted to the Maryland Bar and employed by a corporation involved their right to appear on behalf of that corporation during court and administrative proceedings. Questions arose about whether there was a need for the legislation, because there was little evidence that corporate counsels had been denied the right to represent their employers in court. The issue turned to one of whether corporate counsel had the same rights as their private practice counterparts to recover fees and expenses.

Generally, corporate counsel are salaried employees, so the privilege of collecting the same amount as private attorneys could constitute fee-splitting, unless the in-house counsel could document that he or she had received the full amount of the award for attorney's fees. No legislation concerning in-house counsel has been introduced since 1991, suggesting that an appropriate compromise has occurred. For example, government attorneys may obtain fees based on elements that address the difference in their hourly rate from those in private practice (i.e. lower dollars per hour than private practitioners because of the salary/overhead distinction). Expenses for postage, copying, and depositions would be the same in either type of practice and clearly relate to the attorney's work.

POSITION: MONITOR

REASON: In-house counsel may not have the same overhead costs as private practitioners, which affects the amount of fees and expenses in court should award and may not preclude the ability to recover those fees and expenses in some circumstances.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: CRIMINAL PROCEDURE

ISSUE: MANDATORY SENTENCING

Advocates of mandatory sentencing provisions for various crimes contend that criminal activity will decline if potential offenders are convinced that they will serve time in jail if they break the law. Support for this concept was strong in the Maryland General Assembly during the 1970's and 1980's when statutes were approved containing provisions for mandatory sentencing for a number of criminal offenses.

The types of crimes in Maryland that require a minimum mandatory sentence, with no provisions for suspended sentences, fall within five general categories:

- violent crimes involving use of a handgun (Criminal Law, § 4-204);
- use of a firearm in relation to drug trafficking (Criminal Law, § 5-621);
- drug "kingpin" offenders (Criminal Law, § 5-613 and § 5-905);
- drug distribution offenders in the vicinity of schools (Criminal Law, § 5-627); and
- third conviction for a violent crime (Criminal Law, § 14-101 and § 14-102).

The American Bar Association has opposed mandatory minimum prison sentences not subject to parole or probation since 1974. The Maryland State Bar Association for the first time opposed all mandatory sentencing provisions in any legislation introduced in the 1993 General Assembly.

See HB 2 SB 1005 (2016), HB 1312 & HB 1313 - Justice Reinvestment (2016)

POSITION: OPPOSE

REASON: Mandatory sentences should apply to some crimes, but not all of them.

The MSBA believes that mandatory sentences should exist for those offenses where adequate diversion or rehabilitation programs are available, and the MSBA opposes mandatory sentencing for other crimes based on several key points:

- Mandatory sentencing does not deter crime, because offenders either do not know of the mandatory sentence or are confident that they will elude capture.
- The prospect of a mandatory sentence may lead a jury to find a defendant innocent to avoid a mandatory sentence.
- Mandatory sentences remove and interfere with judicial discretion in sentencing.
- Mandatory sentences exacerbate the overcrowding in correctional institutions.



MARYLAND STATE BAR ASSOCIATION, I

CONTROVERSIAL ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: TORT REFORM—GENERAL

Since the early 1980's, Congress and state legislatures throughout the United States have struggled to change tort law in a way that would satisfy the concerns of some that the system had become too concerned with compensating plaintiffs at the expense of the larger societal goals, and at the same time provide a forum for deserving plaintiffs to obtain adequate compensation. Most of the attention with regard to torts focused on the following topics: collateral source; comparative negligence; immunity for some categories of defendants; joint and several liability; limits on awards (especially punitive damage awards); "loser pays"; and standards of proof.

The 1987 General Assembly devoted considerable time and effort to discussion of torts and ways to deal with the dramatic increase in liability insurance rates in the 1980's. Unlike other states, Maryland legislators did not respond to the "crisis" by passing a complete overhaul of the tort system, but instead, chose to pass some limits on awards while examining the underlying factors that led to the rapid rise in insurance premiums.

Although the General Assembly has not adopted a general comparative negligence provision, nor any of the other modified systems, it has made some modest adjustments in immunities for particular groups. In particular, liability issues have been modified for medical malpractice and patients' access to quality health care.

POSITION: OPPOSE

REASON: The tort system should not unduly restrict individual rights or unreasonably disrupt traditional common law concepts of tort law.

To the extent change is needed, the MSBA encourages expansion of the alternate dispute resolution programs, rather than decreasing access to the court system.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: COMPARATIVE NEGLIGENCE

The comparative negligence theory of law provides that a plaintiff may recover damages in a tort action even if the plaintiff shared the blame with the defendant. This differs from contributory negligence, which completely bars recovery by a plaintiff who did not exercise reasonable care and contributed to the harm suffered.

Maryland remains one of a few states that has not adopted some form of comparative negligence. The types of comparative negligence range from the pure type, in which a plaintiff may recover damages regardless of the amount of negligence, to those with tighter standards (requiring 50% or 49% negligence). Maryland adheres to a contributory negligence standard, which may preclude recovery by a plaintiff except when the defendant's conduct is willful or wanton. The most recent affirmation of the principle by the Court of Appeals occurred in 2013, when the Court applied contributory negligence to preclude recovery by a plaintiff who suffered serious injuries when he grabbed a soccer goal that was not secure. In *Coleman v. Soccer Association of Maryland*, the Court emphasized that the change in this principle needs to occur through the Legislature, and not through the courts. Although the General Assembly has proposed a legislative change, many details have not been resolved, so the law remains unaltered.

See *HB 110 (2007)*, *HB 1156 (2013)*, *SB 465 (2018)*

POSITION: MONITOR

REASON: The change from contributory negligence to comparative negligence affects the parties in ways that do not yield a single answer to a decision to support or oppose.

Supporters of adopting comparative negligence in Maryland explain that contributory negligence unjustly bars a plaintiff from recovery of any kind even when his or her responsibility for the damage was minimal. Opponents of comparative negligence contend that the change would unnecessarily disrupt a common law concept (contributory negligence) that has evolved over centuries and would lead to greater uncertainty as courts sorted out the new method. The change also would affect the related legal doctrines of joint and several liability, assumption of the risk, and strict liability.



MARYLAND STATEBARASSOCIATION, INC.

CONTROVERSIAL ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: FEE SHIFTING

Maryland follows the American Rule for recovery of attorney’s fees, which requires a statute or written agreement for a prevailing party to obtain attorney’s fees from the non-prevailing party. Some Maryland statutes and court decisions define when attorneys’ fees and costs are available, and Maryland Rule 1-341 provides sanctions that may include an award of attorney’s fees when actions are brought or pursued in bad faith.

See SB 188 (1995), SB 362 (2016), HB 902 (2017)

POSITION: MONITOR

REASON: Providing fee shifting in all cases might deter meritorious cases for fear of losing and having to pay the other party’s legal fees.

The measure overlooks the fact that wealthy parties can afford to pay legal costs and large businesses can hire in-house counsel, while the poor and middle-class parties often cannot pay for their own attorneys, much less those court costs and fees incurred by the other side.



MARYLAND STATEBARASSOCIATION, INC.

CONTROVERSIAL ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: HEALTH CLAIMS ARBITRATION

The Health Claims Arbitration Office (HCAO) was established in 1976 as a means of arbitrating claims against health care providers for damages exceeding \$10,000. Once a claim has been filed, the Director of the Office must notify all affected parties and supply a list of categorized qualified arbiters (attorneys, health care providers, interested lay persons) from which a three-person arbitration panel is chosen. The panel is responsible for determining liability and, if appropriate, assessing damages. Parties that disagree with the panel's findings may appeal the decision to the circuit court for a reversal or modification of the award. In 2005, the Office was renamed the Health Care Alternative Dispute Resolution Office, as part of medical malpractice reform.

See HB 1263 (1995), HB 2 (2004), HB 547 (2015), HB 992 (2016)

POSITION: MONITOR

REASON: Medical malpractice issues involve varying positions within the bar association and often do not lead to a unified position.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: STRUCTURED PAYMENTS

Legislation designed to expand current law to provide for structured payments that would itemize verdicts and annuities for life care and future loss of earnings were considered by the Maryland General Assembly in the mid-1980's.

Proponents of the structured payments approach claimed that legitimate awards are supposed to care for plaintiffs on a long-term basis, and that lump-sum payments do not encourage the victims in disability cases to protect their future well-being. Advocates of structured payments believe that their solution to this problem would provide a stream of income to injured parties, while stabilizing the liability insurance market.

Opponents of structured payments contend that, while structured payments may be useful in certain cases, a mandatory approach would be an improper restriction on judgments where flexibility for investment or income tax purposes may be useful. Mandatory structured payments also would deprive injured parties of the interest payments that may accrue as a result of a lump-sum payment and, instead, go to the insurance companies.

HB 832 (2003), HB 734 (2016)

POSITION: OPPOSE

REASON: The MSBA opposes mandatory structured payments as an improper restriction on the injured party.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: TITLE COMPANY REGULATION

Title companies provide consumers with title insurance, conduct examinations to find defects or failure of titles to particular parcels of realty, and serve as escrow and settlement agents in real estate closings. Among the membership of the MSBA, especially those lawyers who practice real property law, there are those who believe that many of the activities of title companies constitute the unauthorized practice of law. Of specific concern is that the title company services include:

- conducting real estate closings without representation by attorneys;
- preparing deeds and other documents affecting the title to real estate;
- preparing lien instruments, such as mortgages; and
- advising parties of their contractual rights under a contract of sale.

Unlike the legal profession, which is regulated extensively through the Court of Appeals (Attorney Grievance Commission, State Board of Law Examiners, Client Protection Fund, Rules of Practice and Procedure), title companies and title agents fall within the scope of the Insurance Commissioner and, before 1995, had few specific regulations covering their activities.

The general provisions relating to all insurers contained in the Insurance Article of the Maryland Code govern the activities of the title insurance companies. As such, title companies that do business within Maryland must receive authorization from the State, and their accounts, records, transactions, documents, and offices are subject to examination by the Insurance Commissioner. There are requirements concerning the type and amount of assets and risk that must be retained by insurers, and they must comply with certification qualifications common to all insurance agents. Ultimately, this means that the interest on title company reserves are distributed to the Maryland Affordable Housing Trust, in accordance with the Insurance Article, rather than the IOLTA provisions applicable to practicing attorneys.

POSITION: SUPPORT

REASON: The MSBA supports the proper enforcement of the IOLTA statute.



MARYLAND STATEBARASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: IMMUNITY FOR SPECIAL INTEREST GROUPS

Over the years the General Assembly and the Courts have provided immunities from civil liability for torts to a wide variety of specific interest groups. During the interim between the 1988 and 1989 sessions of the Maryland General Assembly, the Judiciary Committee staff concluded that no fewer than 75 special interest groups enjoyed some form of immunity from civil liability. In 1990, the array of immunity provisions concerning immunity from liability, limitations on liability, and prohibited actions were consolidated into the Courts and Judicial Proceedings Article.

See HB 113 (2005), HB 700 (2006), SB 664 (2006)

POSITION: MONITOR

REASON: The MSBA opposes any law that would decrease access to justice in civil matters.

Whenever a bill is proposed that expands or adds immunity, the MSBA participates in narrowing the scope and refining the language of the new statutes.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: JOINT AND SEVERAL LIABILITY

The doctrine of joint and several liability, developed over centuries by English and American courts, provides that, when a person suffers an injury as a result of the negligence of two or more defendants, each defendant becomes liable for the entire injury and the total amount of damages. Thus, a defendant whose wrongful conduct has injured the plaintiff cannot avoid liability for the total damage award by showing that some other wrongdoer also was responsible for causing the injury.

Supporters of continuing joint and several liability argue that, without it, plaintiffs would be required to identify every potential wrongdoer, prove the misconduct of each that caused the injury, provide a reasonable basis for apportioning the damages against the defendants, and recover a separate judgment against each defendant. The retention of joint and several liability increases the probability that injured parties will receive adequate compensation for their damages, thereby ensuring one of the primary goals of tort law.

Proponents of abolishing joint and several liability contend that it is unfair to require defendants who may be liable for a small part of an injury to pay, in some cases, the entire amount of the award. As a consequence, impecunious defendants, or those beyond the jurisdiction of the court where the action is filed, may escape responsibility, while those who are able and available to pay may be disproportionately affected.

POSITION: MONITOR

REASON: The MSBA recognizes the validity of both sides of the issue and has remained neutral regarding this legislation.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: LIMITS ON AWARDS — GENERALLY

In liability cases, damages ordinarily are awarded to compensate a victim or surviving family member for medical expenses, lost wages, pain and suffering, and the mental anguish caused by needless death or injury. Punitive damages, designed to punish a defendant and to deter others from similar conduct, may be imposed as well.

There is little disagreement within the General Assembly that victims should be compensated for economic losses (wage loss, medical expenses), which can be documented and quantified. Non-economic losses (pain and suffering, mental anguish) are more difficult to determine because of the subjective nature of those damages. Punitive damages are highly controversial and have been the subject of extensive debate in the courts, state legislatures throughout the country, and in Congress.

Current law provide limits on the amount of damages for certain State and local governments. Usually, they do not include a limit on punitive damages. While the purpose of those limits often is to protect entities that rely on public funds to pay judgments, along with protections available through qualified and public official immunity, the laws result in lower compensation for victims of negligence in circumstances where the actual damages may be much higher.

See HB 2 (Sp. Sess. 2004), HB 606 (2008)

POSITION: MONITOR

REASON: The MSBA promotes justice for all individuals, and the limit on damages is inconsistent with this position.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: LOCAL GOVERNMENT TORT CLAIMS ACT

In 1987, the Local Government Tort Claims Act was enacted to address the insurance and liability issues that were facing local governments. The definition of "local government" under the Act includes all counties and Baltimore City, municipal corporations, community colleges, county libraries, special taxing districts, nonprofit community service corporations, and local housing authorities. The Act retains the immunity otherwise enjoyed by local governments but requires the local government to provide a legal defense for its employees who act within the scope of their employment and to pay any judgment entered against their employees. The law also requires a claimant to comply with a notice provision, so that the local government may investigate the claim promptly and set appropriate reserves.

The Local Government Tort Claims Act differs from the Maryland Tort Claims Act in two significant ways. First, the LGTCA does not waive governmental immunity, while the MTCA waives the State's sovereign immunity. Second, in light of the immunity status, a local government employee remains a necessary party to the lawsuit but is entitled to a defense and payment of any judgment by the government employer. Under the MTCA, however, a State employee has immunity and is not a necessary party to the suit—only the State need be named. Both laws set limits on the liability of the government for damages.

POSITION: MONITOR

REASON: Any expansion of the Act that would limit access to civil justice conflicts with the MSBA's protection of access to the courts.



MARYLAND STATEBARASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: MARYLAND TORT CLAIMS ACT

The Maryland Tort Claims Act was enacted in 1981, and amended several times thereafter, to provide citizens injured by the State with a remedy for compensation, while at the same time protecting State employees from the threat of a multitude of lawsuits. Prior to enactment of this legislation, a tort victim could not sue the State, because of its sovereign immunity, leaving no recourse but to sue the State employee responsible for the tortious act.

The Act waives the State's sovereign immunity when a claimant provides notice within one year of an injury and limits awards up to a specific monetary ceiling. State employees are specifically protected from suit when they act within the scope of their employment.

POSITION: MONITOR

REASON: The MSBA promotes access to justice and opposes laws that would limit a person's ability to sue.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: PRODUCT LIABILITY

The expansion of manufacturers' and suppliers' liability for harm caused by unreasonably dangerous products has been one of the most dramatic developments in tort law. The debate illustrates the irreconcilable interests of consumers and businesses.

Supporters of legislation to restrict the liability of the makers and sellers of dangerous products have sought to limit the ability of the courts to favor plaintiffs by:

- Abolishing or severely limiting punitive damages;
- Adopting a "state of the art defense" that would not hold manufacturers liable if they could not have known of potential dangers, or if there was not a practical or technically feasible alternative design that would have prevented harm;
- Requiring victims to discover and prove what was "knowable" and feasible" about a product's design;
- Barring recovery to victims over a specific age;
- Establishing a less stringent standard of negligence; and
- Reducing awards by any benefits paid through workers' compensation.

Because Maryland products liability law has been established primarily in the courts, supporters of limits have indicated that legislation may be appropriate to specify the rights of consumers and manufacturers. Proponents of this approach believe that, once legislation has been passed, the number of product liability lawsuits will decrease, because both plaintiffs and defendants will have a clear understanding of what to expect from litigation, and that competition and product innovation will be encouraged. Most legislative changes to products liability have occurred at the federal level.

POSITION: OPPOSE

REASON: Any change to the common law regarding product liability should be made uniformly.



MARYLAND STATE BAR ASSOCIATION, INC.

CONTROVERSIAL ISSUE: LIABILITY/DAMAGES

ISSUE: PUNITIVE DAMAGES

Punitive or exemplary damages are designed to punish a defendant and to deter others from similar conduct. In 1991, the United States Supreme Court focused attention on punitive damages when it announced that punitive damage awards must be based upon articulated standards, and a reasonable relationship must exist between the amount of compensatory and punitive damage awards, so that punitive damages are "reasonable in amount and rational in light of their purpose." See *Pacific Mutual v. Haslip*, 499 U.S. 1 (1991).

Following the directives of the Court, supporters of changes in the law of punitive damages proposed legislation during the 1992 Session of the General Assembly in an effort to bring Maryland law into line with the principles espoused in the decision. Others argued that changes were unnecessary, because Maryland already conformed to the points made by the Supreme Court. In 1992, the Court of Appeals established the standard in Maryland as requiring clear and convincing evidence of actual malice for an award of punitive damages. See *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 665 (1992).

HB 459 (2001), SB 836 (2017), SB 5 (2018)

POSITION: MONITOR

REASON: The MSBA has remained neutral on this issue.

DORMANT ISSUES



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: CRIMINAL PROCEEDINGS

ISSUE: ELIMINATION OF DE NOVO APPEALS

In criminal cases, a defendant who is dissatisfied with the verdict in district court may automatically have a new trial in circuit court. Advocates of abolishing this privilege believe the system demeans the district court, because defendants know that the outcome can be reversed at the next level. In some respects, it harkens back to an era when the magistrates that presided over the cases were not all lawyers. The system can be expensive, inefficient, and redundant.

See HB 615 (2004)

POSITION: MONITOR

REASON: The MSBA supports the rights of individuals to due process.



MARYLAND STATE BAR ASSOCIATION, INC.

DORMANT ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: SINGLE-SUBJECT RULE

The Maryland Constitution requires that all bills passed by the General Assembly embrace only one subject. (Article III, Section 29) Over the years, there have been numerous court challenges to various statutes that have resulted in a significant amount of case law on the Single-Subject Rule. In general, these opinions have held that this constitutional provision was designed to be interpreted liberally so as not to thwart the will of the Legislative Branch.

The United States Constitution and a few state constitutions do not have a Single-Subject Rule. As a consequence, certain legislative tactics, such as the use of “riders” to attach amendments unrelated to, or only marginally associated with, the primary purpose of particular bills are employed frequently in Congress and the legislatures of these other states. Conversely, efforts to employ these same techniques are rare in Maryland and, up until the 2000 Legislative Session, there was little interest in abolishing the Single-Subject Rule in the Maryland Constitution.

The move to repeal the Single-Subject Rule was prompted by a Court of Appeals decision that was issued in the middle of the 2000 Legislative Session, which invalidated a bill from the 1998 Legislative Session on the basis that it violated the one-subject constitutional provision. (*Migdal v. State*, 358 Md. 308 (2000)) The issue involved the attempt to add provisions from a bill that was defeated earlier in the 1998 Session (addressing the independence of directors of some investment companies) to another piece of legislation (concerning the process for designating resident agents). The Court reaffirmed the single-subject rule and chastised the Legislature for its attempt to circumvent the requirement.

POSITION: OPPOSE

REASON: The single-subject rule for State legislation is appropriate.

Although the MSBA opposes a repeal of the single-subject rule, no activity has occurred since the 2000 Legislative Session.



MARYLAND STATE BAR ASSOCIATION, INC.

DORMANT ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: JUDICIAL NOMINATING COMMISSIONS

The Maryland Constitution empowers the Governor to appoint appellate court judges (subject to Senate confirmation and retention elections), Circuit Court judges (subject to a contested election), and District Court judges (subject to Senate confirmation only). Judicial Nominating Commissions were established by Executive Order in 1970 to propose nominees for appointment to the judiciary by the Governor. In 1995, the Executive Order was revised by the Governor with the intention of adding greater diversity in the composition of the Commissions. The composition of the Commissions changes periodically based on updated Executive Orders by the Governor.

Between 1989 and 1995 there were several unsuccessful legislative attempts to alter the judicial nominating process by either codifying the commissions into statute, or by giving the State Senate the right to confirm appointments to the Commissions. The Office of the Attorney General issued opinions on these proposals that declared them to be unconstitutional violations of the separation of powers, even though the State Senate generally supported the bills. Since 1995, there have been no legislative efforts to change the Commission process.

POSITION: SUPPORT

REASON: The MSBA supports the use of Judicial Nominating Commissions along with significant attorney participation to ensure that qualified individuals are appointed to the Maryland courts.

The best method of selecting judicial candidates uses a system where power is shared within a constitutional framework and minimizes political pressure inherent in the appointment process by limiting the influence of any one power center. By specifying the respective roles of the Governor, the Legislature, lay and lawyer members of the Commissions, and the lawyers within each judicial district, adequate safeguards have been created to discourage abuse of the judicial appointment process and to ensure racial, ethnic, and gender diversity of Maryland's judiciary. Any attempt to alter this balance by legislation should be opposed.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: JUDICIAL APPOINTMENT/CONFIRMATION

The method of appointing and confirming judges periodically receives scrutiny from the General Assembly. When a vacancy occurs in Maryland courts, the Administrative Office of the Courts notifies the appropriate Judicial Nominating Commission (a statewide Appellate or regional Trial Court) of the opening, which in turn advertises the vacancy and solicits applications from members of the bar. Applications for the position are distributed to Commission members in advance of a meeting at which the filings are reviewed along with recommendations of bar associations and other interested parties. Each candidate for the opening is interviewed by the full Commission or by panels of the Commission. Once these interviews are completed, the Commission prepares a list of the candidates whose legal and professional qualifications make them suitable for judicial appointment. This list contains the names of those candidates who have received a favorable vote from a majority of the Commission present at a voting session. Votes are taken by secret written ballot. The approved list is then sent to the Governor, who must select the appointment from the names on the list or from a previous list submitted within the 24 months prior to the vacancy.

Once the Governor appoints a judge, he or she may serve on the bench immediately. Appellate and District Court judges are subject to Senate confirmation, while Circuit Court judges must run in contested elections. If an Appellate or District Court judge is not confirmed by the Senate during the regular session of the General Assembly, he or she may continue to sit until the end of the session and then leave the Bench.

See SB 150 (2002)

POSITION: MONITOR

REASON: The MSBA supports the Commission system for appointing judges.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: LEGISLATURE AND JUDICIARY

ISSUE: JUDICIAL POWER TO REVISE CRIMINAL SENTENCES

In 2004, the Court of Appeals amended Maryland Rule 4-345, Sentencing - Revisory Power of Court, to provide that the court has revisory power over a sentence, except that the court may not revise the sentence more than five years after the date the sentence originally was imposed on the defendant and the court cannot increase the sentence. The revised Rule applied to violent and non-violent crimes.

Legislation to place a time limit on the court's revisory power arises periodically. It has generally been unnecessary, because most judges consider the revisory power as a tool to ensure rehabilitation of those convicted of crimes, and that motions of this sort should be filed within the one- to two-year range.

See HB 495 (2005), HB 464 (2004), SB 333 (2004)

POSITION: SUPPORT

REASON: The MSBA respects the Court's rulemaking authority regarding a judge's ability to revise a criminal sentence and opposes any change that does not occur through a Court Rule.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: REGULATION OF THE LEGAL PROFESSION

ISSUE: STATE BOARD OF LAW EXAMINERS SUNSET REVIEW

The Board of Law Examiners was created by law and includes a sunset provision to evaluate the law from time to time. The MSBA follows the evaluation process to ensure that responsibility for the Board remains with the Judiciary and that funding is adequate to maintain high standards.

See SB142 (2003)

POSITION: MONITOR

REASON: The MSBA has an interest in the manner of continuing the Board of Law Examiners that evaluates applicants to the Maryland Bar.



MARYLAND STATE BAR ASSOCIATION, INC.

DORMANT ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: STRATEGIC LAWSUITS AIMED AT PUBLIC PARTICIPATION (SLAPP)

Proposals to grant immunity from civil liability to defendants in an action described as a strategic lawsuit aimed at public participation (SLAPP) suit were filed in the 1992 General Assembly. The stated purpose of these bills was to protect citizens who exercise their First Amendment right of free speech from suits by developers, waste disposal companies, landlords, and other organized special interests who often seek to intimidate critics into silence. Under the provisions of these measures, citizens subjected to a SLAPP suit would be permitted to petition the court to dismiss a "suit brought for the purpose of intimidation or harassment."

A SLAPP suit has the following characteristics:

- a civil complaint or counterclaim for monetary damages and/or an injunction;
- filed against non-governmental individuals or groups;
- results from communications to a government body or official, or to the public; and
- addresses an issue of some public interest or concern.

Alternatives to a legislative ban on SLAPP suits include strengthening court rules pertaining to bad faith litigation or legislation that would allow defendants in SLAPP suits to file a countersuit against plaintiffs (i.e., they could SLAPP back).

Statutes have been enacted providing protection to those who raise complaints regarding false claims and other matters that encourage whistleblowers to voice their concerns.

See HB 930 (2004), HB 134 (1997), HB 113 (2003), SB 221 (2012)

POSITION: MONITOR

REASON: The MSBA supports free speech, but opposes bad faith litigation.



MARYLAND STATE BAR ASSOCIATION, INC.

DORMANT ISSUE: INSURANCE

ISSUE: NO-FAULT AUTOMOBILE NEGLIGENCE

No-fault automobile insurance is the type of coverage in which a driver's own insurance company pays for the injuries or damages of the insured party, regardless of fault. The critical provision in some no-fault insurance laws is the "verbal threshold"—a concept in which lawsuits are permitted only for drivers who die or suffer serious injuries. By limiting the number of categories within the "verbal threshold," proponents of no-fault insurance seek to deprive large numbers of injured parties of their right to sue. Other states with no-fault insurance laws use a "monetary threshold," under which claimants are required to submit medical expenses over a certain amount prior to initiating litigation.

Proponents and opponents of no-fault insurance have basic disagreements over issues involving individual responsibility, the relative importance of a driver's right to sue, the impact of litigation on insurance premiums, and the experience of states that have enacted no-fault statutes.

Supporters of no-fault insurance seek to lower automobile insurance costs, to obtain faster payment of benefits to accident victims, and to set up a more efficient insurance system by lessening the amount of litigation. In addition, they consider increased litigation to be the primary cause of increased auto insurance premiums, and cite estimates prepared by the Insurance Information Institute that legal fees add up to approximately 11% of all premium dollars.

Critics of no-fault insurance argue that the statistical evidence prepared by the insurance industry is spurious, and cite examples where no-fault insurance has failed to decrease premium costs. They also emphasize the importance of maintaining a person's right to seek compensation for injuries, and the necessity of making drivers responsible for their actions. Requiring drivers to have insurance that pays for damages to others serves as a deterrent, while no-fault insurance blames the victim, whose premiums will increase as a consequence of payment for damages arising out of accidents that were caused by reckless drivers.

POSITION: OPPOSE

REASON: No-fault insurance legislation alters victims' rights, without correcting abuses and fraud within the tort system.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: INSURANCE

ISSUE: PERSONAL INJURY PROTECTION COVERAGE (PIP)

Personal Injury Protection (PIP) insurance for Maryland drivers was created in 1976 as a limited form of "no-fault" insurance. Prior to the 1989 Legislative Session, this law mandated that every driver in the State buy a minimum of \$2500 worth of PIP insurance to cover medical costs, lost wages, and funeral expenses for the policyholder and others in the driver's car, regardless of blame. In 1989, the Legislature passed a measure allowing policyholders to select an optional form of PIP that excludes adult residents in the household. Under the provisions of the law, drivers are still required to purchase PIP for all of those living in the household under the age of 16, and for all pedestrians.

No additional proposals to restrict PIP have been introduced since 1989, as proponents and foes of the optional approach have been content to monitor premium rates of both those who selected options and those who continued to maintain full PIP coverage.

See SB 637 (1988), HB 841 (2000), SB 139 (2002), SB 784 (2016)

POSITION: MONITOR

REASON: Changes that impact victims' rights or access to justice may trigger a need for an MSBA position.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: INSURANCE

ISSUE: PEOPLE’S COUNSEL FOR INSURANCE

The Office of the People's Counsel was established in 1922 as a representative of the interests of residential consumers of gas, electric, telephone, sewer and water services, and non-commercial users of regulated transportation industries. The primary duty of the People's Counsel is to appear before the Public Service Commission, courts, and federal and state agencies, to protect the interests of residential and non-commercial utility users. The People's Counsel must be an attorney licensed to practice law in Maryland, and the Governor appoints the People's Counsel with the advice and consent of the Senate.

Efforts to expand the duties of the People's Counsel (or to establish a public advocate within the Insurance Division of the Department of Licensing and Regulation) to include insurance matters have failed. While the insurance industry has opposed the effort based on its position that self-regulation is adequate, the MSBA supported the People's Counsel on Insurance late in the 1989 session, because the industry had failed to provide adequate safeguards for consumer interests and the threat of litigation could help lower insurance rates.

See HB 542 (1989), SB 546 (2004), HB 144 (2010)

POSITION: MONITOR

REASON: The MSBA encourages adequate safeguards for consumers.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: JUDICIAL PROCESS

ISSUE: SUBSTITUTED SERVICE OF PROCESS

In 1998, the MSBA opposed legislation that would have authorized substituted service of process in civil actions upon resident agents of insurance companies when defendants could not be located. The problem arises when plaintiffs cannot locate a party for service of process. If passed, the bill would have placed resident agents of insurers in the place of defendants in order to allow litigation to move forward.

The MSBA opposed the measure, because it would have unfairly burdened the counsel for the defense without providing compensation to deserving plaintiffs. Lawyers who are unable to find their clients face significant handicaps in defense of any matter, and insurance carriers likely would refuse to pay in these cases, leaving plaintiffs no better off than before the substituted service of process.

In 1999, legislation was approved to require a defendant's insurer to provide plaintiffs with information about the defendant's last known home address when previous efforts to locate the defendants have failed.

POSITION: MONITOR

REASON: The MSBA supports meaningful substitution of process, but not options that impose a significant burden on one party without providing a noticeable benefit to anyone.



MARYLAND STATE BAR ASSOCIATION, INC.

DORMANT ISSUE: PROPERTY

ISSUE: EMINENT DOMAIN

Both the federal and state constitutions expressly limit condemnation authority of government entities by establishing two requirements for taking property through the power of eminent domain. First, the property taken must be for a “public use,” which Maryland courts have broadly interpreted. Second, the party whose property is taken must receive “just compensation,” which often requires payment of the land’s “fair market value,” as defined by statute.

Historically, State and local governments have used the condemnation authority primarily for the construction of roads and highways. Recently, however, its condemnation authority has been used for commercial redevelopment, including the construction of sports stadiums and theaters. The United States Supreme Court acknowledged the ability of the State to establish the reach of the condemnation power, when it ruled that New London, Connecticut, did not violate the United States Constitution when the town relied on State law allowing use of the condemnation authority to require several homeowners in an economically depressed area to vacate their properties to make way for mixed-use development. See *Kelo v. City of New London*, 545 U.S. 469 (2005).

In Maryland, bills were introduced in 2006 that tried to nullify the effect of the *Kelo* decision or to clarify its holding. Several concerns arose from the proposals:

- A constitutional amendment eliminating eminent domain for economic development might prove to be unwise, because eminent domain may be appropriate in some instances.
- There should not be any special rules governing just one county.
- Any bill providing for legal fee shifting must be carefully examined.
- Any bill should require a clearer computation of damages than is provided under the present law.

POSITION: MONITOR

REASON: While some revisions may be appropriate, they must promote uniformity and consistency throughout the State.

DORMANT ISSUE: CRIMINAL PROCEDURE

ISSUE: FORFEITURE

Developments in the United States Supreme Court, the Maryland Court of Appeals, and the Maryland General Assembly led the MSBA to call for a review of forfeiture statutes in 1994. Drug forfeiture laws were enacted as a means of punishing and deterring illegal narcotics activity (Criminal Procedure Article, Title 12). Maryland also permits forfeiture of cash seized for illegal gambling activities (Criminal Procedure Article, Title 13, Subtitle 1), as well as many seizures of property that are established in common law.

Although the seizure of personal property and assets are authorized when obtained through certain arrests, it remains a fundamental principle of due process that the owner of the seized property has a right to notice and the opportunity to be heard. Current statutes and the Maryland Rules include adequate due process protections

POSITION: MONITOR

REASON: All forfeitures must include adequate judicial review and protect due process rights.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: CERTIFICATE OF MERIT—LICENSED PROFESSIONALS

Legislation was filed in the 1996 Legislative Session to require a certificate of a qualified expert to be filed in any malpractice claim against a licensed professional. The professional groups specified in the bill included architects, interior designers, landscape architects, engineers, and land surveyors.

Current law provides for filing a certificate of a qualified expert for health care malpractice claims (Courts and Judicial Proceedings Article, § 3-2A-04). In addition, Maryland Rule 5-702 allows the court to admit expert testimony to assist the trier of fact to understand evidence or determine a fact in issue. This Rule allows the court to decide whether a witness is a qualified expert, whether the expert's testimony is appropriate, and whether a sufficient factual basis exists to support the testimony.

POSITION: NO POSITION

REASON: When legislation is proposed, the MSBA will review it.



MARYLAND STATEBARASSOCIATION, INC.

DORMANT ISSUE: CIVIL JUSTICE—TORT REFORM

ISSUE: CHANGES IN THE COLLATERAL SOURCE RULE

The collateral source rule holds that a plaintiff is entitled to any and all benefits resulting from successful litigation and prohibits the introduction of evidence that the plaintiff has received benefits from other sources. Proponents of the principle usually argue that a person injured by the wrongful or unlawful acts of another is entitled to the full value of that injury from those who perpetrated the wrong and that to enable a wrongdoer to avoid payment by demonstrating that the injured party has already received benefits for the injury would allow some of those responsible for the injury to avoid paying for their actions. Opponents of the collateral source rule contend that, except where subrogated interests exist by law, a flat prohibition on introduction of collateral sources means that an injured party may be “overcompensated” for the injury by receiving benefits for the same injury from two different sources: the collateral source and the defendant in a tort action.

Attempts to modify the collateral source rule peaked in 1987. The primary focus of the original bills introduced that year was to require courts or health arbitration panels to consider the total amounts paid from collateral sources in civil actions for personal injury or wrongful death. In those instances where a collateral source of benefit payment was available, the court or panel would be required to reduce the award equal to the amounts obtained from other sources. The result of the attempts were changes that permit modification or remittitur of damages in medical malpractice awards if modification is supported by evidence, although it excludes workers’ compensation, life insurance policies, and employee benefits from consideration in the calculations. A similar effort sought to reduce automobile insurance rates in Baltimore City in 1996.

POSITION: OPPOSE

REASON: The MSBA supports the continued effect of the collateral source rule.