

2009
MSBA Preliminary State
Legislative Program

PREFACE

The purpose of the State Legislative Program is to provide the Maryland State Bar Association Board of Governors with an opportunity to review the activities of the Committee on Laws and to establish the legislative priorities of the MSBA in advance of the annual session of the Maryland General Assembly.

The procedure for accomplishing this objective consists of two steps:

1. Review of a Preliminary State Legislative Program by the Board of Governors, which in turn makes recommendations to the Committee on Laws on legislative priorities and Association positions on these priorities; and,
2. Approval of a Final State Legislative Program which incorporates the recommendations of the Board of Governors into the Preliminary State Legislative Program, and is the definitive statement of the Association on issues anticipated to arise during the legislative session.

In deciding which issues are most appropriate for MSBA activity, the Committee on Laws focuses its attention on legislative areas that have a broad impact upon the practice of law and the administration of justice in the State of Maryland, and on previous legislation that has been of great concern to the MSBA membership.

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Article VII 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, unless time constraints make this impracticable.

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, unless time constraints make this impracticable.

Source: Maryland State Bar Association, Inc. Bylaws 6/93

E. Legislative Matters

1. It is important for the Association to take an active role in legislation of concern to the membership and to the general legal community, and to participate in the formulation of such legislation. It is equally important to establish guidelines that will enable the Association 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) Determine from the sections and committees through the use of the Committee on Laws and its liaison, issues of concern which 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 to 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, such 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;

(b) a copy of the bill and the position taken by the Executive Committee is promptly mailed 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.

(Board of Governors - 1/12/88)

A. LEGISLATION

1. Chair Responsibilities:

The primary duty of the chair with regard to legislation is the appointment of a Legislative Liaison. The Legislative Liaison is responsible for all legislative matters concerning your Section or Committee.

In order to be most effective in legislative matters, it is essential that the Legislative Liaison work in concert with the Director of Legislative Relations, the full time employee who is responsible for directing the overall MSBA legislative program. By keeping the Director of Legislative Relations informed of the legislative activities of individual sections and committees, the Legislative Liaison will be able to obtain extensive information about broader legislative and political developments and how they impact on the unique interests of the sections and committees. The Director of Legislative Relations will provide the Legislative Liaison with important information on key dates for legislative activity, contacts within the legislature and operating procedures of the Maryland General Assembly.

On matters of great concern, the Legislative Liaison will consult with the Director of Legislative Relations to determine whether an issue should be reviewed by the Committee of Laws for action by the Board of Governors. In the absence of an emergency or crisis, the work of the Association's legislative program will commence in the late Spring and be finalized by December.

During the annual General Assembly Session (January-April), the Director of Legislative Relations will review all proposed legislation and distribute bills of unique concern to the Legislative Liaison of all of the sections and committees. The Legislative Liaison will be responsible for reporting this information to the section or committee, and informing the Director of Legislative Relations which bills will be supported, opposed, amended or monitored.

Please carefully review Article VII, Section 5 and 16, and Article VIII, Section 4 of the MSBA Bylaws which deal with legislative activities of Committees and Sections.

2. Headquarters Staff Responsibilities

The Director of Legislative Relations is the primary MSBA staff contact on legislative matters, and serves as the legislative representative of the Association during the annual session of the Maryland General Assembly. The Director of Legislative Relations coordinates testimony and advocacy efforts on bills approved for action by the MSBA Board of Governors. On bills of specific interest to the sections or committees, the Director of Legislative Relations distributes copies of bills and hearing schedules, and serves as an informational resource to the Legislative Liaisons.

Source: Maryland State Bar Association, Inc. Administrative Procedures

POSITION CATEGORIES

Listed below are the categories of MSBA involvement with state legislative issues:

CATEGORY #1 - Support/Top Priority - Full MSBA support for issue. Activities would include, but not be limited to, testimony, membership and local/specialty bar association alerts, press activities and direct contact with individual members of the General Assembly.

CATEGORY #2 - Support/Limited Activity - MSBA support for issue. Normal activities would include testimony and participating in coalition efforts with other interested groups.

CATEGORY #3 - Oppose/Top Priority - Full MSBA opposition to an issue using the same organizational resources listed in Category #1.

CATEGORY #4 - Oppose/Limited Activity - MSBA opposition to an issue using the same approach described in Category #2.

CATEGORY #5 - Refer to Section/Committee - Issue is referred to the Section or Committee concerned with the subject matter.

CATEGORY #6 - Monitor - Activity deferred until a later date with close attention paid to specific legislation.

CATEGORY #7 - No Position - No activity.

GENERAL INFORMATION

ORGANIZATION OF BILLS - Legislative issues are divided into three general categories:

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

MIDDLE-RANGE ISSUES - Bills which 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.

NEW ISSUES - Bills that were introduced in the previous session of the General Assembly on which the MSBA took a position

KEY QUESTIONS - On controversial issues the following questions must be asked before taking a position of a specific piece of legislation:

1. Is the legislation well written and clearly understood?
2. Is the legislation in the best interest of the general public?
3. Is the legislation in the best interest of the legal profession?
4. Is the legislation in the best interest of the Maryland State Bar Association?

MSBA Legislative Policies and Procedures

The Maryland State Bar Association Board of Governors recognizes that the MSBA legislative process is a dynamic undertaking, intended to confront issues of significance to the legal profession as they arise, to initiate legislative action to address problems in the justice system, and to discontinue involvement on issues that are no longer suitable for active MSBA involvement.

The issues contained in the State Legislative Program, may be rearranged according to the following categories: 1) CORE ISSUES with a high degree of membership support on both the importance of MSBA involvement and the position of the Association; 2) MIDDLE RANGE ISSUES which are important to the proper functioning of the legal system, but have disagreement over the proposed solutions, and; 3) CONTROVERSIAL ISSUES in which a segment of the membership disagrees with both the propriety of MSBA involvement and the position adopted by the MSBA Board of Governors.

CORE ISSUES

Some items are central to the purpose of the legislative programs of organized bars throughout the country. These CORE ISSUES are cited in membership surveys, mentioned in focus groups and the media, and rarely disputed when bar association governing bodies adopt appropriate legislative positions. This group of issues and positions includes: opposing taxes on lawyer commissions and increases in attorney admission and renewal fees; protecting the judiciary's regulatory oversight of the legal profession; supporting adequate funding of the court system, and; defending the integrity of the judicial selection process.

On these CORE ISSUES there is wide acceptance within the MSBA as to the importance of Association involvement and the positions on specific pieces of legislation. Unless there is an indication that a segment of the membership disagrees with the MSBA's handling of a CORE ISSUE, it is assumed that the Association should maintain its present position.

MIDDLE RANGE ISSUES

There are some issues which most lawyers agree are appropriate for bar association involvement, but unlike CORE ISSUES, there is disagreement over general approaches to solutions or specific positions on legislation to address these topics. The establishment of a Family Court or Family Division within the court structure, the use of cameras in courtrooms, the appropriate application of alternative dispute resolution programs, and the judicial disabilities process are examples of these MIDDLE RANGE ISSUES.

Most lawyers agree that it is the business of bar associations to help mold court structures, to assist in the design of court procedures and to fine-tune methods for evaluating and disciplining judges. The debate on the MIDDLE RANGE ISSUES is over the appropriate method of confronting these topics.

In order to build a consensus on solutions to these problems, the MSBA routinely consults its sections and committees for advice. Often issues cross jurisdictional lines where two or more sections may claim that a particular item falls within their area of interest.

The normal method of addressing this dilemma is to jointly refer the issue to the competing sections well in advance of the legislative session so that the issue may be hashed out in a deliberative manner. As the General Assembly session draws near, efforts are undertaken to arrive at an acceptable solution. On some issues this approach has worked.

CONTROVERSIAL ISSUES

On some issues, there is heated debate within legal circles on whether or not bar associations should take an active role in the formulation of public policy. These **CONTROVERSIAL ISSUES** involve topics which concern a large number of attorneys in adversarial settings on a routine basis. The criminal defense bar abhors mandatory sentences and forfeiture laws while prosecutors press for tougher sanctions for offenders. The plaintiffs bar defends full public access to the tort system, while lawyers who represent corporations seek ways to limit their clients' expenses. Court reformers push for the elimination of contested Circuit Court elections, while spokespersons for groups that historically have been under-represented in the judiciary defend the process as a necessary curb on majority control of the judicial appointment process.

CONTROVERSIAL ISSUES for bar associations usually involve two aggressive groups of attorneys who have diametrically opposed views of what the law should be. Often these groups have roughly the same amount of influence in the General Assembly on a particular issue. Under these circumstances, involvement by a bar association on one side or the other is sometimes critical, enabling one of the factions (with the more reasonable position for lawyers and the public) to gain an advantage in the quest of its legislative objective. In order to prevent this from occurring, the other faction seeks to keep the bar association out of the conflict.

CONTROVERSIAL ISSUES provide a true test of a bar association's mettle in the face of sometimes stinging criticism from the affected members. In order to protect itself from criticism from within its membership that the decision making-process is slanted, the MSBA Committee on Laws gives interested parties numerous opportunities to state their case as to why or why not the Association should be involved in an issue and what, if any, the position should be. Once opinions are stated and written materials are distributed, the Committee on Laws uses a four-question test before recommending a course of action: 1) "Is it good law?"; 2) "Is it good for the public?"; 3) "Is it good for lawyers?" and 4) "Is it in the best interest of the Maryland State Bar Association?" If the answer to all these questions is "Yes," then the Committee on Laws normally makes a recommendation to the Board of Governors in support of a proposal. In some cases the Board of Governors repeats this process before adopting a formal position on behalf of the Association. Once a decision by the Board of Governors is made, the issue is given to the staff for implementation.

There are some issues that clearly fall outside the realm of bar association involvement. Legislation dealing with state personnel policy, local liquor licensing, education spending and bond bills for construction projects are just a few of the myriad of bills that do not concern organized bar interests. Many other issues such as abortion, welfare, economic development, transportation policy may have individual lawyers who fervently desire MSBA involvement, but are not included in the Association legislative program unless they are shown to have an impact on the practice of law or the functioning of the justice system. Then there are those issues that routinely involve many lawyers and the courts that may be appropriate for MSBA action, but which the Association has chosen to avoid. Examples of these issues are gun control, correctional policies, most family issues, land use policies and most health care issues. Bills concerning these items are referred to MSBA sections and committees for review and possible action by these groups.

It is important to recognize that the MSBA legislative process has been designed to encourage a free flow of information between sections and committees, local and specialty bars and the Board of Governors, while maintaining a strict process for the adoption of an Association-wide position. Sections in particular, are seen as a fertile source of new ideas for the development of legislative initiatives. Sections have autonomy in taking stances on bills that fall within their area of expertise. Unlike some other state bar associations, the MSBA does not require Board of Governors approval before sections may adopt a section position on legislative proposals, so long as it does not conflict with a policy or position of the Board of Governors. In most cases the Board of Governors seeks the views of one or more sections on particular issues before it adopts a formal position on a specific piece of legislation.

The MSBA Committee on Laws meeting held in the fall of each year, the first substantive meeting of the Board of Governors in September , and the Bar Presidents' Conference in the fall of each year are all part of the MSBA's legislative process. It is important that the MSBA conduct a full and complete discussion of controversial issues on these occasions.

ISSUES AND RECOMMENDATIONS

CORE ISSUES

TAX ON LEGAL SERVICES



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: TAXING LEGAL SERVICES

SUMMARY: A dramatic decline in State tax revenues combined with diminished federal assistance, stagnant economic growth and increased state and local government expenses resulted in a fiscal crisis in Maryland during the early 1990's. Improvements in the economy and cutbacks in state and local government spending eased the pressure for a decade, but the national economic downturn hit Maryland with a vengeance in 2003, resulting in a severe budget shortfall for FY 2003. The 2003 General Assembly responded to this deficit by approving a series of tax measures to increase revenues. But the veto of these bills by the Governor of Maryland led to great uncertainty as to how Maryland will have a balanced budget in FY 2004. During the 2004 General Assembly session tax measures received little consideration. However, the Governor and the legislature did raise additional revenue by raising certain user fees.

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.

Local governments (23 counties and Baltimore City) depend primarily upon two revenue sources, the property tax and the income tax, which are subject to certain restrictions imposed by the State. Some subdivisions also have local admissions and amusement taxes, recordation and property transfer levies, trailer park taxes, and local sales taxes.

While Maryland's sales and use tax is the state's third most important source of revenue, accounting for about 15 per cent of its income, the consumer base for this tax is one of the narrowest in the country. There are two major reasons for this atrophied consumer tax base: (1) Over the years a wide range of retail commodity products including food for home consumption, prescription drugs, medical appliances, non-prescription drugs, and residential utilities have been exempted from the state sales tax; and, (2) there are few taxes on retail services, and those must be enumerated in statute.

The recession of the early 1990's highlighted the deficiencies in Maryland's tax structure when it became apparent that revenue projections were inadequate to meet spending forecasts. Proposals to address the problem through hiring freezes, expanding working hours, eliminating government waste, consolidating programs, requesting early retirements, mandating furloughs on a selective basis, requiring unpaid holidays, and reducing the services provided by State government met with resistance from State employees and those groups benefiting from the programs that would be affected by the cuts. Legislators in the 1991 session, fearful that the public adamantly opposed any general tax increases, swiftly killed a proposal from an Executive Branch study group (Linowes Commission) that would have added over \$800 million to State coffers.

Throughout the early 1990's, the General Assembly removed some tax exemptions, increased other taxes selectively, and cut a few programs and the amount of aid to local governments. The 1994 election, in which the defeated gubernatorial candidate nearly won a stunning upset by proposing drastic reductions in the state income tax rate, sent politicians of both major parties scrambling to find new ways to respond to this strong public sentiment. These efforts culminated in the 1997 Tax Reduction Act, legislation that provided for a 10% cut in state taxes over a five year period. The time frame for implementing these reductions was accelerated in 1998 from 2% to 5% the first year, and from 4% to 6% in 1999. Despite the recent decline in state revenues, lawmakers rejected calls to suspend the final 2% of the reduction in the 2002 session.

In order to compensate for the anticipated revenue reductions that will come about as a result of the income tax cuts, some legislators began to focus more attention on increasing taxation of personal and professional services. Fear of the firestorm of negative reaction that would be generated by an across-the-board levy on services has led legislators in previous sessions to reject all taxes of this sort except for those on janitorial, telephone, credit reporting and security services. But it is difficult to ignore that personal and professional services are the most vibrant sector of the Maryland economy, accounting for over 20% of the state gross product. Adding a wide range of services to the base would have a dramatic impact upon state and local revenue forecasts and could pave the way for additional adjustments to property, income, and commodity sales taxes.

An example of this renewed interest in professional service taxes was the introduction of House Bill 755 in the 1997 session. Camouflaged under the title "General Service Business Gross Receipts Tax", House Bill 755 would have imposed a 0.4% gross receipts tax on a wide range of professional services. Doctors, lawyers, engineers, accountants, architects and other professionals who collect commissions or fees would have been required to pay modest amounts if the bill had passed, but subsequent efforts to collect greater revenue from these sources would have become a matter of shifting a decimal point rather than mounting a major campaign to enact a new tax. Although the legislation first was watered down to simply establish a study of the issue and then failed to pass the Senate, it must be viewed as a harbinger of more serious attempts to impose a tax of this nature in future sessions.

In 2001, an indication of the increasing interest in taxing services was the introduction of legislation sponsored by the Chairman of the House Ways and Means Committee to tax dozens of previously untaxed services. While direct legal services were not covered by the bill, some associated activities such as tax preparation, temporary help, and notaries public were included. An array of those groups and services covered by the bills mounted a strong campaign to stop the proposal dead in its tracks, and the 2002 election forestalled any additional attempts in the last session.

In addition to legislation imposing direct taxes on legal services, changes in the tax code that could have an adverse effect on the practice of law and law practice management arise from time to time in the General Assembly. For example, in 2001 a proposal was filed to eliminate the 2% public service company franchise tax on telecommunications companies and replace it with a 5% sales and use tax on services such as telephone calls. Businesses and professionals such as attorneys which rely on high volume telephone use would have had to make up much of the lost state revenue. The proposal failed, but it is an indication that special interest groups seeking changes in the tax code for their own benefit will continue to seek legislation often at the expense of other groups and interests.

MSBA 2009 POSITION: Oppose any proposal to tax legal services.

Rationale:

Arguments against a legal services tax should focus on the following areas:

1. Clients, not lawyers, would pay a tax on legal services. A legal services tax is not a tax on lawyers, but a tax on those who seek legal advice. Lawyers may pay the tax bill, but the taxes and the cost of administering the payments will be passed on to the clients in the form of higher bills.

2. A Maryland legal services tax would encourage clients, especially those with high legal bills, to seek legal advice in bordering states.

3. A legal services tax is a disincentive for citizens to seek legal advice. 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.

4. 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.

5. A legal services tax places an additional burden on those already experiencing financial problems. Clients seeking legal advice on dissolution of marriage, bankruptcy, child support, debt collection and similar matters are those who can least afford to pay an additional charge.

6. An audit of client fund accounts in order to administer the tax would violate the

attorney/client privilege.

7. The tax is regressive in that citizens and small businesses would have a disproportionate burden for paying a legal services tax. As many of the larger businesses retain attorneys as staff, they could avoid the tax, while moderate-income taxpayers and smaller business entities would have to pay the tax.

8. A legal services tax could be a tax on tax advice. Many citizens seek advice from tax law specialists as a means of clarifying their tax obligations. A tax on legal services, ironically, would impose an additional tax on those who are looking for ways to reduce their tax burden.

9. A key indicator of a state's economic climate is its tax structure. Passage of taxes on a wide range of services in other states, including legal services, in Florida and Massachusetts, has been a disaster. Boycotts and threats of business relocations led to repeal of the statutes in both states.

10. Taxing a person's ability to defend himself or herself in a criminal proceeding could be challenged as unconstitutional.

11. As many legal services are provided to non-Maryland clients, or a mixture of in- state and out-of-state customers, deciding what services are eligible to be taxed would be an administrative nightmare and would probably be challenged in court. This would result in added administrative and legal costs to the state.

12. Restricting the tax on legal services to "business-related activities" and excluding "personal legal services" would harm a vital center of the state's economy and be aimed at the entities most likely to seek legal services from out-of-state firms.

SAMPLE LEGISLATION: House Bill 755, General Assembly of Maryland, 1997
House Bill 1, General Assembly of Maryland, 2002
House Bill 448, General Assembly of Maryland, 2007



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: ATTORNEY ADMISSION/RENEWAL FEES (PROFESSIONAL PRIVILEGE FEES)

SUMMARY: 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 that received attention in 1992 was a bill, and later a budget amendment, to establish an admission and biennial renewal fee for all Maryland lawyers.

Under the provisions of Senate Bill 544, all those newly admitted to the Bar would be required to pay \$100, and all current lawyers would have to pay \$250 every two years in order to practice law in Maryland. The legislation did not stipulate what additional services would be provided in return for the additional fees.

Maryland lawyers already pay substantial amounts to provide for regulation and maintenance of professional standards. Applicants to the bar exam must pay fees of \$150 to take the test. Once admitted, each attorney must pay \$85 per year (Attorney Grievance Commission - \$65/ Client Protection Fund of the Bar of Maryland - \$20) to support the disciplinary and public protection infrastructure of the state's legal profession. The Maryland State Bar Association, Inc. (MSBA), although a voluntary bar, provides many of the services supplied by government agencies and unified bars in other states. MSBA annual dues are \$125 per year. In addition, the Maryland Institute for Continuing Professional Education of Lawyers (MICPEL), a fee and sales supported nonprofit organization, serves another function that is a government program in other jurisdictions.

There have been no bills to impose a professional privilege fee on lawyers since 1992, but an unsuccessful attempt to charge a flat \$100 per lawyer fee increase to pay for legal services to indigent defendants was made in 1998. In 1999, a bill that would have required all Maryland attorneys to purchase fidelity bonds to cover losses caused by defalcations was defeated in Committee. A bill filed in the 2000 session would have used a portion of the fees paid to the Clients' Security Trust Fund (now Client Protection Fund) to assist lawyers who serve low income clients in paying off their student loans. This legislation also failed.

In 2003, legislation submitted by the Maryland Judicial Conference to hike the State Board of Law Examiners' fees from \$150 to \$325 for admission to the Bar was defeated in both Senate and House Committees early in the session.

MSBA 2009 POSITION: Oppose any additional attorney admission or renewal fees.

Rationale:

Arguments in opposition to new fee proposals should emphasize that additional professional service fees, if enacted, must include all professions, not just the legal profession, and that consideration must be given to the impact of such a fee on efforts to encourage attorneys to devote more time to pro bono activities.

SAMPLE LEGISLATION: Senate Bill 544, pp 1 & 2, General Assembly of Maryland, 1992

House Bill 16, General Assembly of Maryland, 1999

House Bill 56, General Assembly of Maryland, 2003

REGULATION OF THE LEGAL PROFESSION



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: REGULATION OF THE LEGAL PROFESSION

SUMMARY: A number of bills are filed in the Maryland General Assembly each year that aim at regulating specific aspects of the legal profession. Legislation has sought to place a series of restrictions on lawyers, including proposals to interfere in the attorney discipline process, to require continuing legal education, to restrict fee arrangements and to alter Bar admission requirements.

The legislature's domain for regulating the legal profession is the Business Occupations and Professions Article of the Maryland Annotated Code (formerly Article 10 - Attorneys at Law and Attorneys in Fact). 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 of 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 Court of Appeals Standing Committee on Rules of Practice and Procedure, and the State Board of Law Examiners.

The question regarding which branch of government has primary responsibility for regulating the legal profession received considerable attention in a 1981 Court of Appeals case (*Attorney General of Maryland, et al. vs. Richard V. Waldron*). In its opinion, the court ruled that 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. The special relationship that exists between the legal profession and the judiciary was critical to the Court's arguments supporting this contention. Although the court acknowledged that the legislative branch did have a role in "a restricted class of statutes relating to the legal profession . . . pursuant to its interest in promoting the health, safety and welfare of the people of this state" (namely, policing of legitimate court powers and establishing minimum Bar admission criteria), this opinion emphasized that the Judicial Branch had primary regulatory responsibility for the legal profession.

Since 1993 there have been several bills aimed at regulating the practice of law in Maryland. Legislation to require lawyers to complete six hours of continuing legal education in ethics, to restrict a lawyer's ability to collect fees if damages exceed \$150,000, to remove the authority of the Attorney Grievance Commission to oversee lawyer discipline activities, and to permit the Executive Branch to set attorney fees were filed in 1993 and 1994. In 1995, legislators sought to revoke an attorney's right

to practice law if he or she did not meet child support obligation, to ban lawyers from representing clients in small claims court, and to restrict certain forms of lawyer advertising. None of these measures were successful. Some of the bills were filed again in 1996, but suffered the same fate, and there was a marked decline in bills of this type in the 1997 session. During the 1998 General Assembly, legislation passed that limited lawyer solicitation of the victims of specific accidents or disasters, and to those charged with specific criminal or traffic offenses. A 1999 bill requiring all Maryland lawyers to purchase fidelity bonds was defeated (see Attorney Admission/Renewal Fees). The few bills affecting the practice of law in 2000 and 2001 were modest in scope by being aimed primarily at specific fee and expense arrangements and exempting lawyers who work with title insurers from filing annual statements of financial condition with the Insurance Administration. In 2002 the only significant legislation affecting the regulation of lawyers was a failed attempt to prohibit a lawyer from offering or discussing employment opportunities with a judge if the lawyer had matters pending before the jurist. In 2003, a bill to substitute the General Assembly for the Workers' Compensation Commission in setting legal fees for services preformed in connection with claims before the Commission died in Committee.

Suspension of Attorney Licenses – Child Support

During the 2007 session the General Assembly passed legislation that amended the 1997 act that authorized the suspension of professional licenses of individuals who fail to pay child support obligations. Under the 1997 legislation, attorneys were not among the licensees subject to suspension. To address that omission, in the 2007 session, the General Assembly passed legislation establishing procedures for the suspension of attorneys' licenses for failure to pay child support. The bill amends the definition of "licensing authority" to include the Court of Appeals. Under the provisions of the bill, the Child Support Enforcement Administration (CSEA) is authorized to refer an attorney who is 120 days in arrears on a child support obligation to the Attorney Grievance Commission for proceedings in accordance with the Maryland Rules governing attorney discipline. On recommendation of the commission, the Court of Appeals may suspend an attorney's license or take other disciplinary action permitted by the Maryland Rules. The MSBA monitored this legislation to ensure that the Court of Appeals would maintain control over the actual disciplining of attorneys, under the provisions of the bill.

Tax Clearance

During the Special Session of November 2008 the Senate Budget and Taxation Committee adopted an amendment to Senate Bill 2, the Tax Reform Act of 2007, on the floor of the Senate, that requires that before the Client Protection Fund of Maryland may accept and consider paid, the annual assessment every attorney in Maryland pays to the Client Protection Fund (CPF), the CPF must "verify through the Office of the Comptroller that the lawyer has paid all undisputed taxes and Unemployment Insurance contributions. That amendment was enacted during the Special Session.

Attorney discipline lies within the domain of the judicial branch of Maryland government. The Client Protection Fund, part of the judicial branch, has a very narrow mission and purpose. Collection of state income taxes or unemployment insurance contributions is not part of that mission. To remedy the problem created by the Special Session amendment, legislation was introduced during the 2008 Regular that repealed the certification requirements of the Special Session amendment. The legislation passed during the 2008 Session requires that the Client Protection Fund provide to the Comptroller a list of all attorneys who have paid their annual assessment, to assist the Comptroller in determining whether each attorney has paid all undisputed taxes to the Comptroller, and any applicable unemployment insurance contributions payable to the Department of Labor, Licensing and Regulation. Further, the bill provides that if the Comptroller or Secretary of Labor, Licensing and Regulation finds that an attorney refuses to make timely payment of taxes or unemployment insurance contributions, the Comptroller or Secretary may refer the matter to Bar Counsel for possible disciplinary action. The MSBA strongly supported this legislation.

Residential Foreclosures: Attorney's Fees

During the 2008 Session, legislation was introduced that would have provided that in most residential foreclosure actions, the court may only approve a trustee commission or attorney's fees that the court finds reasonable. Moreover, the bill would have capped attorney's fees exceeding \$800. The MSBA opposed this legislation on the basis that the bill represented a legislative intrusion into the regulatory domain of the Court of Appeals. The bill died in the Senate Judicial Proceedings Committee.

MSBA 2009 POSITION: The Judicial Branch of government has the primary responsibility for regulating the legal profession. All bills that aim at replacing the authority of the courts in this regard should be opposed.

SAMPLE LEGISLATION: House Bill 468, General Assembly of Maryland, 1993
House Bill 1292, page 1, General Assembly of Maryland, 1993
House Bill 2, General Assembly of Maryland, 1994
House Bill 165, General Assembly of Maryland, 1995
House Bill 184, General Assembly of Maryland, 1995
House Bill 16, General Assembly of Maryland, 1999
House Bill 1398, General Assembly of Maryland, 2002
House Bill 426, General Assembly of Maryland, 2003
House Bill 1108, General Assembly of Maryland, 2004
House Bill 792, General Assembly of Maryland, 2007
Senate Bill 493, General Assembly of Maryland, 2008
Senate Bill 389, General Assembly of Maryland, 2008



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: ATTORNEY DISCIPLINE

SUMMARY: It is the policy of the MSBA that attorney discipline is the sole jurisdiction of the Judiciary of Maryland, and accordingly the Association should oppose any legislative attempt to dilute the authority of the Judiciary in this area.

MSBA 2009 POSITION: **Oppose** any proposal to take regulation of the attorney discipline process out of the Judicial Branch. On the issue of public disclosure of complaints against lawyers, any change in current rules should be done by the Judicial Branch, and not by legislation.

SAMPLE LEGISLATION: Senate Bill 466, General Assembly of Maryland, 1994
Senate Bill 76, General Assembly of Maryland, 1996



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: STATE BOARD OF LAW EXAMINERS SUNSET REVIEW

SUMMARY: The goal of the "sunset" process is to review the operation of various entities of state government periodically to determine whether these agencies are fulfilling their intended purposes. The research phase of the process is conducted by the Division of Budget Review of the Department of Legislative Services which reports its findings to an Evaluation Committee appointed by the President of the Senate and the Speaker of the House of Delegates. This evaluation is then reported to the General Assembly prior to the regular session and contains specific information about the operation of the agencies under review. Under the provisions of the Maryland Program Evaluation Act (1984, ch.284), the State Board of Law Examiners was evaluated in 1993 and again in 1999. Legislation passed in 2002 set 2009 for the next review.

The State Board of Law Examiners was created in 1898 and consists of seven attorneys with five or more years' standing who are appointed by the Court of Appeals for a term of five years. All applications for admission to the Bar in Maryland must be made by petition to the Court of Appeals and filed with the State Board of Law Examiners. The Board is charged with conducting the admission examination twice annually and reporting the results to the Court of Appeals which has the primary and ultimate responsibility for regulating the practice of law and the conduct and admission of Maryland attorneys.

The MSBA initially sought to monitor the sunset review of the State Board of Law Examiners in 1994, but ended up playing a pivotal role in the process. When legislation was proposed that aimed at continuing the Board's existence contingent upon passage of provisions to open to the public the Board's character and fitness hearings and the development of bar exam questions, the MSBA intervened and arranged a mediation session with the interested parties. The outcome of this meeting was a Memorandum of Understanding between the State Board and the Department of Legislative Services that permits department personnel to review the Board process for determining character and fitness of Bar applicants and the method of determining exam questions, but not be permitted access to a specific candidate's files or be allowed to see particular bar exam questions in advance of the tests. A five-year extension in the Board's existence also was agreed upon.

In 1999, the bill to extend the Board for 15 years was amended to require the Board to raise other revenues in order to remain deficit-free. During the last weekend of the session, the amendment was removed, but the 15-year sunset date was revised to five years and an additional amendment raised the cap on the examination fee from \$100 to \$150. In 2002 sunset extension legislation was passed to extend the life of the

Board until 2009. In 2003, a bill to raise the cap to \$325 was introduced but rejected.

MSBA 2009 POSITION: Monitor. Closely follow the evaluation process of the State Board of Law Examiners to insure that responsibility for the Board remains with the Judicial Branch of government and that funding for the Board is adequate to maintain high standards. Work closely with the MSBA Section of Legal Education and Admissions to the Bar to achieve these objectives.

SAMPLE LEGISLATION: Senate Bill 639, General Assembly of Maryland, 1993
Senate Bill 82, General Assembly of Maryland, 1999
Senate Bill 127, General Assembly of Maryland, 2002
House Bill 155, General Assembly of Maryland, 2002
Senate Bill 142, General Assembly of Maryland, 2003

FUNDING OF THE JUSTICE SYSTEM I



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: FUNDING THE JUSTICE SYSTEM

SUMMARY: 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 most glaring problem in the Maryland justice system is in Baltimore City which handles half of the state's drug cases. Although the General Assembly voted to aid the City to deal with juvenile crime resulting from the drug crisis, much more funding is needed.

In July, 1994 the Governor of Maryland issued an Executive Order establishing a Commission to Study State Assumption of the Circuit Courts which mandated a final report by the Commission no later than October 15, 1994. The underlying premise of the Order was that local governments are having difficulties in funding Circuit Courts and will be unable to cope with financial strains in the future.

The Commission did not recommend that the State take over the entire cost of operating the Circuit Courts, but several measures were proposed. Legislation was filed to require state government to pay for juror compensation, office space for Circuit Court clerks, interpreter services and courtroom security, as well as to establish State master positions. The General Assembly initially rejected these changes because of the high price tag of such moves, but in the 2000 session a bill providing for state assumption of masters' compensation, and an increase in juror costs passed with a 2001 effective date.

The Commission on the Future of Maryland Courts thoroughly reviewed the funding system for the courts and concluded that as part of the consolidation of the Circuit Courts, the state should provide full payment for the operation of those courts, and part of the capital expenses for courthouses. An analysis of the Commission's recommendations by the Department of Legislative Services estimated that the cost of Circuit Court consolidation to the state could be as high as \$85 million. The Legislative Services report did not specify the savings that local governments would obtain as a consequence of consolidation.

Another initiative, the Circuit Courts Action Plan, issued in November 1999 at the request of the General Assembly, rejected consolidation of the Circuit Courts in favor of coordination under the leadership of the Conference of Circuit Judges and more state funding. That report called for increased state payment of juror costs, state funding of masters' salaries and benefits, additional family division judgeships, more law clerks, leasing of clerk of the court offices, and greater state assistance for court security. The rejection of the additional family division judgeships in 2000 and 2001 by the General Assembly upset the implementation schedule for changes and was an indication of diminished legislative enthusiasm for greater state assistance to the courts. This trend became even more apparent in 2003, when the fiscal crises led to program cutbacks throughout State government including those of the Judiciary.

The Judiciary of Maryland has made every effort to keep pace with changing trends in litigation, and to provide specialized education for judges and specialized docket management, as was the case with business and technology matters and family matters. The MSBA has supported specialized dockets within the Judicial Branch, as long as the Judiciary supports and takes the lead in determining the structure of the Circuit Courts and the District Court.

MSBA 2009 POSITION: Monitor. Closely follow any proposals affecting funding of the justice system, as well as any proposals affecting the structure and docket management within the Judicial Branch..

SAMPLE LEGISLATION: Senate Bill 197, General Assembly of Maryland, 1995
Senate Bill 133, General Assembly of Maryland, 1999
House Bill 913, General Assembly of Maryland, 2000

COURT OVERLOAD



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: INCREASED NUMBER OF JUDGESHIPS

SUMMARY: Several methods have been suggested to reduce clogged court dockets. Among them has been to increase the number of judgeships in some jurisdictions.

Since 1979, the Chief Judge of the Maryland Court of Appeals has formally requested the approval of new judgeships by the General Assembly. Until 1996, no new judgeships had been approved by the legislature without the Chief Judge's certification, but in that year the General Assembly broke with precedent by creating four new Circuit Court judgeships in Baltimore City. In the 2000 session, an attempt to add a District Court judgeship in St. Mary's County that was not certified failed, but its demise led to the defeat of a bill that would have added six new Circuit Court Judgeship. This outcome was repeated in 2001, when some State Senate leaders questioned the need for any new Circuit Court judgeships by rejecting ten new positions for the most populated counties in family divisions, plus two slots for rural jurisdictions. The proposed five new District Court positions were supported by both houses of the General Assembly, but were lost when the legislation creating all new judgeships failed to pass. Three new Circuit Court positions were added in Montgomery County, while two District Court slots were removed as part of the transfer of juvenile cases in that subdivision. The Judiciary did not request any new judgeships in 2002, but an independent legislative effort to add four District Court positions failed.

The method of deciding which jurisdictions require additional judgeships relies on a statistical analysis which 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 for the filing of the case through disposition (divided by criminal, civil and juvenile); and the population per judge for each jurisdiction. In addition, each circuit administrative judge and 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.

Because of 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.

Since 1988, the General Assembly has approved thirty-four Circuit Court judgeships (Prince George's-seven, Montgomery-seven, Baltimore-three, Charles-two,

St. Mary's-two, Anne Arundel-one, Calvert-one, Carroll-one, Cecil-one, Frederick-one, Harford-one, Howard-one, Washington-one, and Wicomico-one Counties and Baltimore City-seven) and seventeen District Court positions (Districts 1-three, 2-one, 4-one, 5-three, 6-two, 7- two, 8-one, 9-one, 10-one and 11-two).

In the 2005 Session, the MSBA Board of Governors voted to support House Bill 236 sponsored by the Judiciary. HB 236 created seven new circuit court judgeships: two (2) in Baltimore City, and one (1) each in Anne Arundel, Baltimore, Montgomery, Washington, and Worcester counties. The bill also creates six new District Court judgeships two (2) in District 5 (Prince George's County), and one (1) each in District 1 (Baltimore City), District 2 (Dorchester, Wicomico, Somerset, and Worcester counties), District 4 (Charles, St. Mary's, and Calvert counties), and District 7 (Anne Arundel County). The bill further provided that two (2) of the District Court judges from District 2 be appointed from Worcester County and that two (2) of the District Court judges from District 4 be appointed from Calvert County. The bill passed without amendment, and was signed into law by the Governor as Chapter 199.

During the 2006 Session, the MSBA supported legislation that would have created two (2) additional circuit court judgeships, one in Baltimore City and one in Montgomery County. That legislation was unsuccessful.

In the 2007 legislative session, the MSBA supported Maryland Judicial Conference legislation that would have added 2 judgeships in the circuit courts (one in Baltimore City and one in Montgomery County), and 2 in the District Court (one in Montgomery County and one in Charles County). The legislation failed in both chambers.

MSBA 2009 POSITION: Monitor.

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

SAMPLE LEGISLATION: Senate Bill 219, General Assembly of Maryland, 1997
Senate Bill 69, General Assembly of Maryland, 2000
House Bill 689, General Assembly of Maryland, 2002
House Bill 236, General Assembly of Maryland, 2005
House Bill 1557, General Assembly of Maryland, 2006

CLIENT PROTECTION



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: UNAUTHORIZED PRACTICE OF LAW (CLIENT PROTECTION)

SUMMARY: Challenges to the exclusive privilege of attorneys to practice law have been initiated in recent years and are likely to increase in the future. Pitted against each other are two conflicting ideals: preservation of high-quality legal services (professionalism) versus provision of affordable legal advice (consumerism).

Over the years there have been many examples of non-lawyer professionals seeking and getting permission to perform legal transactions. 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. To a certain extent these threats to the right to practice law have ebbed recently as the various professions have carved out their respective territories and have accepted a de facto truce. An attempt in Congress in 2000 to provide accountants with the confidentiality protections of lawyers appears to have faded.

More recently, individuals with some legal training who are not lawyers (referred to as paralegals, although legal technicians, legal assistants or limited law advisors are used frequently) have sought to establish qualified legal practices. 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: (1) 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, (2) representation of others before administrative agencies or boards such as public utility commissions, workers' compensation boards, motor vehicle administrations, environmental permit bodies, rent 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.

It is unlikely that the movement questioning the monopoly of lawyers to practice law will go away. A multitude of studies have been published that document unmet legal needs. Self-help legal courses and materials are growing. An anti-lawyer activist group operating under the acronym HALT (Halt All Legal Tyranny) has been pursuing legislation to establish greater access by non-lawyers in the legal system and to deprofessionalize the practice of law by turning it into a service industry. As the affordability of legal services becomes more remote, the public may begin clamoring for a lower quality of service in return for a cheaper price.

In 1994 a bill was filed to permit members of the General Assembly who are not lawyers to represent constituents in summary ejectment proceedings in District Court. This proposal failed. In 1995 and 1996, a measure was submitted that would have enabled non-lawyer advocates to provide assistance during judicial proceedings to victims of domestic violence. The MSBA supported the bill with the proviso that the lay advocates serve under the supervision of a lawyer, but the House Judiciary Committee chose to kill the bill. Another unsuccessful measure in the 1996 session would have carved out an array of actions in the small claims, bankruptcy and family law areas for non-lawyer practice. No bills concerning client protection issues were introduced in the 1997 General Assembly. In 1998, a bill passed to allow insurance companies to use non-lawyers, but only after it was amended to apply only to claims adjustment hearings. In 1999, the only piece of legislation in this area was a minor change affecting attorneys who work with Boards of Education. In the 2000 session, no bills or amendments were introduced to broaden the scope of law practice by unauthorized professionals, but in 2001 legislation passed authorizing non-lawyers within state agencies to represent those bodies before the Office of Administrative Hearings. The MSBA Section of Administrative Law chose to take no position on this proposal.

In 2005 the MSBA Board of Governors supported an amended version of House Bill 691, which established regulation of immigration consultants. In many Latino communities within the State, immigration consultants, some calling themselves 'notarios' (a term connoting the ability to provide services ordinarily performed by an attorney in the U. S.) have made claims to clients that they can perform immigration-related services that often cross into the area of legal services. Under House Bill 691, an immigration consultant may not: (a) provide legal advice or legal services concerning an immigration matter; (b) make a misrepresentation or false statement to influence, persuade, or encourage a client to use the consultant's services; (c) state that the consultant can or will obtain special favors from or has special influence with any of the specified federal agencies; (d) collect compensation for services not yet performed; (e) refuse to return documents supplied, prepared, or paid for by a client, at the client's request; or (f) represent, advertise, or communicate in any manner that the consultant possess titles or credentials that would qualify the consultant to provide legal advice or legal services. The amended HB 691 was passed by the General Assembly in the final moments of the Session, and was signed by the Governor as Chapter 570.

MSBA 2009 POSITION: Oppose all legislation that would expand the rights of non-lawyers to perform those services that have been provided by attorneys in the past. Monitor all bills dealing with paralegals with careful consideration of bills that would establish licensing of paralegals by non-judicial agencies.

SAMPLE LEGISLATION: House Bill 691, General Assembly of Maryland, 2005
Senate Bill 22, General Assembly of Maryland, 1996
House Bill 982, General Assembly of Maryland, 1996

See Regulation of the Legal Profession section



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: LAWYER/CLIENT CONFIDENTIALITY

SUMMARY: One of the key elements in a lawyer's effective representation of a client's interests is the principle that the confidentiality of information must be protected. Only in those circumstances when a lawyer must disclose confidential information: to prevent fraudulent or criminal acts by the client; to rectify the consequences of criminal and fraudulent acts by a client with the lawyers assistance; to protect a lawyer's rights in a controversy or disciplinary proceeding; or, to comply with other rules, court orders or statutes, may a lawyer reveal this information without the client's consent. (Rule 1.6. CONFIDENTIALITY OF INFORMATION)

Perhaps the greatest challenge to the attorney confidentiality principle is the movement toward multi-professional combinations, especially those involving lawyers and accountants. A bill that passed in the 2001 General Assembly backed by certified professional accountants allows CPAs to share ownership interests with those outside of the profession. Even though the legislation did not specifically mention attorneys, and indeed was filed to accommodate administrative and information technology professionals, its introduction alarmed some lawyers who feared this was the first step in undercutting the rule barring attorney-CPA incorporations. Recent events at the national level, however, are expected to weaken or even reverse this trend.

MSBA 2009 POSITION: **Oppose** all legislative attempts to modify the attorney/client privilege. If change in the confidentiality of information exchanged between lawyers and clients is necessary, it should be accomplished by amendments to the Maryland Rules.

SAMPLE LEGISLATION: Senate Bill 617, General Assembly of Maryland, 1988
House Bill 183, General Assembly of Maryland, 1998

LEGISLATURE AND JUDICIARY



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: JUDICIAL DISABILITIES

SUMMARY: Criticism of specific judicial statements, verdicts and sentences by members of the public has prompted some legislators to examine alternative methods of removing and disciplining judges to replace those currently in place.

The Constitution of Maryland requires judges to retire when they reach 70 years of age. A judge also 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 "on conviction in a Court of Law, of incompetency, of 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* plea for a felony or a misdemeanor related to his or her public duties.

The more conventional 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.

Constitutional revisions to the Commission on Judicial Disabilities were approved by the Maryland General Assembly in 1995 and the voters in 1996. As approved, the membership of the Commission was increased to eleven members (3 judges, one each from the appellate, Circuit and District Courts; 3 attorneys; and, five lay persons) who must be confirmed by the State Senate and reflect the racial, gender, and geographic diversity of the population of Maryland.

In addition to the constitutional changes, the Maryland Court of Appeals adopted amendments to the Rules of Procedure governing the Commission in the spring of 1995. Complaints that are not frivolous on their face are investigated by paid counsel and reported on within 60 days. The Commission's proceedings also are open to the public if formal charges against a judge are filed.

MSBA 2009 POSITION: **Oppose** efforts by the legislature to alter the scope or responsibilities of the Commission on Judicial Disabilities. The Commission was

established in the Maryland Constitution as a judicial agency. As such, any changes to the functioning of the Commission should be done by Court Rule, not legislation.

SAMPLE LEGISLATION: Senate Bill 223, General Assembly of Maryland, 1995
House Bill 915, General Assembly of Maryland, 1995
House Bill 916, General Assembly of Maryland, 1995



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: JUDICIAL INDEPENDENCE

SUMMARY: Attempts by some legislators to intimidate the Judiciary have been increasing in recent years, but the level of hostile rhetoric and filing of bills to trump court decisions reached a distressing level in 2000. The effort to add a new judgeship beyond the certification process, the spate of bills to nullify court decisions through retroactive application, and the constitutional amendment to radically change the one subject rule, taken in their entirety, represented a dramatic breach in the legislative/judicial relationship.

Traditionally, a certain level of conflict between these branches of government is expected during most General Assembly sessions as legislators file bills in response to court rulings on specific public policy issues. As the legislature has passed laws and the courts have interpreted these statutes in the constitutional context, friction has often developed, but in prior eras the debate centered on the scope of the particular issues under discussion. Bills submitted in the 1990's however were a different variety, designed to threaten judges with fines, public humiliation, or recall from office.

In 1992, for example, a measure was introduced to fine judges who failed to render decisions in cases after 60 days. The bill was killed in the Senate Judicial Proceedings Committee, but this did not discourage the sponsor who filed similar bills in 1993 and 1994 that would have required the Administrative Office of the Courts to publish the names of Circuit Court judges who failed to decide cases within 60 days.

During the ensuing several sessions, attempts by some legislators to delay or defeat items in the Judiciary budget as a means of sending messages to judges with whom they disagreed on certain court decisions seemed to multiply. This development was not particularly novel, but it was the brazenness of these actions, coupled with an attitude that this was an acceptable public policy function that disturbed the Judiciary and the MSBA.

Efforts to blunt these attacks were successful for the most part within the General Assembly, but some legislators recognized that in the political arena criticizing the courts was a popular message with certain voters. This approach took the form of campaign rhetoric in the 1994 General Election, as some candidates openly espoused the adoption of a constitutional amendment that would provide for a recall of judges who did not sentence those convicted of crimes to the maximum term permitted by law. Fortunately, the judicial recall constitutional amendment was swiftly and decisively rejected in the 1995 session, but defeat of this specific proposal was attributed primarily to the flaws in the recall concept and to the arrogance of the sponsors of the bill.

Criticizing the Judiciary in other areas for tactical purposes still was alive and well within the Maryland General Assembly.

Reviewing initiatives affecting judges and the courts that have been filed in recent years provides a good indication of the areas that may threaten judicial independence in the future. The judicial appointment/confirmation process, criminal sentencing, trial delays, judicial salaries, creation of new judgeships and the Judiciary budget have been and will continue to be scrutinized by the General Assembly. All of these topics are appropriate for legislative action. The challenge, however, for those who are committed to protecting judicial independence will be to distinguish between those items that are submitted for sound public policy reasons and considered within the context of the legislature's historic and constitutional mission, and those efforts that are designed to harass judges and to intimidate the courts. Establishing judicial salaries is a legislative function. Tying strings to the approval of a judicial pay raise is judicial harassment.

With the rejection of the redistricting plan submitted by the Governor and the subsequent redrawing of legislative district lines by the Court of Appeals, there were predictions that the 2003 session would be filled with rhetoric criticizing the Court's actions. This was not the case as the prime inter-branch rivalry focused on the disagreements between the Republican Governor and the Democratic-controlled General Assembly.

During the 2006 Session, in the aftermath of a decision by a Baltimore City Circuit judge in the matter of *Deane v. Conaway* (case # 24-C-04-005390), which declared unconstitutional a Maryland statute (Family Law Article, Section 2-201) defining marriage as being "between a man and a woman," an "Address for Removal" was filed calling for removal of the trial judge who issued the opinion. The MSBA opposed the "Address for Removal" and the measure died in the Judiciary Committee.

MSBA 2009 POSITION: Oppose all bills designed to threaten judicial independence or to weaken the Judiciary's status as a co-equal branch of government.

SAMPLE LEGISLATION: Senate Bill 586, General Assembly of Maryland, 1992
House Bill 713, General Assembly of Maryland, 1995
House Bill 268, General Assembly of Maryland, 1996
Senate Bill 872, General Assembly of Maryland, 1997
Senate Bill 225, General Assembly of Maryland, 1999
Senate Bill 69, General Assembly of Maryland, 2000
Senate Bill 903, General Assembly of Maryland, 2000
Senate Bill 904, General Assembly of Maryland, 2000
House Bill 62, General Assembly of Maryland, 2001

NOTE: See MIDDLE RANGE ISSUE "Judicial Power to Revise Criminal Sentences"

THE INITIATIVE



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: THE INITIATIVE

SUMMARY: The initiative is a method of lawmaking by which citizens circumvent the legislative process to place proposals directly before the voters. Over a dozen states placed the initiative in their constitutions during the last century as a means of limiting the abuse of power by elected leaders.

Reforms such as the initiative and the referendum were enacted in an era when political corruption was rampant with few methods to expose and effectively prosecute misdeeds by public officials. During the 20th century greater citizen participation in the legislative and electoral process and more extensive coverage by the mass media has diminished the appeal 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.

The recent experience of some states that employ the initiative appears to favor the opponents of the technique. California voters, for example, are barraged with a host of ballot questions every election year. Often these issues are distorted by expensive mass media campaigns of special interest groups intent on protecting or establishing narrow, self-serving concerns. Emotional advertising appeals launched late in the campaign may shift thousands of votes without providing any recourse to those who could undercut these arguments with facts. In this type of political atmosphere issues may be distorted and laws enacted that are harmful to the interests of most citizens.

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 in recent years.

MSBA 2009 POSITION: **Oppose** placing the Initiative in the Maryland Constitution.

SAMPLE LEGISLATION: House Bill 818, General Assembly of Maryland, 1997
House Bill 1667, General Assembly of Maryland, 2006

RETROACTIVE LEGISLATION



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: RETROACTIVE LEGISLATION

SUMMARY: During the 2000 and 2001 legislative sessions, several major disputes arose over the issue of retroactive effective dates of laws passed by the General Assembly.

Up until the 2000 General Assembly, it had been generally accepted that legislation should be prospective, not retroactive. Bills that were passed during any annual session, which constitutionally must begin on the second Wednesday of January and conclude on the second Monday in April, in most circumstances went into effect on three future dates: June 1st (constitutional date), July 1st (customary date for budget items) or, October 1^s (customary date for all other legislation). Exceptions to these effective dates were vetoed bills (do not go into effect unless the General Assembly overrides the veto), emergency legislation (effective at the date of signing by the Governor), and constitutional amendments (effective upon approval by registered voters on Election Day and certification of the results).

The General Assembly's reluctance to pass bills with retroactive effective dates was breached in 2000 with the passage of two pieces of legislation designed to nullify decisions by the Court of Appeals. In the first case (*Burch v. United Cable et al.*) late fees charged by cable television companies were permitted back to 1995. In the second instance, (*Riemer v. Columbia Medical Plan*) Health Maintenance Organizations were granted rights of subrogation back to 1976. A third bill designed to roll back the clock on an opinion (*David Migdal et al. v. State of Maryland*) that the Court of Appeals determined to be a violation of the single subject rule, did not pass, primarily because it would have caused a conflict with a retroactive provision in the Annual Curative Bill that reached back to 1998 in an attempt to address the item thrown out in the *Migdal* case.

The success of the bills with retroactive effective dates in 2000 prompted those who would profit by using this technique to file legislation of this nature in 2001. For the third time in four years, proponents of a measure to protect directors of some investment companies from shareholder lawsuits passed a bill to provide a January 30, 1998, effective date. Advocates of this legislation, fearing that a court challenge on the single subject rule would void the previously-passed statutes thereby allowing federal suits aimed at the directors filed in February, 1998, to go forward, wanted a free-standing law to accomplish their goal. Another retroactive bill also passed in 2001, one that would void a Maryland Court of Appeals case (*Housing Authority of Baltimore City v. Crystal Bennett*) concerning the Local Government Tort Claims Act. A third retroactive proposal designed to protect two business owners who had shot three suspects breaking into their establishment was filed too late in the session to have a

chance of approval.

Retroactive application of bills was absent in the 2002 session until *sine die* when an amendment was added to legislation effectively trumping a Court of Appeals decision announced earlier in the day.

While the Constitution of the United States bans states from passing *ex post facto* laws for crimes, there is no similar prohibition on the civil side. During the debate over retroactivity in the 2000 session, proponents of the concept cited an Assistant Attorney General's opinion which stated that the bills in question would be constitutional because they would not violate any vested rights. Foes of retroactivity countered with an analysis by a University of Baltimore School of Law professor who argued that the legislation did indeed deprive a group of consumers of their property rights. The MSBA chose to defer judgment on these constitutional issues, deciding instead to focus its attention on the public policy concerns raised by retroactivity. In the Association's view, having a floating date for when laws become effective could lead to confusion for both lawyers and their clients, especially if the practice of having laws apply retroactively became widespread. Only by establishing a firm principle that statutes would become effective at some predetermined date in the future could this problem be avoided.

Given the uncertainty over the constitutional issues raised during the 2000 session on the retroactivity issue, many of those involved in the battle over the legislation anxiously awaited a court decision on litigation challenging the statute. In July 2000, a Circuit Court judge in Baltimore County ruled that the law concerning late fees charged by cable companies could be applied retroactively because the penalties were covered by contracts with subscribers. The Maryland Court of Appeals heard oral arguments on this case in January 2001. In late August 2002, the Court of Appeals, in a unanimous decision (No. 71, September Term, 2002, *Ash Dua, et al. v. Comcast Cable of Maryland, Inc., et al.*, and No. 121, September Term, 2002, *Douglas Harvey v. Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.*) ruled that retroactive legislation that deprived citizens of vested rights violated Articles 19 and 24 of the Maryland Declaration of Rights, and Article 3, Section 4, of the Constitution of Maryland. This decision bolstered the MSBA's public policy arguments against retroactive legislation and led to a decline in legislation of this nature in the 2003 session.

MSBA 2009 POSITION: Oppose legislation that provides for retroactive implementation dates.

SAMPLE LEGISLATION: Senate Bill 145, General Assembly of Maryland, 2000
Senate Bill 158, General Assembly of Maryland, 2000
House Bill 1434, General Assembly of Maryland, 2000
Senate Bill 264, General Assembly of Maryland, 2001
Senate Bill 433, General Assembly of Maryland, 2001
House Bill 1462, General Assembly of Maryland, 2001
House Bill 1448, General Assembly of Maryland, 2006
House Bill 1449, General Assembly of Maryland, 2006

SINGLE SUBJECT RULE



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: SINGLE-SUBJECT RULE

SUMMARY: The Constitution of Maryland (Article III, Section 29) requires that all bills passed by the General Assembly embrace but one subject. 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 to not 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 states. Conversely, efforts to employ these same techniques are rare in Maryland, and up until the 2000 session there was little interest in abolishing the Single Subject Rule in the state constitution.

The move to repeal the Single Subject Rule was prompted by a Court of Appeals decision (*David Migdal et al. v. State of Maryland et al.*) issued in the middle of the 2000 session which invalidated a bill from the 1998 session on the basis that it violated the one subject constitutional provision. The issue in question was the drafting of a bill that was defeated earlier in the 1998 session dealing with the independence of directors of some investment companies, on to another piece of legislation concerning the process for designating resident agents. With the ardent urging of the Attorney General's Legislative Office, the head of which had represented the State in the *Migdal* case, General Assembly leaders in both houses launched a late session blitz to effectively remove the Single Subject Rule from the state constitution.

The MSBA mounted an aggressive campaign to defeat the constitutional amendment to weaken the Single Subject Rule. The Association's staunch opposition to this bill was based on the observation of lawmaking in Congress, and the mischief that is a central part of that process. At the federal level, amendments unrelated to legislation under consideration are added as a means of circumventing the committee process and avoiding public hearings on these issues. As a consequence, some bills approved by Congress often contain provisions that are objectionable to the President, but become law simply because the Chief Executive seeks enactment of the central purpose of the legislation. Not only does this process create confusion for lawyers and judges who must interpret these laws, it also reinforces public cynicism and the perception that the federal legislative process is completely under the control of well-heeled special interest groups.

Ironically, the MSBA was assisted in its efforts to kill the legislation by several representatives of special interest groups. While these lobbyists recognized the advantages for themselves if the bill passed, they also were afraid that their colleagues on the opposing side of many proposals would use the repeal of the one subject rule to accomplish their own selfish ends. In order to appreciate this reasoning, it is important to recognize that most veteran lobbyists have molded successful careers by learning to skillfully manage arcane bill drafting techniques and parliamentary procedures for the entire 90 day session, and by cultivating friendships with strategically placed legislators within standing committees. To change a central rule of the game, that all bills must deal with only one subject, could enable those with less experience and fewer connections to succeed simply by focusing attention on only one institution, the six-person conference committee. By successfully managing the conference committee during the closing days of the session, when tensions are high and attention spans are short, dozens, perhaps hundreds, of bills that had been killed by standing committees earlier in the session could be slipped into unrelated proposals and passed into law almost unnoticed. This prospect would have an unsettling impact not only on the form of bills that passed, but also on the clientele of some of the most powerful legislative agents in Annapolis.

Despite the strong sponsorship of the bill, rank and file members of both the Senate and the House reacted negatively to the proposal. Arguments from the bill's supporters, that the legislature needed greater flexibility to deal with late session crises by amending proposals that were nearing passage, were undercut as the General Assembly suspended its rules to allow the introduction of several bills in the closing weeks of the session. This maneuver, along with an expedited hearing process, demonstrated that the legislature had sufficient leeway under the present rules to deal with late-breaking events. By the time the session neared *sine die*, there was little enthusiasm to move either the Senate or House bill, and both measures were allowed to die peacefully in their respective committees.

For the present, interest in abolishing the single subject rule has waned, and given the strong opposition to the 2000 proposal, interest in reviving the debate appears remote.

MSBA 2009 POSITION: **Oppose** abolition of the Single Subject Rule.

SAMPLE LEGISLATION: House Bill 1436, General Assembly of Maryland, 2000
House Bill 1456, General Assembly of Maryland, 2006

MIDDLE RANGE ISSUES

LICENSURE OF PRIVATE PROCESS SERVERS



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: LICENSURE OF PRIVATE PROCESS SERVERS

SUMMARY: Legislation providing for the licensure and regulation of private process servers was introduced in the 1994 and 1995 sessions of the Maryland General Assembly. In each case, the bill failed to get a favorable recommendation from the Senate Judicial Proceedings Committee. Since then, no bills of a similar nature have been submitted.

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 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.

Under the provisions of the proposal introduced in the legislature, all private process servers would be supervised by the superintendent of the State Police who would be authorized to adopt regulations to enforce the law. All applicants for private process server licenses would be subject to background investigations and be required to pay a licensing fee of \$400 (renewal fees would be \$200) that would be deposited in the State's General Fund. Sheriffs, local police, and certified private investigators and their employees would be exempt from the licensing requirements.

The underlying purpose of the bill was to provide a method of limiting the number of individuals entitled to be process servers, and thereby enabling those who were licensed to increase their fees. During testimony on the proposal, supporters could not offer any reliable information as to significant problems with the existing service of process system other than a few anecdotal accounts of process servers who had exploited their positions to gain unauthorized access to homes and businesses. Senate Judicial Proceedings Committee members were not persuaded by these stories and rejected the bill.

MSBA 2009 POSITION: **Oppose** all legislation that would provide for the licensure of private process servers.

SAMPLE LEGISLATION: Senate Bill 435, General Assembly of Maryland, 1995

CLIENT PROTECTION FUND



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: CLIENT PROTECTION FUND

SUMMARY: 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). As of July ~~2003~~ 2008, there were approximately ~~31,000~~ 34,700 active lawyers in Maryland who are charged a \$20 annual fee to finance the CPF.

Trustees of the Fund are concerned over recent trends because of the large volume of pending claims. As of June 30, 2002, the assets of the Fund totaled \$4,532,212 compared with \$4,227,950 the previous year. In FY 2002, the fund paid 50 claims for a total of \$725,392. As of June 30, 2002, there were 87 pending claims totaling \$2,360,101 with three additional pending claims with no specific amount stated.

CPF officials fear an increase in claims because of the greater number of lawyers and the tough economic conditions facing some attorneys. As a means of removing the temptation to steal a client's money, the CPF asked the legislature to pass a bill that would require insurers to notify third party claimants in cases involving \$2000 or more that payment had been delivered to their attorneys. Supporters of the measure cited similar laws or regulations in New York, Pennsylvania and New Jersey that had resulted in a significant decline in the number of claims against lawyers in these types of cases. Opponents of the proposal representing insurance companies and trial lawyers criticized the underlying premise of the bill ("LAWYERS CANNOT BE TRUSTED") and argued that the cost of administering the new law would be passed on to all policyholders in the form of higher premiums. A modified version of this bill passed the General Assembly in 1995 which authorizes insurers to send notice of payment to claimants in bodily injury cases after payment has been specifically authorized by the claimant's attorney, and at least five working days after payment has been delivered to the attorney. Attempts to eliminate the five working days waiting period and the attorney authorization requirement failed in 1998, 2001, 2002, and 2003. Another proposal permitting a raise in the cap on the annual CPF fee from \$20 to \$50 was introduced in the 1995 session, but was rejected by the Senate Judicial Proceedings Committee. The fee hike was resubmitted in a more modest form (\$20 to \$30) in 1997, but this version also was killed, this time by the House Judiciary Committee. The CSTF took a new tack in 1998 by seeking to remove the authority of the General Assembly to set the fee, and place this power with the Court of Appeals, but the legislature balked at this approach and killed the bill. Two bills calling for a raise in the cap to \$35 and \$100 respectively, were defeated in the House Judiciary Committee in 1999.

In 1996, a CSTF-supported measure that would have required lawyers to reimburse the Fund for payments made to claimants as a consequence of those attorneys' action was defeated. A similar proposal, introduced in 1997, was reviewed by the MSBA Section of Litigation which developed amendments to clarify the bill's provisions concerning reimbursement. These revisions were opposed by the trustees of the CSTF, but the State Senate sided with the MSBA and adopted the amendments on the Senate floor. The changed bill was reviewed by the House Judiciary which gave the measure an unfavorable report in the closing days of the session.

MSBA 2009 POSITION: Support legislation requiring insurers to notify third party claimants that payment has been delivered to their attorneys. Support efforts to increase the statutory cap on the \$20 annual fee charged by the Client Protection Fund.

SAMPLE LEGISLATION: House Bill 46, General Assembly of Maryland, 1995
Senate Bill 171, General Assembly of Maryland, 1997
Senate Bill 172, General Assembly of Maryland, 1997
Senate Bill 687, General Assembly of Maryland, 1999
Senate Bill 118, General Assembly of Maryland, 2000

NOTE: The MSBA opposed the bill submitted in the 2000 session that would have changed the present law on notification of third party claimants, and monitored a similar bill in 2001.

CAMERAS IN THE COURTROOM



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: CAMERAS IN THE COURTROOM

SUMMARY: Maryland is one of nine states that forbid the use of broadcasting, recording or photographic equipment in criminal trial courts.

In 1980 the Court of Appeals adopted Maryland Rule 1209 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.

Although Rule 1209 allows extended media coverage of all civil actions in the trial and appellate courts there are certain restrictions. 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.

Supporters of opening up criminal cases to television and radio broadcasters contend that the justice system has nothing to fear from greater public access to the courts, and more media coverage would serve to educate the public about legal proceedings. They point out that the development of unobtrusive filming and audio equipment has eliminated concerns over disruption of court proceedings. As to fears that lawyers would use the media to grandstand, and that jury members may be intimidated or distracted, proponents of lifting the prohibition contend that competent judges can curb excesses and protect juries from threats or the fear of retaliation.

Opponents of any change in current practice insist that allowing electronic media into criminal trials is inconsistent with the purpose of proceedings, which is to determine the guilt or innocence of the accused, not to titillate a prurient viewing public. They argue that docudramas that exploit rumors and market them as fact, and sleazy pseudo-news programs and talk shows that compete with each other to glorify depravity would exploit filming of trials as a means of boosting ratings. Foes of altering the rules also point to the broadcast of sensational criminal trials that have received extensive coverage in recent years which they feel jeopardizes the defendants' rights to a fair trial before an impartial jury.

Legislation to remove the statutory ban on cameras in the courtroom during criminal trials passed the State Senate in 1994 but failed by one vote to pass the House Judiciary Committee. The 1995 version of the bill contained detailed language

regulating the uses of broadcasting equipment in addition to repealing the existing statute. The proposal was withdrawn by sponsors in the face of strong opposition from the House Judiciary Committee.

In 2005 the Senate considered Senate Bill 550, which would have repealed the prohibition against recording or broadcasting a criminal matter held in a trial court or before a grand jury and would have set forth procedures for a trial judge to utilize when determining whether to grant a request to record or broadcast proceedings. The MSBA opposed the bill, as did the Judiciary of Maryland. The bill passed the Senate Judicial Proceeding Committee, but was re-referred from the Senate floor back to the Committee. The bill then died without further action.

In 2007 and 2008, “cameras in the courtroom” legislation was scaled down, and rather than providing for the broadcast of criminal trials, the bill provided only for the broadcast of criminal sentencing proceedings. Nevertheless, the bill failed in the House Judiciary Committee. The MSBA opposed the legislation, as has been the case with previous attempts to legislate press access to judicial proceedings, on the grounds that if such access is to be granted, it is rightfully up to the judicial branch to determine.

MSBA 2009 POSITION: ~~Support legislation that will reestablish the jurisdiction of the Courts in regulating extended coverage of criminal trials (Rule 1209). Oppose legislation that would limit the authority of the Court to regulate media coverage of court proceedings.~~

SAMPLE LEGISLATION: Senate Bill 13, General Assembly of Maryland, 1994
House Bill 609, General Assembly of Maryland, 1995
Senate Bill 550, General Assembly of Maryland, 2005
House Bill 81, General Assembly of Maryland, 2006
House Bill 207, General Assembly of Maryland, 2007
House Bill 77, General Assembly of Maryland, 2008

VICTIM'S RIGHTS



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: VICTIM'S RIGHTS

SUMMARY: The approval by Maryland voters of a constitutional amendment on 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 statutes to insure that victims will have a role in a variety of criminal justice proceedings.

The 1995 General Assembly passed two statutes concerning the rights of victims. The first was a bill to require 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. A bill to prohibit criminals from profiting from their crimes by selling the rights to their story to the media was defeated.

Since 1995 the Task Force to Examine Maryland's Crime Victims' Rights Laws has been working to implement the Victims' Rights Amendment. In 1996 a law was passed specifying the procedures that courts and prosecutors must use to notify victims of crimes of criminal proceedings. Another bill that reorganized and recodified laws concerning victims and witnesses was passed as well. In 1997, comprehensive legislation to implement the Victims' Rights Amendment (Chapter 311 of the 1997 Acts of the General Assembly) was approved. Fine tuning of this statute occurred in 1998 and 1999, as bills passed concerning notification of victims with regard to parole releases and plea agreements, expansion of the definition of trial to include juvenile proceedings, and provision for state payment of transportation of homicide victims to mortuaries. In 2000, a bill passed expanding the definition of victim in cases where children charged as adults have petitioned to have their cases transferred to juvenile court. The 2001 General Assembly passed legislation enhancing the right of victims in incompetency and criminal responsibility proceedings, broadened the categories of crimes eligible for "no contact" conditions, and expanded the definition of crime for purposes of criminal injuries compensation. All of these statutes are a clear indication that the rights of victims in the criminal justice system is an accepted principle and is critical to the fair implementation of sentencing policy.

In the future, no dramatic changes in statutory law are expected, as advocates have shifted their attention to the courts, enforcement agencies and Congress. If supporters of greater rights for victims run into significant roadblocks in their quest, they may once again turn to the General Assembly for assistance.

MSBA 2009 POSITION: Monitor all legislation concerning the rights of victims to insure that the rights of defendants are protected and that the proposals do not violate constitutional principles.

SAMPLE LEGISLATION: Senate Bill 131, General Assembly of Maryland, 1994
Senate Bill 300, General Assembly of Maryland, 1994
House Bill 624, General Assembly of Maryland, 1995

**RESTRICTIONS ON
LEGISLATORS REPRESENTING CLIENTS**



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: RESTRICTIONS ON LEGISLATORS REPRESENTING CLIENTS

SUMMARY: Public concern over potential conflicts of interest of members of the General Assembly has prompted calls for restrictions on the activities of lawmakers. In some cases sponsors of these proposals have a legitimate desire to prohibit potential corruption or the perception of misconduct. In other instances the goal of these bills has been to embarrass political opponents.

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, such as a part-time job or a spouse's earnings. It is the second part-time income that has aroused concerns that special interest groups may be hiring legislators and paying salaries in return for favors from these elected officials.

Lawyer-legislators have been subjected to criticism from groups who charge that their votes have been affected by clients who compensate them for their legal services. Other critics have sought to curb the ability of these attorneys to practice law before executive and Judicial Branch agencies. 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 are having an adverse effect on their performance in both professions.

Legislation that passed the 1995 General Assembly placed restrictions on a legislator's representation of clients for compensation before State agencies in any matter involving procurement or the adoption of regulations. This bill was amended to exclude judicial, quasi-judicial or administrative hearing (contested cases) bodies from coverage under the Act. Since that time there have been no additional attempts to revise the law in this area, but some interest groups have begun to question the propriety of lawyer- legislators voting on bills that would benefit their law practices.

The decline of attorneys running for elective office in recent years is likely to continue if laws are passed to restrict the clientele or the activities of lawyer-legislators. At the same time, 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.

MSBA 2009 POSITION: Monitor. Closely follow all legislation restricting the activities of lawyer-legislators.

SAMPLE LEGISLATION: House Bill 1198, General Assembly of Maryland, 1995

ELIMINATION OF TRIAL DE NOVO



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: ELIMINATION OF TRIAL DE NOVO APPEALS

SUMMARY: In the 2004 General Assembly session the Maryland Judicial Conference introduced House Bill 615/Senate Bill 516, which would have provided that in a criminal appeal that is tried *de novo*, there is no right to a jury trial unless the offense charged is subject to a penalty of imprisonment of more than 90 days, or unless there is a constitutional right to a jury trial for the offense. The bill failed in both the House Judiciary and Senate Judicial Proceedings Committees.

Legislation to eliminate trials *de novo* in criminal appeals has a long history in the Maryland General Assembly. In 1993 House Bill 414 was introduced, and had the support of the Schaefer Administration and leaders of the Judiciary. The bill was defeated and was not resubmitted in 1994. In 1995 efforts to make appeals of domestic violence protective proceedings and violation of probation cases to be made on the record from District Court also were unsuccessful. No trial *de novo* bills were introduced in 1996, but proposals to eliminate the practice in cases involving enforcement of local housing codes and minor crimes surfaced in 1997. Both measures died in Committee. No trial *de novo* bills were filed in 1998, but proponents tried again in 1999, only to fail once more. A modest approach to the issue was made in 2000 with a bill to eliminate *de novo* appeals in local code enforcement cases, but this effort failed as well. Proponents of ending *de novo* appeals made no effort to file any bills in 2001, 2002 or 2003.

The present appeals procedure in criminal cases allows a defendant who is dissatisfied with the verdict in District Court to automatically get a new trial in Circuit Court. Advocates of abolishing this privilege believe the system demeans the District Court because defendants know the outcome can be reversed at the next level. Additionally, critics of trial *de novo* appeals argue that the provision is an anachronism, dating back to an era when trial magistrates, some of whom were not even lawyers, presided in the lower courts. The advocates of ending automatic appeals contend that the method is used by criminal defense attorneys to pressure prosecutors into agreeing to reduced sentences or even to drop cases that are costly or time-consuming. Trial *de novo* foes feel that the present system is expensive, inefficient and redundant.

Supporters of keeping the present criminal appeals procedure believe that the caseloads in Circuit Courts are reduced by the right to an appeal because most defendants are satisfied with their treatment in District Court and do not even get to the next level. Elimination of *de novo* appeals would encourage defendants to take their only chance in Circuit Court where they would be able to try their cases before a jury. Indeed, this argument was supported by the Maryland Department of Fiscal Services summary on the bill that estimated an additional 2500 jury trials per year, which would

be a terrible burden for many already overburdened Circuit Courts. There also may be difficulties in the District Courts because the need to protect the record of the proceedings would require much more care than is exercised presently. Relatively routine cases that take a minimal amount of time to handle would become more complicated because the safety valve provided by Circuit Court de novo appeals would be eliminated. Trial de novo supporters are convinced that the present system is functioning well, providing adequate rights for criminal defendants in a relatively efficient manner.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: House Bill 615, General Assembly of Maryland, 2004
House Bill 414, General Assembly of Maryland, 1993
House Bill 600, General Assembly of Maryland, 1995
House Bill 302, General Assembly of Maryland, 1997
House Bill 719, General Assembly of Maryland, 1999

SENTENCING GUIDELINES



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: SENTENCING GUIDELINES

SUMMARY: The 1996 General Assembly passed legislation to establish the Maryland Commission on Criminal Sentencing Reform to review Maryland's sentencing laws and make recommendations to change these laws. The Commission issued its Final Report in December, 1998.

Maryland presently 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 (See Criminal Procedure Article, Section 6-216), and applies the Maryland Sentencing Guidelines as developed by the Sentencing Guidelines Advisory Board, consisting 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: (1) training for judges, court personnel, public defenders, states attorneys, and parole and probation officers in the application of the guidelines; (2) A Maryland Sentencing Guidelines Manual with matrices to aid judges in the application of appropriate sentences; and, (3) 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 in order to apply to changing circumstances.

Supporters of the idea of having a sentencing advisory body set up to advise the General Assembly question the dominant role of judges in sentencing. They believe that the correctional system will be better served if other "stakeholders" (criminal justice professionals, victims' rights advocates, law enforcement officers) are included in the process to balance the views of judges and lawyers. The advocates of this approach claim that their goal is to insure that in this era of limited resources, violent criminals serve the maximum amount of prison time, while alternate forms of punishments are reserved for nonviolent lawbreakers. To them, too many hardened criminals are getting lenient treatment, while valuable prison space is occupied by offenders who have been convicted of less serious crimes.

Opponents of the Sentencing Commission do not feel that the Maryland corrections system requires an extensive overhaul. They challenge supporters of the sentencing commission concept to document their case with statistical evidence and credible examples of abuse of sentencing guidelines used in Maryland. To bolster their arguments they have produced their own statistics to show that the overwhelming

number of prisoners convicted of serious crimes in the state are sentenced within the accepted guidelines and serve at least 60% of their sentence in correctional institutions. They point out that the disproportionately large percentage of victims' rights advocates, prosecutors, and law enforcement officers in the makeup of the proposed Sentencing and Policy Advisory Commission is an indication of the real intention of supporters of the bill--more and longer mandatory sentences. Legislation extending the life of the Maryland Sentencing Commission passed the 1999 General Assembly late in the session after an amendment was added to the bill establishing a procedure by which a three-judge panel by a unanimous vote could override a statutorily-imposed mandatory sentence.

During the debate over the sentencing revisory power of judges during the 2001 session, the absence of any statistics on the use of this practice led proponents to seek amendments directing the Maryland Sentencing Commission to compile the appropriate data. These amendments did not pass. In 2002, legislation was approved to require the Commission to provide a review of reconsidered sentences and to categorize this information by crimes of violence and by judicial circuit. While some legislators expressed frustration over the failure of judges in some jurisdictions to stay within the range of sentencing guidelines, no bills were passed in 2003 to make guidelines mandatory.

MSBA 2009 POSITION: Monitor legislation affecting the Maryland Sentencing and Policy Advisory Commission.

SAMPLE LEGISLATION: Senate Bill 222, General Assembly of Maryland, 1996
House Bill 1143, General Assembly of Maryland, 2002

NOTE: See MIDDLE RANGE ISSUE – “Judicial Power to Revise Criminal Sentences.”

LIMITS ON CONTINGENCY FEES



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: LIMITS ON CONTINGENCY FEES

SUMMARY: 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 is a windfall for both the plaintiffs and the plaintiffs' attorneys and should be handled differently than the fees for compensatory awards.

A bill was introduced in the 1990 General Assembly that proposed to cap attorney fees at a percentage of the award that would decrease as the total amount of the recovery increased. For example, a lawyer in a case that resulted in a \$100,000 award could collect up to \$30,000, or 30 per cent, while the attorney in an action that resulted in a \$500,000 total recovery would be limited to a fee of \$75,000, or 15 per cent. Bills were filed in 1993 to limit fees in cases with awards in excess of \$150,000 to 20 per cent of the settlement, and to three annual installments. None of these measures passed the House Judiciary Committee. In response to the tobacco litigation issue, an unsuccessful bill was filed in the 2002 session to provide for legislative oversight of contracts for fees expected to exceed \$1,000,000.

Bills were introduced in both the 2004 and 2005 Session, similar in effect to the 1990 bill, that would have limited contingency fees in medical malpractice cases. The 2004 bill was killed in the House Judiciary Committee, and the 2005 bill was withdrawn.

MSBA 2009 POSITION: Oppose all bills aimed at regulating legal fees by statute.

Rationale:

1. The Court of Appeals is the proper authority for disciplining attorneys who charge excessive fees, and has shown a willingness to limit abuses.
2. Those who propose to limit contingency fees fail to appreciate that many injured parties cannot afford to pay legal expenses prior to a settlement. Contingency fees enable poorer clients to receive competent legal assistance on complicated cases that involve months of preparation and research without paying for these services before the conclusion of the trial. A flexible contingency fee system allows attorneys to assume responsibility and take the risks in deserving cases.

3. Strict percentage formulas to cap lawyer fees do not recognize that some cases require enormous amounts of research and preparation while other actions involve minimal work. Plaintiffs who have complex causes of action or injuries may have to pay a higher amount to attorneys than those who have relatively simple cases.

SAMPLE LEGISLATION: House Bill 1215, General Assembly of Maryland, 2005
House Bill 878, General Assembly of Maryland, 2002
House Bill 1292, page 1, General Assembly of Maryland, 1993
House Bill 1196, General Assembly of Maryland, 1990

JUDICIAL SELECTION



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: JUDICIAL NOMINATING COMMISSIONS

SUMMARY: 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 changed once again in April 2007 (Executive Order 01.01.2007.08).

The Appellate Judicial Nominating Commission consists of 17 members. Twelve (12) members of the Commission are appointed by the Governor, and five (5) members are to be recommended to the Governor for appointment by the President of the Maryland State Bar Association. However, if the President of the MSBA submits fewer than five names to the Governor, the Governor may select candidates to fill any remaining vacancies. The chairman of the Commission also is selected by the Governor and may or may not be a lawyer.

The 16 Trial Court Judicial Nominating Commissions have 9 members each. Six (6) members of each Commission shall be appointed by the Governor, and four (4) members shall be named by the Governor on the recommendations of the local bar associations. The Chairman of each commission is appointed by the Governor and may or may not be an attorney.

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. Attorney General's opinions on these proposals declared them to be unconstitutional violations of the separation of powers principle, but the State Senate generally supported the bills in spite of these opinions. Since 1995 there have been no legislative efforts to change the commission process, but significant questions were raised in 1999 concerning the process used to select a Circuit Court judge in a suburban Baltimore jurisdiction.

MSBA 2009 POSITION: **Support** the Judicial Nominating Commission process with continuing significant attorney membership and participation.

Rationale: The best method of selecting judicial candidates is a mixed system where

power is shared within a constitutional framework. The goal of such a system is to minimize political pressure inherent in the appointment process by limiting the influence of any one power center. During recent decades there have been calls from a wide variety of groups, including the Maryland State Bar Association, to increase the opportunities for women and minorities to become members of the bench. By specifying the respective roles of the Governor, legislature, lay and lawyer members of the commission, 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.

SAMPLE LEGISLATION: Senate Bill 896, General Assembly of Maryland, 1993
Senate Bill 680, General Assembly of Maryland, 1995



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: JUDICIAL APPOINTMENT/CONFIRMATION

SUMMARY: The method of appointing and confirming judges has received considerable scrutiny in the General Assembly and is likely to continue.

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 bar associations. 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.

Attention on the judicial appointment and confirmation process was intense in the 1993 session owing to the controversy surrounding the unsuccessful appointment of a District Court judge. A constitutional amendment was submitted to prohibit Appellate and District Court judges from taking office until the Maryland State Senate confirms the nomination. The MSBA opposed this proposal because of the burdens that would be placed on those courts with vacancies for up to twelve months. The amendment was introduced again in 1994, but by this time the original momentum behind the 1993 proposal was gone and the bill died.

A half-hearted effort to add Senate confirmation to the selection process for Circuit Court judges was filed in 1996 and subsequently withdrawn. In 2002, a bill to remove Circuit Court judges from the contested election process was submitted but the sponsor made little effort to galvanize a coalition powerful enough to push its passage

and it died in the Senate Judicial Proceedings Committee.

MSBA 2009 POSITION: Monitor any legislation that would alter the present system of judicial appointments and confirmation and refer any bills to the MSBA Committee on Judicial Appointments for a recommendation.

SAMPLE LEGISLATION: Senate Bill 889, General Assembly of Maryland, 1993
Senate Bill 870, General Assembly of Maryland, 1993
House Bill 268, General Assembly of Maryland, 1996
Senate Bill 150, General Assembly of Maryland, 2002

FUNDING OF THE JUSTICE SYSTEM II



**2009
STATE LEGISLATIVE
PROGRAM**

MARYLAND STATE BAR ASSOCIATION, INC.

ISSUE: MARYLAND LEGAL SERVICES CORPORATION, INC.

SUMMARY: The Maryland Legal Services Corporation (MLSC) was established by statute in 1982 by the Maryland General Assembly as a means of expanding the availability of legal services to those citizens of the state 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.

The Maryland State Bar Association, Inc. 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. After passage of comprehensive IOLTA in 1989, the MSBA pressed for legislation to extend the principles of IOLTA to title company trust accounts (Interest on Trust Accounts or IOTA), as a means of closing a major loophole in the law, and establishing a fairer method of regulating these escrow funds. This legislation was passed by the 1992 General Assembly.

Opponents of the MLSC filed legislation to return to a voluntary IOLTA system in the 1990 session, but were unsuccessful. In 1991, anti-MLSC legislators took a different tack. Citing both the MLSC's 1989-1990 Annual Report which gave the appearance that the Corporation was holding over \$4.4 million in its fund balance, and the pressing needs of the Office of Public Defender (OPD) to provide representation to indigent parents in "Child In Need of Assistance" (CINA) cases, foes of the MLSC introduced a bill to shift \$3/4 million to the CINA program. This bill was approved, as were similar measures to take the same amount of funds from the MLSC to assist the CINA program, in the October 1991 special session and the 1992 regular session. There were no attempted raids on the MLSC's funds in the 1993 General Assembly and in 1994 the \$1/2 million annual contribution by the MLSC to fund CINA cases was reduced to \$250,000.

While attacks on the MLSC in the Maryland General Assembly subsided in the late 1990's, Congressional assaults on the Legal Service Corporation, the agency which shares its resources with state and other federal entities that pay for indigent legal programs, accelerated during that time. This development, when coupled with low interest payments to IOLTA accounts, significantly reduced the MLSC's available resources. In a quest to offset these losses, the MLSC in conjunction with other legal service providers, backed legislation in 1996 and 1997 to add a surcharge on Circuit and District Court filing fees in civil cases. The measure was defeated in the House Judiciary Committee. In 1998, a broad-based coalition from the legal community mounted a major effort to enact a proposal to hike filing fees to pay for legal services to the poor. After the Senate passed an amended bill to increase Circuit Court charges by \$10 and District Court fees by \$2, and to place the MLSC in the budget of the Judicial branch, the coalition succeeded in convincing the House of Delegates to pass the measure without amendments. The new statute has raised about \$11,000,000 in additional revenue for the MLSC since July 1998.

With the prospect of deep cuts in funds to legal service providers looming because of the low interest rates of IOLTA accounts, the Judiciary asked for a \$1.2 million grant for FY 2004 to compensate for the shortfalls. While the General Assembly approved only \$300,000 of this request it was a significant development in the context of the budget reductions in many other programs, and the recognition that State intervention may be necessary to keep legal services funding at sufficient levels.

MSBA 2009 POSITION: Defend the Maryland Legal Services Corporation against legislative attempts to threaten its authority and independence. Oppose any legislative efforts to return to a voluntary IOLTA system. Continue cooperating with the Maryland Legal Service Corporation and the Office of Public Defender to find a solution to funding the Child In Need of Assistance Program that minimizes the involvement of lawyers and the courts.

SAMPLE LEGISLATION: Senate Bill 316, General Assembly of Maryland, 2004
Senate Bill 208, General Assembly of Maryland, 1990
House Bill 1290, General Assembly of Maryland, 1991
House Bill 1068, General Assembly of Maryland, 1992
House Bill 1109, General Assembly of Maryland, 1992
House Bill 860, General Assembly of Maryland, 1997
Senate Bill 332, General Assembly of Maryland, 1998



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: OFFICE OF PUBLIC DEFENDER

SUMMARY: The Office of Public Defender (OPD) was created in 1971 to provide legal representation for indigent defendants in criminal or juvenile proceedings.

There are three divisions within the OPD:

1. The Mental Health Division offers legal assistance to individuals who have been involuntarily committed to facilities that are regulated by the Department of Health and Mental Hygiene;
2. The Inmate Services Division provides counsel to those persons who have legal difficulties concerning their incarceration; and,
3. The Appellate Division processes all appeals to the Court of Appeals and the Court of Special Appeals.

The governance of the OPD is invested in a three-member Board of Trustees, appointed by the Governor to three-year terms. The Board of Trustees is charged with appointing an experienced attorney to serve as the Public Defender, and approving the choice of a Deputy Public Defender and District Public Defenders for each of the districts of District Court. Once a year the Public Defender must submit a report to the Board of Trustees, the Governor, and the General Assembly. Oversight at the local level is provided by twelve District Advisory Boards for the Public Defender System which are composed of a judge of the Circuit or District Court in the district and four active attorneys appointed by the Governor to three-year terms.

Funding the OPD has been a topic of considerable discussion in the Maryland General Assembly. Prior to 1990 the Public Defender defied legislative limits on spending by asserting that the Office had a constitutional mandate to provide criminal defendants with counsel, and that the necessary funds would be spent to fulfill this mandate. In recent years, however, state policy makers have decided that no agency is immune from the budget ax, and they have successfully reined in the Office's spending. State budget appropriations for the OPD rose significantly in the 1990's and early 2000's but was inadequate to cover the office's needs. Legislative monitoring of OPD expenditures and revenue collection procedures remained intense during that time.

As a way of reducing direct state outlays to the OPD, the 1991 Maryland General Assembly shifted \$750,000 from the Maryland Legal Services Corporation (MLSC) to cover some of the costs of the Child In Need of Assistance (CINA) program. An additional \$750,000 was transferred during a special session of the General Assembly

in October, 1991, and a third reallocation of \$3/4 million was approved in the 1992 regular session. These moves were controversial because they pitted two essential providers of legal services to the poor against each other, and were considered by some to be cynical attempts by sponsors to use a needed program to threaten the independence of the MLSC. The OPD and the MLSC have been coordinating their activities on CINA cases to minimize the involvement of lawyers in favor of social workers, and to limit the use of the CINA program as a legislative bludgeon in the future.

In 1999, 2000, 2001 and 2002 MSBA-sponsored legislation initiated by the Section of Correctional Reform to provide public defenders at bail review hearings as a means of reducing the time inmates are incarcerated for minor offenses failed to pass primarily because the Governor did not provide funding for the program in the State budget. In the 2001 session, legislation was filed to boost public defender salary levels up to those of lawyers in the Attorney General's Office. The bill failed, but language in the budget requiring a report on these salary inequities by December 2001 was approved. Despite clear evidence in the report that public defenders were underpaid, the 2002 General Assembly failed to approve legislation authorizing a raise.

One positive development was the action in the 2003 session to increase the OPD budget by over \$5,000,000 (8.83%) over expenditures of the previous year. This FY 2004 appropriation was significant because it came at a time when most State agencies were cutting costs or having only modest (1%) additions. The increases will cover costs associated with greater caseloads, the Baltimore City Juvenile Justice Center, CINA representation for non-custodial parents, the new Hargrove Southern District Court, the Montgomery County District Court Criminal docket and full funding of panel attorneys.

In 2005, the MSBA Board of Governors approved and issued a resolution to the budget committees of the General Assembly, urging them to approve a proposed increase in the budget of the Office of the Public Defender, for fees paid to panel attorneys. The increase was adopted by the budget committees and passed by the full legislature. Beginning in July 2005, panel attorney fees, which had been \$35 per hour in court and \$35 per hour out of court, became \$50 per hour for both.

MSBA 2009 POSITION: Support efforts to secure adequate funding for the Office of the Public Defender from the General Fund of the State of Maryland to enable the state to fulfill its constitutional mandate.

SAMPLE LEGISLATION: Senate Bill 599, General Assembly of Maryland, 1992
Senate Bill 138, General Assembly of Maryland, 2000
Senate Bill 354, General Assembly of Maryland, 2002

ALTERNATIVE DISPUTE RESOLUTION



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: ALTERNATIVE DISPUTE RESOLUTION

SUMMARY: The frustration over the perceived litigiousness of American society has resulted in a variety of proposals to take some of these disputes out of the courts and into alternative forums for settling differences.

During most sessions of the General Assembly, suggestions for other avenues of dispute resolution are reflected in specific bills designed to enact these ideas into law. In 1992, for example, a bill was introduced that would have established a process for defendants and plaintiffs to negotiate offers of judgment in advance of a trial and again between the liability and award phases of the trial. The intent of the proposal was to encourage the parties in a trial to avoid extensive and expensive litigation.

The American Bar Association, the Maryland State Bar Association, and many local and specialty bar associations have supported a wide range of alternative dispute mechanisms for many years. Law schools have courses and community organizations have numerous programs to encourage potential litigants to avoid the courthouse. There is a broad spectrum of the general public that would endorse new methods to help parties resolve differences out of court, and this sentiment was reflected in several recommendations of the Commission on the Future of Maryland Courts.

The strong level of support for Alternative Dispute Resolution, (ADR) when added to the log jams in the court dockets of some jurisdictions, has resulted in an increase of support for legislation in this area. Agreement on several unresolved issues, however, such as mediator qualifications and standards, types of cases where mediation is desirable, and consumer protection concerns will need to be determined before legislation will move forward.

In order to resolve some of the differences over the role of ADR in Maryland, the Chief Judge of the Court of Appeals appointed a 39-member commission in February, 1998. In December 1999, the Commission published its Practical Action Plan which outlined the ways ADR could be used in schools, neighborhoods, businesses, government agencies and other areas to divert many conflicts away from the courts. Since that time, the Commission has been working to implement these goals.

MSBA 2009 POSITION: **Support** measures to permit unrestricted access to the judicial system including legislation that would make ADR available to the parties. Monitor legislation that would require ADR as a condition for filing lawsuits. The success of ADR depends upon flexibility and innovation. Simply entrenching a particular method or a program into statute will not achieve the goals of ADR. Monitor all bills that would provide incentives for early settlement of disputes.

SAMPLE LEGISLATION: House Bill 405, General Assembly of Maryland, 1994
Senate Bill 611, General Assembly of Maryland, 1997
Senate Bill 618, General Assembly of Maryland, 1997
Senate Bill 619, General Assembly of Maryland, 1997
House Bill 1043, General Assembly of Maryland, 1997

CHANGES IN THE JURY TRIAL SYSTEM



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: CHANGES IN THE JURY TRIAL SYSTEM

SUMMARY: There has been concern among members of the Maryland Judiciary for over a decade that the system of dealing with criminal and civil cases has resulted in serious imbalances between the Circuit and District courts.

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.

In recent years 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 of those cases considered. The 1992 General Assembly considered several bills that were intended to restructure the jury trial system in order to promote economy and efficiency in the Judicial Branch. Two constitutional amendments, one allowing six person juries in civil trials and the other increasing the amount in controversy necessary to demand a jury trial in civil proceedings from \$500 to \$5,000, passed the 1992 General Assembly and were ratified by the voters. The 1998 General Assembly increased this threshold to \$10,000 which was ratified by the voters in November, 1998. On the criminal side, attempts to enact changes to limit the right to a jury trial in the first instance and to eliminate completely the right to a jury trial for offenses with penalties of six months or less, or a fine of \$500 or less were defeated. No bills affecting the structure of the jury trial system were filed in 1999, 2000 or 2001, but legislation to permit juries of more than six members in civil cases was submitted in 2002 and 2003. The bill was endorsed by the Maryland Judicial Conference, but opposed by the MSBA and was defeated in the House Judiciary Committee. In 2004, members of the Judicial Conference and the MSBA Committee on Laws agreed on amendments to a previous bill that would have provided that in a civil action, the court may order that the jury consist of not less than six but not more than eight jurors. The Board of Governors voted to support the measure. Nevertheless, the bill (House Bill 614) failed in the House Judiciary Committee.

In the 2006 Session the General Assembly passed legislation introduced by the Maryland Judicial Conference and supported by the MSBA that included a number of measures designed to improve the process of selection of jurors and the experience of jurors who do serve. The measure was enacted and signed by the Governor.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: House Bill 58, General Assembly of Maryland, 1992

House Bill 59, General Assembly of Maryland, 1992
House Bill 71, General Assembly of Maryland, 1992
House Bill 72, General Assembly of Maryland, 1992
House Bill 113, General Assembly of Maryland, 2002
House Bill 614, General Assembly of Maryland, 2004
Senate Bill 796, General Assembly of Maryland, 2006

JURISDICTIONAL AMOUNTS



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: JURISDICTIONAL AMOUNTS

SUMMARY: Dollar thresholds and ceilings for determining the jurisdiction for settling cases and the right to demand a jury trial are a topic of discussion in almost every recent session of the Maryland General Assembly.

In 1991 legislation expanded the exclusive original civil jurisdiction of District Court of the maximum amount per claim from \$10,000 to \$20,000 in particular cases. Another bill was approved that amended the Uniform Enforcement of Foreign Judgments Act to permit the option of filing a foreign judgment in either District or Circuit Court when the amount in controversy is between \$2500 and \$20,000. In 1992, a constitutional amendment was passed to increase from \$500 to \$5000 the minimum monetary amount in controversy required in order for a party to demand a jury trial in a civil proceeding. The success of this amendment led to the introduction of a bill in 1993 and 1994 that would have raised the maximum dollar amount of small claim actions from \$2500 to \$5000. These measures were soundly defeated in the House Judiciary Committee. In 1995, a bill to provide for the exclusion of interest and costs in determining the amount in controversy failed because the measure also included a \$10,000 rise in the ceiling for District Court jurisdiction in these cases.

Arguments in favor and against tampering with jurisdictional amounts center on maintaining balance in the respective courts and protecting the rights of the parties involved in the actions. Advocates of higher minimum amounts required to move cases to Circuit Court emphasize the benefits of dispensing justice in the speedier and less expensive District Court and the need to adjust the dollar figures periodically to account for inflationary changes. Supporters of lower thresholds stress the importance of basic rights (e.g., jury trials), rules of discovery and the possibility that a disproportionate number of litigants will not be satisfied with their day in court.

Legislation filed at the request of the MSBA to exclude costs and interest in determining the amount in controversy passed the General Assembly in 1996. A bill to change the amount in controversy threshold from \$5000 to \$10,000 in order to demand a jury trial in a civil action passed in 1998 and was ratified by the voters in November, 1998. Another measure raising the jurisdictional amount for District Court from \$20,000 to \$25,000 also was approved. In 2000, a bill to raise the amount in controversy of civil cases over which the District Court and Circuit Courts have concurrent jurisdiction from \$2500 to \$10,000 failed. A measure giving the District Court exclusive jurisdiction in dishonored check cases regardless of the amount passed the General Assembly but was vetoed by the Governor.

In 2001 and 2002 the dishonored check case legislation passed once again, and the General Assembly also approved a bill to raise the amount for small claims actions from \$2,500 to \$5,000. Following the sessions, however, the previous Governor vetoed both of these measures. In 2003, these bills passed once again and were signed into law by the new Governor.

In response to concerns about the effect of a 2004 Court of Appeals decision, (*Davis v. Slater*) which addressed the jurisdictional amount requirement for seeking a jury trial in civil cases, the General Assembly passed two bills (a proposed Constitutional amendment, HB 413, and its statutory companion, HB 427) that reinstate the limitation on civil cases in which a party may request a jury trial to cases in which the amount in controversy is in excess of \$10,000. The bills were enacted and signed by the Governor. The Constitutional amendment was approved by the voters of Maryland in the General Election in November 2006.

In the 2007 session, the General Assembly once again expanded the original jurisdiction of the District Court for amounts in controversy, this time from \$25,000 to \$30,000.

During the 2008 Session, legislation was introduced in both chambers (in the form of a Constitutional Amendment and companion statutory provisions) which would have raised from over \$10,000 to over \$20,000 the amount at which the right to a jury trial may be limited by statute. In this instance the MSBA opposed the measures, and the legislation failed.

MSBA 2009 POSITION: Monitor

SAMPLE LEGISLATION: House Bill 211, General Assembly of Maryland, 1996
House Bill 407, General Assembly of Maryland, 1997
House Bill 408, General Assembly of Maryland, 1997
House Bill 42, General Assembly of Maryland, 2000
House Bill 356, General Assembly of Maryland, 2000
House Bill 416, General Assembly of Maryland, 2000
House Bill 70, General Assembly of Maryland, 2001
House Bill 546, General Assembly of Maryland, 2001
House Bill 70, General Assembly of Maryland, 2002
House Bill 413, General Assembly of Maryland, 2006
House Bill 427, General Assembly of Maryland, 2006
House Bill 1109, General Assembly of Maryland, 2007
Senate Bill 403, General Assembly of Maryland, 2008
Senate Bill 404, General Assembly of Maryland, 2008

PUBLIC DEFENDERS AT BAIL REVIEW HEARINGS



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: PUBLIC DEFENDERS AT BAIL REVIEW HEARINGS

SUMMARY: One of the chronic problems in the detention facilities of some jurisdictions 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 Commission's Report states:

"Lack of complete discovery frustrates the early resolution of cases. Plea agreements are fostered when the defense is able to assess with confidence the strengths and weaknesses of the State's case. Defense disclosure of pertinent information within the limits of privilege and confidentiality likewise allows the State to better evaluate its case and sentencing options.

The State, defense, and detention centers also should be encouraged to collaborate to develop methods to facilitate attorney/client contacts, early status conferences and convenient access to treatment evaluators and providers. Emerging communication technologies should assist in this area. Special attention and accommodations should be made by the courts, prosecution and detention facilities to increase early participation by the defense bar."

Following the publication of the Final Report of the Commission on the Future of Maryland Courts, the MSBA Section of Correctional Reform began the process of drafting legislation and finding legislative sponsorship to enact the Commission's recommendation on early involvement of defense counsel into law. As part of its campaign, the Section requested the MSBA Board of Governors to endorse the concept of early involvement. The Board agreed to endorse the proposal and subsequently approved the CFMC's recommendation on this issue.

The Section of Correctional Reform's bill was filed in the 1998 General Assembly, but was defeated in the House Judiciary Committee. In 1999, prospects for

passage of the bill looked more favorable, but the switch of a key vote on the Senate Judicial Proceedings Committee doomed the legislation. In spite of this defeat, the inclusion of funds in the State budget to support a pilot project in the Baltimore City system allowed the program to begin. Results of this project produced strong evidence that this approach works, but despite these results and passage of legislation by the State Senate, the bill failed to come up for a vote in the House Judiciary Committee in the 2000 session. In 2001, the House Judiciary Committee killed the bill primarily because the Governor failed to provide funding for the program in the FY 2002 State Budget. In 2002 the bill was filed but was withdrawn when the Governor once again failed to provide sufficient funding, and in 2003 the bill was not filed.

MSBA 2009 POSITION: Support legislation to encourage earlier involvement of defense counsel in criminal cases, provided that the additional funding necessary for the Office of the Public Defender to establish a program to have counsel at bail review hearings of indigent defendants is available.

SAMPLE LEGISLATION: Senate Bill 335, General Assembly of Maryland, 1999
House Bill 889, General Assembly of Maryland, 1999
Senate Bill 138, General Assembly of Maryland, 2000

EMPLOYMENT DISCRIMINATION



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: EMPLOYMENT DISCRIMINATION

SUMMARY: Currently, 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.

During the past decade the General Assembly has considered a number of bills designed to grant the Maryland Human Relations Commission additional remedies in employment discrimination cases, but none of them has been enacted into law. Until the 2000 session the MSBA had either taken no position, monitored or referred the legislation to the Section of Administrative Law or the Section of Labor and Employment Law. Midway through the 2000 session, the MSBA adopted a position of "Support with Amendments" on House Bill 208, and formed a three-person subcommittee of the Committee on Laws to establish underlying principles that would provide a basis for amendments to the legislation. The proposed amendments would have required radical surgery upon House Bill 208 in order to accomplish the reforms recommended by the MSBA.

As originally proposed, House Bill 208 aimed at clarifying confusion in present law by establishing the responsibility and authority of administrative law judges and the courts in employment discrimination cases where there was intentional discrimination and illegal harassment of workers. Under the terms of the legislation any employer in the State, rather than only those with 15 or more employees which is current law, would be subject to the Maryland Human Relations statute. In addition, where an employer was found to have been engaged in an intentional and unlawful employment practice, Administrative Law Judges (ALJs) would be authorized to require payment of lost wages and assess compensatory damages for lost pay in the future, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other noneconomic damages. ALJs also would be empowered to award attorney and witness fees if employers were found to have engaged in unlawful employment practices. Complainants would have the option of having their cases decided in a civil action, and in some circumstances the court would be authorized to assess punitive damages against private (non-governmental) employers, issue injunctions and restraining orders, and take other actions deemed appropriate.

Because MSBA involvement on House Bill 208 was approved after the public hearing on the legislation had been held, the Association did not participate in the public hearings on the bill. The MSBA, however, proposed written testimony asserting that it would support an anti-discrimination bill if it included the following elements:

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

After the MSBA proposed this position, the Chairman of the House Commerce and Governmental Matters Committee accepted the Association's offer to provide assistance in drafting amendments to the legislation. That panel, however, decided to reject the proposal in late March, thereby ending any chance for further involvement.

In 2001 the MSBA entered the employment discrimination issue on several fronts. In addition to supporting with amendments the 2001 version of House Bill 208 from the 2000 session, the MSBA endorsed legislation to ban employment discrimination on the basis of genetic information, and joined a broad coalition in support of a bill to forbid housing and employment bias in cases concerning an individual's sexual orientation. The General Assembly passed the genetic information and sexual orientation measures, but the bill concerning the Human Relations Commission failed in the Senate Judicial Proceedings Committee by a close margin. The General Assembly passed no legislation on any employment discrimination issues in 2002 or 2003.

In the 2007 session, the General Assembly passed legislation 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. Previously, Maryland had been one of only 11 states to bar access to the courts in employment cases. The legislation also provides for remedies that may include a) compensatory damages based on the size of the employer; b) punitive damages if the respondent is a non-governmental entity and was found to have engaged in an unlawful practice with actual malice; and c) 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. The MSBA supported this legislation.

MSBA 2009 POSITION: Support legislation that would contain the following elements in cases involving anti-discrimination in employment practices:

1. A private right of action in state courts;
2. The right to trial by jury;

3. Meaningful compensatory damages;
4. The right to private counsel; and,
5. The right of the prevailing party to recover attorney's fees, expenses and costs.

SAMPLE LEGISLATION: House Bill 208, General Assembly of Maryland, 2000
Senate Bill 2, General Assembly of Maryland, 2001
Senate Bill 104, General Assembly of Maryland, 2001
Senate Bill 205, General Assembly of Maryland, 2001
House Bill 314 General Assembly of Maryland, 2007

ACCESS TO COURT RECORDS



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: ACCESS TO COURT RECORDS

SUMMARY: The burgeoning growth in the amount of information within the judicial system, and calls from some quarters to provide greater public access to this data, has prompted the Courts and the Maryland General Assembly to review present 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 citizens who have dealings that require judicial attention. In addition to extremely personal information associated with data collected for criminal investigations, proceedings in civil cases also generate details about individual lives that are inappropriate for widespread dissemination to the general public. Even in situations that appear reasonable, such as releasing criminal records to employers who are hiring applicants for positions of trust, questions are raised concerning the range of information necessary for distribution or review.

Another issue involves the method of making records available to the public of items that are considered suitable for release. Simply establishing a public policy that enables interested parties to go to the repositories where these records are kept may not be enough when relatively inexpensive technology exists to provide widespread access to this information through electronic means.

Yet a third major consideration is the expense of producing records for release to the public, especially if only paper records are available. Staff salaries of those searching for data, copiers and paper cost money, and questions are raised about who should bear the burden of paying for the production of data that may be organized and then marketed by private enterprises for a lucrative profit.

Information that private citizens take great pains to protect from others in order to prevent misuse may exist in a court file, and when located by others could lead to improper use of that data. Credit card numbers, social security numbers and arrest records are just a few of the examples of information that could be exploited for illegitimate purposes such as identity theft or character assassination. Conversely, many government agencies or commercial enterprises, concerned about hiring employees with criminal records for jobs that require the handling of cash or working with privileged communications, believe that barring access to a potential employee's criminal record could affect their operations adversely.

In addition to these difficulties, there are a host of other unintentional problems that may arise. Clerical errors are possible when data is recorded or transferred. Arcane

terms and procedures that are understood by those working within the court system may be misinterpreted by those who are unfamiliar with judicial proceedings. Innocent individuals with names that are the same as or similar to those who have criminal records may be harmed because of this coincidence. Juvenile records that are handled differently than those of adults may be released contrary to policies established in statute and practice. Some of these dangers have existed for many years, but it is the recent development of technology capable of assembling, organizing and transmitting data so rapidly that has heightened concerns over the sufficiency of existing procedures regulating the release of sensitive court records to the broader public.

In order to cope with problems in this area and to anticipate future difficulties, a task force consisting of those within the judicial system familiar with the extent of information contained in court records, began working on a report to update existing policies and practices governing the release of this data. This group's recommendation that access to court records be curbed significantly became public in late 2000 and was met with a firestorm of opposition from representatives of the press and business interests. Momentum calling for legislation to block many of the suggested changes from being implemented was slowed early in 2001 when the Chief Judge of the Court of Appeals decided to appoint a broader-based committee consisting of court officials and representatives of the legislature, businesses, public interest groups, and the media to revisit the subject and examine alternative approaches. The reconstituted task force formed subcommittees to thoroughly review a series of relevant topics and finished its work early in 2002.

The Report of the Committee on Access to Court Records contains seven general recommendations:

1. Court records should be open to the public in both paper and electronic form, and for both civil and criminal matters with minimal inquiry concerning the reasons for seeking access to this data.
2. Requests for access to electronic records should be granted subject to registration procedures and charging of reasonable fees for processing and distribution.
3. Records closed by statute or sealed by court order should continue to be off-limits to the public.
4. Efforts should be undertaken to insure maximum accuracy of all court records.
5. All court access policies should be uniform throughout the state.
6. Greater computerization of court records should be encouraged.
7. An on-going task force consisting of those familiar with court records should be formed to review additional necessary changes as they become apparent in the future.

MSBA 2009 POSITION: Monitor. Closely follow any legislation that impacts public access to court records.

SAMPLE LEGISLATION: House Bill 1461, General Assembly of Maryland, 2001

JUDICIAL POWER TO REVISE CRIMINAL SENTENCES



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: JUDICIAL POWER TO REVISE CRIMINAL SENTENCES

SUMMARY: Concern among some legislators that courts were using their power to reduce criminal sentences without sufficient justification or adequate notice to victims led to the introduction of several bills in the past five (5) legislative sessions to restrict this authority.

During the 2004 General Assembly session, several bills were introduced which would have constrained a judge's ability to revise a criminal sentence. The time limits that the bills would have imposed from the date of sentencing ranged from 1 year (Senate Bill 333) to 5 years (House Bill 464). Each of the bills applied only to crimes of violence. Concurrently, the Court of Appeals Committee on Rules of Practice and Procedure reviewed the implications of the current Rule 4-345, and options for altering the Rule. Ultimately, the leadership of the General Assembly decided to defer to the Court of Appeals' commitment to place a time limit on a judge's ability to revise a criminal sentence.

On May 10, 2004, the Court of Appeals amended Maryland Rule 4-345, Sentencing - Revisory Power of Court, to provide that ". . . the court has revisory power over the sentence except that it may not revise the sentence after the expiration of five years from the date the sentence originally was imposed on the defendant and it may not increase the sentence." The revised Rule applies to both violent and non-violent crimes.

History:

Although the three-judge panel sentence review concept has had its critics, primarily those who advocate mandatory incarceration statutes, it is the power of a single judge to revise a sentence many years after it has been rendered that has come under fire recently. Reports that some sentences had been revised without informing the victims of the crimes in question has served to focus media attention on the issue and this in turn has prompted legislators to call for changes.

Advocates for placing a time limit on or abolishing revisory powers of the courts believe the practice of changing a sentence after it has been imposed undermines public confidence in the Judiciary and places excessive burdens on prosecutors. They have based their arguments on a handful of cases in which they believe the sentencing judge reduced the conditions of confinement after the passage of too much time and outside public scrutiny. They stress the need to have some definitive date for a sentence to be rendered, after which only the Parole Board or the Governor could modify the terms of confinement or probation. Of critical

importance is the need for victims to have a sense of closure so that they may have satisfaction that justice was fair and complete. As part of this process, victims should be notified of all sentence modification proceedings and provided with the opportunity to protest any reductions in the length of incarceration time. In order to guard against widespread or arbitrary modifications, judges would be required to state in writing the reasons that any particular sentence was reduced.

Supporters of the present system see the judicial role in the sentencing process as central to insuring that the amount of time that those convicted of crimes must serve is sufficient to address the function of incarceration. As such, the sentencing judge must have the authority to revisit the case as he or she sees fit in order to make the punishment fit the crime in light of positive or negative developments during the term of imprisonment. No one, they contend, is better suited to review a criminal sentence than the judge who imposed that sentence. As far as victim notification of sentence reconsideration hearings is concerned, there is little controversy, but supporters of revisory powers steadfastly oppose allowing victims to present impact statements, because that opportunity was available at the time the original sentence was imposed. They see the court power to change the terms of confinement and probation as a necessary safety valve which, though used infrequently, is still available to those who have met the filing requirements and want to change their lives for the better.

Legislation to place a one-year time limit on judicial reconsideration of sentences was filed in 2000, but was killed in the House Judiciary on a close vote. A similar version of the bill was submitted in both the Senate and House in 2001, and momentum for passage appeared to be mounting in the wake of a series of newspaper articles, and coverage in the electronic media on the topic. The move to pass a bill was derailed, however, when the Court Committee on Rules of Practice and Procedure decided to review the issue and made recommendations to bolster the public notification methods, but not place a time limit. This action, combined with the offer by the Maryland Commission on Criminal Sentencing to study the extent to which original sentences are revised by judges, served to provide opponents with enough ammunition to defeat the proposal once again in the House Judiciary Committee. Proponents of the measure returned again in 2002, but were thwarted when the President of the Senate used his power to forestall floor action on the bill despite a favorable vote in the Judicial Proceedings Committee. In order to provide greater understanding of the use of revisory powers, the MSBA, in conjunction with the University of Baltimore Law School, conducted a study of the issue during the 2002 interim and shared its findings with the General Assembly during the 2003 session.

The study indicated that most judges consider the revisory power as a tool to insure rehabilitation of those convicted of crimes, and that the length of time for considering motions of this sort are in the one to two year range. Because this information seemed to support the arguments of those seeking to retain the present approach, many legislators on the House Judiciary Committee expressed reluctance to favor a bill to place what is currently practiced into statute. Recent comments by

some members of the Court Rules Committee, however, indicate that the Judiciary may consider this issue during the upcoming months.

MSBA 2009 POSITION: Support the Court's rulemaking authority with respect to a judge's ability to revise a criminal sentence.

SAMPLE LEGISLATION: House Bill 495, General Assembly of Maryland, 2005
House Bill 464, General Assembly of Maryland, 2004
Senate Bill 333, General Assembly of Maryland, 2004
House Bill 884, General Assembly of Maryland, 2000
House Bill 62, General Assembly of Maryland, 2001

CONTROVERSIAL ISSUES

CONTESTED CIRCUIT COURT ELECTIONS



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: CONTESTED CIRCUIT COURT ELECTIONS

SUMMARY: Circuit court judges in Maryland are appointed by the Governor, but must run in a contested election within two years following the first year of service.

Circuit court judges are the only judges in Maryland who must run in a contested election. Judges of the appellate courts are appointed by the Governor, confirmed by the Senate, and retained in office in elections based upon their records. District court judges are appointed by the Governor and confirmed by the Senate, but do not have to stand for an election.

The 1988 General Assembly considered the issue of contested Circuit Court elections. The House Judiciary Committee gave a favorable report on a 12-11 vote to House Bill 502 that would have made the Circuit Court selection process consistent with the selection method of the other Maryland courts (appointment by Governor, confirmation by Senate, retention election for a ten-year term). The full House of Delegates approved this measure by a 86-48 vote, one vote more than the required 60%. This was the first time that the House of Delegates had approved a bill to change the Circuit Court selection process. The Senate Judicial Proceedings Committee, however, rejected this bill on a 6-5 vote, thereby ending the chances for passage during the 1988 session.

Legislation concerning contested Circuit Court elections was not introduced in 1989, 1990 or 1991. A compromise proposal to eliminate contested elections for judges who have competed in the initial election following their original appointment and who had served their full term was put forward in 1992 but rejected. An attempt was made following the 2000 General Assembly session to rejuvenate interest in ending contested Circuit Court elections after the defeat of two African-American jurists in separate suburban jurisdictions during the late 1990's, but the lack of any broad-based coalition to support the effort effectively ended the campaign before it started. A half-hearted effort to pass a bill to eliminate the present system in 2002 also ended in failure. Despite the defeat of an African-American judge in Baltimore County and a highly divisive judicial campaign in Montgomery County during the 2002 election, the General Assembly soundly defeated a series of bills to reform the system in the 2003, 2004, 2005, 2006 **and 2007, and 2008** sessions, and the prospects for success any time soon are dim. Additionally, in 2005, 2006 and 2007, several bills were introduced that would have maintained the contested election system, but would have provided that judicial candidates compete for office on a non-partisan basis. All of the non-partisan judicial election bills failed.

The primary reasons s for supporting an end to contested Circuit Court elections are:

1. Many of the best qualified candidates for the circuit court are reluctant to give up their practices and careers when they must run the risk of losing their seat in a contested election.
2. The appearance of sitting judges accepting campaign donations from contributors, including those who have cases before them, undermines public trust in an independent judiciary.
- 3 . The Code of Judicial Conduct prohibits a sitting judge from ~~debating a non-judicial opponent or~~ 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~~ **the judicial campaign process becomes an inherently unfair process.**
4. The present system threatens the independence, integrity and competence of the Circuit Court.

MSBA 2009 POSITION: Support legislation that will eliminate contested elections for Circuit Court judges.

NOTE: This issue was put "ON HOLD" by the MSBA in 1993, 1994, 1995, 1996 and 1997. Consideration of the method of selecting judges was part of the mission of the Commission on the Future of Maryland Courts, which recommended removing Circuit Court judges from the contested election process.

SAMPLE LEGISLATION: House Bill 502, General Assembly of Maryland, 1988
Senate Bill 261, General Assembly of Maryland, 1992
Senate Bill 88, General Assembly of Maryland, 2003
House Bill 450, General Assembly of Maryland, 2004
Senate Bill 647, General Assembly of Maryland, 2004
House Bill 271, General Assembly of Maryland 2005
Senate Bill 206, General Assembly of Maryland, 2006
Senate Bill 647, General Assembly of Maryland, 2006
House Bill 1363, General Assembly of Maryland 2007
House Bill 1275, General Assembly of Maryland, 2008

IN-HOUSE COUNSEL



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: IN-HOUSE COUNSEL

SUMMARY: In the past, legislation has been introduced in the Maryland General Assembly to establish in statute the authority and privileges of in-house or corporate counsel.

Legislation filed in the 1989 and 1990 sessions concerned clarification that attorneys admitted to the Maryland Bar and employed by a corporation had the right to appear on behalf of that corporation during court and administrative proceedings with the same rights as an attorney in private practice. While the MSBA did not oppose these bills, questions were raised about whether there was a need for the legislation since there was little evidence that corporate counsels had been denied the right to represent their employers in court.

In the 1991 session a bill to establish the rights of corporate counsel to recover the same expenses in an action as an attorney in private practice was proposed. The MSBA Committee on Laws consulted with the MSBA Committee on Ethics, Committee on Client Protection, Section of Business Law and Section of General Practice prior to recommending that the MSBA Board of Governors oppose the legislation.

The primary reason for opposing the bill was that granting corporate counsel, who are salaried employees, the privilege of collecting the same amount as private attorneys would 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. An overwhelming majority of the House Judiciary Committee agreed with this argument and voted to reject the bill.

Following the conclusion of the General Assembly session, the Maryland Court of Special Appeals handed down an opinion that supported the arguments put forward by the MSBA on the in-house counsel issue. In an unreported opinion (*Equitable Bank, N.A. v. Edward R. Butler, et. al.*, No. 951, September Term, 1990) the Court stated::

"When a private attorney is retained, a substantial portion of his fee represents the overhead associated with a private law practice, i.e., office space, support staff, research materials, etc. An attorney who is employed as an in-house counsel by a corporation, however, receives a salary in addition to those items that constitute the overhead of a private practice. The in-house attorney is not required to pay for those overhead expenses out of his salary. Indeed, one very important purpose for employing in-house counsel is to avoid the high fees associated with retaining private firms."

No legislation concerning in-house counsel has been introduced since 1991.

MSBA 2009 POSITION: Continue to oppose any legislation that would enable corporations to collect attorney fees over the actual expenses incurred for the payment of the salaries and benefits to in-house counsel.

SAMPLE LEGISLATION: House Bill 664, General Assembly of Maryland, 1991

CRIME AND PUNISHMENT



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: MANDATORY SENTENCING

SUMMARY: 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: (1) violent crimes involving use of a handgun (Criminal Law Article, Section 4-204); (2) use of a firearm in relation to drug trafficking (Criminal Law, Sections 5-621); (3) subsequent drug "kingpin" offenders (Criminal Law, Sections 5-613 and 5-905); (3) subsequent drug distribution offenders in the vicinity of schools (Criminal Law, Section 5-627); and, (5) third conviction for a violent crime (Criminal Law Article, Sections 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.

The MSBA's opposition to mandatory sentencing in 1993 was based on several key points:

1. Mandatory sentencing is not an effective deterrent to crime because many potential offenders are unaware of which crimes have mandatory imprisonment provisions, and most criminals are confident that they will elude capture, and thereby never be subjected to any prison term.
- 2.. Many observers of the criminal justice system believe that some offenders avoid punishment in cases where evidence for a conviction, though substantial, may not be convincing enough to remove all reasonable doubts in the minds of some jurors of the defendant's guilt. In these cases, the prospect of a mandatory sentence may lead the jury to find a defendant innocent when a guilty verdict would have been more appropriate.
3. Judicial discretion is a key element in diverting some offenders away from a career of criminal activity. While some criminals deserve maximum sentences, rehabilitation programs either in lieu of or in conjunction with a prison sentence may be more appropriate in other cases. Mandatory sentences remove this flexibility and limit the likelihood that some of these offenders may return to

become productive and law-abiding citizens of our society.

4. Overcrowding in state and local correctional institutions has reached the point of crisis. More mandatory sentences only will serve to exasperate this problem. Until recently, laws with mandatory sentencing provisions have been approved without serious consideration given to the cost of additional prison space to house inmates for the entirety of their term.

Although the appeal of mandatory sentences has declined among many legislators in recent years, it is likely that measures containing these provisions will continue to be filed. There also has been greater interest in curbing the uses of parole and early release of prisoners, but the cost of building new facilities to incarcerate these inmates usually discourages even the most ardent anti-crime leaders from pushing these bills to passage. Given the current anti-tax mood of the General Assembly, and the price tag of a new state prison (\$100 million +), it is unlikely that any extensive new mandatory sentences will be approved in the immediate future.

In the 1996 session, the General Assembly established the Maryland Commission on Criminal Sentencing with the goals of examining sentencing practices in the state and recommending changes to these patterns, if warranted. The Commission's Final Report, issued in late 1998, recommended continuance of the body and affirmed the objectives of reducing disparity of sentences for similar crimes and maintaining judicial discretion. Legislation extending the life of the Commission passed on the last day of the 1999 session. It reaffirmed voluntary sentencing guidelines, but provided guidance to judges in determining appropriate punishment for criminal offenders. An amendment added to the bill provided for review of sentences by panels consisting of three judges who may change sentences and may override a statutorily imposed mandatory sentence by a unanimous vote by the panel. Since 1999 the momentum for adding new mandatory sentences has stalled as evidence has mounted around the country that the threat of certain imprisonment has more disadvantages than benefits. Given the present leadership of the legislative committees that consider bills with mandatory sentencing provisions, the prospects of passing bills of this sort are bleak.

During the Special Session of 2006, the General Assembly considered a number of bills which included mandatory minimum sentences for various sexual offenses. Although the MSBA opposed the mandatory sentencing components of the bills, in recognition of the seriousness of the crimes the MSBA supported legislation which proposed creating a task force to study the issue. That task force bill failed and the Legislature eventually passed legislation related to registered sexual offenders which included mandatory minimum sentences for certain offenses. That bill was enacted and signed by the Governor.

MSBA 2009 POSITION: Oppose all new mandatory sentencing provisions. Carefully monitor legislation that would remove mandatory sentences for those offenses where adequate diversion or rehabilitation programs are available.

SAMPLE LEGISLATION: Senate Bill 168, General Assembly of Maryland, 1994
House Bill 152, General Assembly of Maryland, 1997
Senate Bill 389, General Assembly of Maryland, 2003
House Bill 2, General Assembly of Maryland, Sp. Sess, 2006

FORFEITURE



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: FORFEITURE

SUMMARY: Developments in the United States Supreme Court, the Maryland Court of Appeals and the Maryland General Assembly led the Maryland State Bar Association to call for a review of forfeiture statutes in 1994.

Drug forfeiture laws were passed over two decades ago 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. Bills to extend the forfeiture principles to cases involving solicitation of prostitutes have failed to pass the General Assembly in recent years.

Greater attention was focused on forfeiture laws as a result of a U.S. Supreme Court decision (*United States v. James Daniel Good Real Property, et al.*) which barred the government from seizing real estate linked to illegal drug activity unless it provided the owner with a hearing in court. Although the Court acknowledged that forfeiture laws were intended to be powerful instruments to enforce narcotics statutes, it criticized overzealous enforcement of the laws because innocent owners were deprived of their property in violation of the Due Process Clause of the Fifth Amendment.

Two Maryland cases decided in early 1994 added greater uncertainty as to how the state forfeiture laws would be enforced. The Maryland Court of Special Appeals ruled that the owner of a seized vehicle could avoid forfeiture if the evidence showed he or she had no actual knowledge of the property's illegal use (*1988 Jeep Cherokee v. City of Salisbury*). Two months later the Court of Appeals held that when total circumstances justify the seizure of property in drug cases, the Judicial Branch may not conduct a review of the forfeiture decision. A minority of the Court agreed that while the law gives police broad discretion in cases involving forfeitures, their authority is not limitless, and the court is not powerless to correct an abuse of that discretion (*State v. One 1988 Toyota Pick-up Truck*).

Defense lawyers cited these cases as evidence that the law gives authorities too much discretion over a defendant's property, that there is uneven enforcement and that in some situations the harshness of the penalty does not fit the crime. They called for legislation to clear up ambiguities in Maryland's statute and provide for greater judicial authority.

In the 1990's there were more than 1000 seizures in the state worth millions of dollars in confiscated assets. In each successive year more property was seized. During this same period the anti-tax movement forced government officials to scramble for new

sources of revenues. Opponents of the forfeiture laws feared that without proper controls, such as judicial review of seizures, the temptation to take cash, real property and motor vehicles from suspected drug dealers as a means of compensating for budget shortfalls would be too great.

Legislation passed by the 1995 General Assembly allows courts limited authority to review forfeiture as a means of determining whether or not the seizures were in error or an abuse of discretion.

Action in the United States Supreme Court in 1996 gave prosecutors a victory when the panel ruled that forfeiture did not violate the double jeopardy clause of the U.S. Constitution which forbids multiple punishments for the same crime. Since that decision, the adoption of “zero tolerance” policies in drug cases in some jurisdictions has resulted in an increase in forfeitures.

At the federal level, the government has the power to seize personal property by merely showing “probable cause” that the property being confiscated was connected with the criminal act, and it’s up to owners to prove that the seizure was improper. Legislation has been introduced in Congress to change the law by shifting the burden of proof to the government to use a preponderance of the evidence standard that the property was used in connection with a crime. The American Bar Association supports asset forfeiture reform

In the 1998 session, a bill was filed that would have permitted forfeiture of motor vehicles if any occupant of that vehicle possessed illegal drugs. Several changes to the proposal that were recommended by the MSBA were adopted, including one striking the expanded power to forfeit. Under the new statute, a show cause order will not be required in applications for money or currency contraband forfeitures. Other changes include the establishment of a more equitable process for notification and bonding procedures to retrieve forfeited property, and an expanded role for the court in the process.

The only forfeiture bill to pass in the 1999 session added the State to the list of eligible government entities to receive seized property, and clarified that the jurisdiction that initiated the investigation that resulted in the forfeiture would be the one to receive proceeds from the sale of the action. No additional forfeiture bills have passed since that time.

MSBA 2009 POSITION: Monitor all legislation concerning forfeitures to insure adequate judicial review and inclusion of due process provisions.

SAMPLE LEGISLATION: House Bill 74, General Assembly of Maryland, 1995
House Bill 75, General Assembly of Maryland, 1997
HR 1965 (short title and table of contents.). U.S. House of Representatives, 1997

**CIVIL JUSTICE
(TORT REFORM)**



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: CIVIL JUSTICE (TORT REFORM)

SUMMARY: 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 chose instead to pass some limits on awards while examining the underlying factors that led to the rapid rise in insurance premiums.

Over the past decade, there have been a broad range of General Assembly proposals to amend tort law, while the courts in Maryland have issued numerous opinions on the same topics. In most instances, the legislature has avoided dramatic changes in this area, preferring instead to let the Judicial Branch take the lead. Two Court of Appeals' decisions of particular importance, *Owens-Illinois, Inc., et al. v. William Zenobia, Sr., et al.* concerning punitive damages, and *U.S. v. Glenn D. Striedel, et al.* dealing with the legislatively-imposed cap on non-economic damages in wrongful death cases led to several bills in the General Assembly to revise the law in these areas. All but one of these measures, (the successful 1994 bill to raise the cap on non-economic damages to \$500,000 per individual/\$750,000 to multiple claimants applied prospectively with a \$15,000 annual adjustment), have failed.

In other areas of tort law, the General Assembly has made some modest adjustments in immunities for particular groups, but has not adopted comparative negligence, modified joint and several liability, changed the collateral source rule or accepted a loser pays approach. Recent developments in Congress indicate that there is growing interest in passage of Federal legislation that would preempt some State laws, primarily those in the medical malpractice area.

MEDICAL MALPRACTICE

In June 2003, the legislatively-created Medical Mutual Liability Insurance Co.(Med Mutual), which is the largest insurer of physicians in Maryland, requested a

large rate increase. Not long thereafter, a significant portion of the requested rate increase was granted. The rate increase granted to Med Mutual for 2004 prompted several unsuccessful legislative proposals during the 2004 session, including a proposal drafted by a House workgroup comprised of members of the Economic Matters Committee, the Health and Government Matters Committee, and the Judiciary Committee. Following the failure of the 2004 legislation, a Senate Special Commission on Medical Malpractice Liability Insurance was formed in the 2005 interim to consider all aspects of the medical malpractice issue, including patient safety, comprehensive insurance reform, physicians' reimbursements, and the tort system for medical malpractice claims. The Governor also organized a task force during the interim that met to study the issue.

Maryland Patients' Access to Quality Health Care Act of 2004

The Governor issued an Executive Order calling the General Assembly into a special session on December 28, 2004, to take immediate action to address the recent increases in the cost of medical malpractice insurance. Bills crafted by the Administration, the Speaker, and the Senate Special Commission were introduced. Drawing from the three bills, the General Assembly amended House Bill 2 of the 2004 Special Session to offer a comprehensive package to address the malpractice crisis. Although House Bill 2 was vetoed by the Governor, the veto was overridden by the General Assembly before the start of the 2005 session. Included in the reforms of HB 2 are several changes affecting medical malpractice claims.

Among the features of House Bill 2 were provisions which lowered the cap on noneconomic damages, altered of the method for calculating economic damages, mandated alternative dispute resolution, made changes in the required expert certifications, and created an offer of judgment option.

Other Tort Measures Introduced During the 2005 Session

Some believed that further reforms were needed beyond those enacted by House Bill 2 of the 2004 Special Session. A number of other bills were introduced to address the perceived shortcomings of HB 2, all of which failed.

MSBA 2009 POSITION: Oppose major changes in the tort system which unduly restrict individual rights and which unreasonably disrupt traditional common law concepts of the tort system. Support initiatives that expand alternative dispute resolution programs to the extent that these programs do not decrease access to the court system.

SAMPLE LEGISLATION: See discussion above



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: CERTIFICATE OF MERIT- LICENSED PROFESSIONALS

SUMMARY: Legislation was filed in the 1996 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 (Section 3-2A-04, Courts and Judicial Proceedings Article). 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.

Under the provisions of the 1996 legislation, a qualified expert, defined as a licensed professional in Maryland who practices in the same field as the defendant and who devotes at least 80% of the professional time to that discipline, would be required to certify any malpractice claim. The qualified expert's statement would have to include an opinion that the licensed professional being sued failed to meet the standard of care within the profession and caused the injury through negligence, misconduct, error or omission. The bill set a 90-day limit, with a possible extension upon a finding of good cause, for the plaintiff to file the certificate of merit.

The 1996 proposal attempted to mirror the qualified expert approach used in health care malpractice claims, but failed to reconcile the significant differences in the methods for handling the respective cases. Unlike medical malpractice suits, where there is a statutory right to get records from the health care provider and where hospitals and other health care facilities may provide additional information, there is no independent source of background data to document the cause of action against construction and design professionals. Any suit against a surveyor, architect, engineer, interior designer, or landscape architect would be a case in which the defendant possesses all of the pertinent information and has a proprietary interest in controlling that information.

Supporters of the certificate of merit approach contend that design and construction professionals must pay high insurance premiums to protect themselves against the possibility of frivolous lawsuits, and must spend additional funds to prepare their defense when weak cases are filed. They believe that the certificate of merit requirement would stop marginal lawsuits early in the process and save them these insurance and defense costs.

On the other side are those who disagree with the underlying premise of the proposal. They dispute the proponents' claim that there are a multitude of frivolous lawsuits being filed. The opponents also state that adding another step to the litigation process would slow down cases, add to costs, and have a chilling effect on citizens with meritorious cases. They say that passage of the bill in all likelihood would lead to the growth of a cottage industry of "qualified experts" who would be available to certify claims. Lastly, they complain that the 90 day, or even 180 day, time frame for filing the certificate of merit is too constrictive to conduct a sufficient analysis of a potential claim.

When the certificate of merit bill was filed in 1997, the MSBA supported the bill with amendments. The changes proposed by the MSBA focused on allowing qualified professionals from other states to serve as experts, expanding the time frame available to claimants to obtain a certificate, and providing claimants with access to information that would have been discoverable in civil actions. This legislation passed the House of Delegates with most of the MSBA-proposed amendments, but did not come up for a vote in the Senate before the General Assembly adjourned.

A bill containing all of the MSBA-endorsed amendments to the 1997 measure was approved overwhelmingly by the General Assembly in the 1998 session. Since that time there have been no bills to change the law in this area.

MSBA 2009 POSITION: No position until legislation is available.

SAMPLE LEGISLATION: Senate Bill 143, General Assembly of Maryland 2005
House Bill 1347, General Assembly of Maryland, 1997
House Bill 188, General Assembly of Maryland, 1998



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: COLLATERAL SOURCE

SUMMARY: 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.

In support of the collateral source rule, proponents 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. They further argue 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 argue 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.

Recent 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.

When these early attempts to eliminate the collateral source rule failed, proponents of change introduced legislation late in the session to permit modification or remittitur of damages in medical malpractice awards if modification is supported by evidence. This proposal was passed by the legislature and signed by the Governor. The statute excludes workers’ compensation, life insurance policies and employee benefits from consideration in the calculations.

The statute authorized defendants to require that an award of damages be reduced by the amount a plaintiff obtains from other sources. Some award sources such as workers’ compensation, life insurance policies and employee benefits were excluded from consideration.

An effort to change the collateral source rule was undertaken in 1996 as part of the Governor’s bill to bring down automobile insurance rates in Baltimore City. The proposals passed, but only after the sections dealing with collateral source were

removed.

MSBA 2009 POSITION: Oppose any changes in the collateral source rule.

SAMPLE LEGISLATION: House Bill 155, General Assembly of Maryland, 1988



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ISSUE: COMPARATIVE NEGLIGENCE

SUMMARY: The comparative negligence rule contends that a plaintiff may recover damages in tort actions even if the blame was shared. In contrast, the contributory negligence approach bars recovery by a plaintiff who did not exercise reasonable care and contributed to the harm suffered.

A total of 46 states have some form of comparative negligence method, ranging from those with the pure type in which a plaintiff may recover damages regardless of the amount of negligence, to those with tighter standards (50% or 49% negligence). Maryland is one of the four states along with the District of Columbia that uses a contributory negligence standard. Although this provision does not appear in the State code, it has been consistently upheld in Maryland courts as an interpretation of common law. The contributory negligence rule does not apply in cases where the defendant's conduct is willful or wanton.

Over the past decade and a half, bills to establish comparative negligence in Maryland have been introduced eight times (1988, 1993, 1996, 1997, 1998, 1999, 2000, 2001). Comparison of the evolution of these bills indicates the sponsors' recognition that any comparative negligence statute must be linked with changes in joint and several liability. It is this linkage that, at least in part, has contributed to the defeat of the bills as lawmakers and interested organizations have struggled to draft language that enables plaintiffs to collect damages when one or more of the defendants is impecunious and, at the same time, protects defendants from paying a disproportionate share of the award.

In 1988, the MSBA followed the advice of the Section of Negligence, Insurance and Workers' Compensation and the Section of Litigation to withhold support or opposition to the comparative negligence principle until legislation was available. The absence of any comparative negligence bills in the 1989-1992 sessions precluded any MSBA involvement in the issue. The MSBA Board of Governors voted to support (with amendments affecting joint and several liability) the 1993 comparative negligence bill, but the proposal was withdrawn before the Association could comment publicly. In 1996, the MSBA testified in favor of comparative negligence if amendments abolishing joint and several liability were added, but the bill was withdrawn before a committee vote. The 1997 version of the bill died in the House Judiciary Committee by one vote, despite the MSBA's offer to assist legislators to craft a bill that would balance the interest of both plaintiffs and defendants under a comparative negligence system. A similar proposal filed in 1998 was killed in the Senate Judicial Proceedings Committee in large part due to the intense opposition of local government officials. Proponents of comparative negligence hoped that changes in committee assignments after the 1998 election would improve chances for passage of legislation. This optimism, however, was

not warranted, as the bill died once again in the House Judiciary Committee in large part due to the efforts of local governments fearful of the change. In 2000 and 2001, the comparative negligence bills died by a substantial margin in the Senate Judicial Proceedings Committee and the version filed in 2002 languished in the Senate Rules Committee from the day it was introduced until *sine die*. No comparative negligence legislation was filed in 2003.

Opponents of comparative negligence contend that passage of such a statute 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. They underscore the need to build in changes to other legal doctrines--joint and several liability, assumption of the risk, strict liability--if a comparative negligence statute was approved. Finally, they challenge supporters of comparative negligence to demonstrate any serious flaws in Maryland's use of the contributory negligence principle, and predict that passage of comparative negligence would have an adverse affect on the state's business climate.

Supporters of adopting comparative negligence in Maryland argue that contributory negligence unjustly bars plaintiffs from recovering losses in cases where their responsibility for the damage was minimal. They point to the experience of the courts in 46 states that have some form of comparative negligence where the method has been tested over the years. In turn, they challenge opponents of comparative negligence to demonstrate any adverse affects on the business climate of those 46 states that have adopted the principle.

Identical Senate and House bills were introduced during the 2007 session attempting to change Maryland from a contributory negligence state to a comparative negligence state. Not since the 2002 session had the legislature considered similar legislation. The bills did not contain provisions relating to joint and several liability, and no amendments affecting joint and several liability were offered in either chamber. The bills would have provided that, in an action to recover damages for negligence that resulted in property damage or the death of or injury to a person, the fact that the plaintiff may have been contributorily negligent would not bar recovery by the plaintiff if the negligence of the plaintiff was less than the negligence of the defendant or the combined negligence of all defendants. Any damages awarded to the claimant would have been diminished in proportion to the amount of negligence attributed to the claimant. Maryland remains one of five jurisdictions, along with Alabama, North Carolina, Virginia, and the District of Columbia, in which contributory negligence on the part of a plaintiff completely bars any recovery by the plaintiff for damages.

After careful consideration of this legislation, the Board of Governors voted to take no position, either in support or opposition of the measure.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: House Bill 1314, General Assembly of Maryland, 1988
House Bill 1094, General Assembly of Maryland, 1993

House Bill 846, MSBA Redraft with Cover Letter, 1997
House Bill 551, General Assembly of Maryland, 1999
Senate Bill 483, General Assembly of Maryland, 2001
House Bill 110, General Assembly of Maryland, 2007



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ISSUE: FEE SHIFTING (“LOSER PAYS”)

SUMMARY: With the election of Republican majorities in both houses of Congress in 1994, efforts were undertaken to rejuvenate a variety of tort reform proposals that had been thwarted by Democrats who had controlled the House of Representatives for over four decades. Among those issues that became legislatively viable for revision were product liability, medical professional liability, collateral source rule, limits on awards, punitive damages, caps on contingency fees, joint and several liability, and structured payments.

A bill was submitted in the 1995 Maryland General Assembly to require courts to allow the prevailing party to recover legal fees and costs of litigation from the losing party. The bill was introduced only in the State Senate and was defeated by a large majority in Senate Judicial Proceedings Committee. Since that time, no serious effort has been undertaken to pass a “loser pays” bill in the legislature.

Some Maryland statutes and court decisions define when attorneys’ fees and costs are available, and Maryland Rules provide for sanctions when actions are brought or pursued in bad faith. The MSBA opposed the 1995 Senate Bill because in the pursuit of discouraging “frivolous” lawsuits, the proposal also would dissuade potential litigants with meritorious cases from seeking legal redress. In addition, the bill did not define the term “prevailing party” which could have led to the unintended effect of more litigation, as the parties squabbled over who won and who lost in cases where there was a close call or a complicated settlement. The MSBA also stressed that the measure was anti-middle class, as the wealthy could afford to pay legal costs, large businesses could hire in-house counsel, and the poor would never be able to pay for their own attorneys, much less those court costs and fees incurred by the other side.

MSBA 2009 POSITION: Monitor. Closely follow bills that require courts in civil cases to allow a party to recover their attorney fees and court costs from the other party.

SAMPLE LEGISLATION: Senate Bill 188, General Assembly of Maryland, 1995



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ISSUE: HEALTH CLAIMS ARBITRATION

SUMMARY: The Health Claims Arbitration Office (HCAO) was established in 1976 as a means of arbitrating claims against health 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 1985, the Special Committee on Health Claims Arbitration of the MSBA issued a report to the Board of Governors recommending numerous changes to the HCAO including: specific lists to be used in selecting panel members; authority of the Director of the Office; jurisdiction in cases involving non-health care providers; allocation of costs, interest payments or awards; rules of evidence; and, the process for transferring cases to the Circuit Court.

In recent legislative sessions, most of the proposals dealing with the HCAO have centered on qualifications and requirements of panel members, restrictions on attorney's fees and expenses in cases involving "bad faith" or without substantial justification, and the qualifications of expert witnesses. During the 1989 General Assembly, the MSBA supported a successful bill that prevented a physician from serving as a qualified expert in cases in which that physician was a defendant.

In 1995 legislation passed to permit claimants or defendants to waive unilaterally the arbitration of a claim before the HCAO under specified circumstances. No bills affecting this process were passed by the General Assembly until 2005.

In 2005, the office was renamed the Health Care Alternative Dispute Resolution Office (Chapter 5, Acts of Special Session of 2004), as part of the medical malpractice reform legislation which was enacted during the Special Session of 2004.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: House Bill 2, General Assembly of Maryland, Special Session, 2004.
House Bill 1263, General Assembly of Maryland, 1995



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ISSUE: IMMUNITY FOR SPECIAL INTEREST GROUPS

SUMMARY: 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 staff of the House Judiciary Committee undertook a study of those entities that had statutory immunity under Maryland law. After thoroughly reviewing the Code of Maryland and researching numerous court cases, the Judiciary Committee staff concluded that no fewer than 75 special interest groups enjoyed some form of immunity from civil liability. After reviewing the analysis, the Judiciary Committee concluded that the time had come to curb the process of picking apart the tort system piece by piece through statutory immunities. In order to establish a clearer sense of which groups did or did not deserve immunity, it was agreed to combine the various immunities into one area of the Maryland Code. As a consequence, legislation was approved in the 1990 session consolidating the provisions of existing law concerning immunity from liability, limitations on liability, and prohibited actions.

In the 1993 legislative session there were no successful attempts to expand special interest group immunities although a bill to clarify the liability of community service providers did pass. In 1994 proposals passed to limit liability of certain non-profit organizations to the amount of insurance available to these groups. No immunity bills passed in 1995 or 1996, although an effort to increase limits on the liability of law enforcement officers came close to enactment. In 1997, the General Assembly provided immunity for legislators in Maryland and other states for acts or omissions within the scope of their public duties in communications on behalf of constituents under specific circumstances. Three other groups--owners of sports shooting ranges, volunteer engineers at the scenes of emergencies or disasters, and emergency medical service providers--also were given limited immunities. On all of these bills, the MSBA was instrumental in narrowing the scope and refining the language of the new statutes.

In 1998, the limited immunity given to engineers at scenes of emergencies or disasters was extended to architects, and limited immunity was given to landowners who allow their property to be used for historical reenactments. No additional immunities for non- governmental entities were enacted in 1999, but a limited immunity bill for governments affected by problems related to Year 2000 information technology failure was enacted. In 2000, two immunity bills passed. The first expanded the duty of care and liability applicable to public and private land used for recreational or educational purposes, while the second made fiduciary institutions and their officers and employees immune for actions in restricted situations involving disclosure of customer financial records. In 2001, a bill to provide limited immunity to child safety seat installers passed

as did legislation providing for partial protection for those who comply with statutory requirements when notifying authorities of excavation or demolition projects near underground facilities.

In 2002 legislation providing limited immunity for those who abandon or accept and provide care to newborn babies was approved. In 2003, legislation providing limited liability to clearly defined community associations was approved after sponsors agreed to advice from the MSBA.

In 2005 legislation was introduced which created civil immunity for individuals providing emergency medical aid to persons in certain medical facilities under specific circumstances. The bills did not pass.

In response to a 2006 decision of the Court of Appeals (*Fox v. Wills*), which held in part that counsel appointed by the courts to represent the interests of children were not immune from civil liability, legislation was proposed to authorize the courts to appoint attorneys to represent children and to provide immunity for those appointed attorneys. Although the MSBA's position on civil immunity is to closely follow legislation that provides for immunity from civil liability, it supported the initial legislation which included the immunity provisions, based upon the concern that without qualified immunity attorneys would not be willing to serve. The legislation that eventually passed which provided guidance for attorneys representing the interests of children did not include immunity provisions.

MSBA 2009 POSITION: Monitor. Closely follow legislation that provides for immunities from civil liability for any additional special interest groups, bearing in mind that the MSBA opposes decreases in access to civil justice.

SAMPLE LEGISLATION: House Bill 256, pages 1-4, General Assembly of Maryland, 1997
House Bill 383, General Assembly of Maryland, 1997
House Bill 1125, General Assembly of Maryland, 1997
Senate Bill 635, General Assembly of Maryland, 1999
House Bill 913, General Assembly of Maryland, 1999
Senate Bill 816, General Assembly of Maryland, 2000
House Bill 296, General Assembly of Maryland, 2000
Senate Bill 35, General Assembly of Maryland, 2001
House Bill 467, General Assembly of Maryland 2003
House Bill 113, General Assembly of Maryland, 2005
House Bill 700, General Assembly of Maryland, 2006
Senate Bill 664, General Assembly of Maryland, 2006



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ISSUE: JOINT AND SEVERAL LIABILITY

SUMMARY: 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 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 defendants, and recover a separate judgment against each. These added burdens would deprive many deserving plaintiffs of compensation and allow considerable wrongful conduct to go unchecked.

Requiring defendants to be jointly and severally liable recognizes that a plaintiff's injuries would not have occurred at all without each defendant's misconduct. In many cases, injury produced by the combined negligence of several defendants could have been completely avoided had any one defendant not been negligent. The retention of joint and several liability increases the probability that injured parties will receive adequate compensation for damages, thereby ensuring one of the primary goals of tort law.

Proponents of abolishing joint and several liability contend 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 are disproportionately affected.

In the 1987 General Assembly, the MSBA opposed unsuccessful legislation that would have abolished joint and several liability. The issue was referred to the Section of Negligence, Insurance and Workers' Compensation the next year which recommended NO POSITION until specific legislation was available. As no bills concerning joint and several were introduced between 1989 and 1992, the MSBA did not have the opportunity to voice a position on joint and several liability. In 1993, a bill linking modification of joint and several liability and comparative fault was filed. The MSBA opted to support the bill with amendments, but the proposal was withdrawn before the Association could comment. A similar measure was filed in 1996 and once again withdrawn, but only after the MSBA had testified in support with amendments to abolish

joint and several liability if comparative negligence was approved. In 1997 and 1998, the MSBA again testified in support of a comparative negligence bill that would modify joint and several liability. This legislation failed in the House Judiciary Committee in 1997 and 1999, and was defeated in the Senate Judicial Proceedings Committee in 1998. In 2000, there was no legislation concerning joint and several liability and the bill on comparative negligence died so quickly that there was no opportunity for the MSBA to comment on any joint and several liability amendments to the proposal. The MSBA did have the chance to testify on the comparative negligence bill with the recommendation of an amendment on joint and several liability in 2001, but the measure died before the amendment process could begin. In 2002 the comparative negligence bill never emerged from the Senate Rules Committee, and no comparative negligence bills were introduced in 2003.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: See Comparative Negligence Section



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ISSUE: LIMITS ON AWARDS

SUMMARY: 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). Losses of an economic nature can be documented and quantified. Non-economic losses (pain and suffering, mental anguish), are more difficult to determine because of the subjective nature of the extent of the damage.

Punitive damages are highly controversial and have been the subject of extensive debate in the courts, state legislatures throughout the country, and in Congress. (See Punitive Damages Section of this Program.)

In 1992 the Maryland Court of Appeals concurred with the Maryland Court of Special Appeals decision that reduced a \$1.8 million award in the case of *Richard A. Edmonds v. Sarah Murphy*, 325 Md. 342 (1992) holding that the State of Maryland's \$350,000 cap on pain and suffering damages does not violate the equal protection doctrine by treating severely injured victims the same as those with milder injuries. This decision was the first time that the State's highest court had ruled on the legislatively-mandated damage cap. In 1993, however, the Court of Appeals ruled that the cap only applied to personal injury cases and not wrongful death actions (*U.S. v. Glenn D. Striedel, et al.*).

The 1994 General Assembly approved and the Governor signed legislation to include wrongful death in non-economic damage limits, but raised the amount of the ceiling to \$500,000 per individual and \$750,000 in cases with multiple beneficiaries, on a prospective basis with a \$15,000 annual adjustment.

Between 1994 and 1999 there were signs that a *modus vivendi* had been reached on the cap on damage awards, but the filing of a bill to remove the limit for asbestos and tobacco cases in 1999 disrupted the truce. The legislation failed but was submitted again in 2000 in a modified form. Another proposal that was introduced would have removed the cap entirely. Both bills died in the House Judiciary Committee. With two successive years of failure behind them, proponents of changing the damage cap decided to forgo a battle over the past three sessions. Legislation concerning damage awards should be reviewed carefully. Every effort should be made to assure that the total amount of the award is adequate to compensate victims and to deter potential

offenders. In 2004 and 2005 legislation was introduced to either freeze or reduce the statutory cap on non- economic damages. House Bill 2 of the Special Session of 2004 froze the cap on noneconomic damages in certain medical malpractice cases at \$650,000 through calendar year 2008.

In 2008, legislation was introduced to repeal the \$15,000 annual upward adjustment in Maryland's cap on noneconomic damages. The bill received an unfavorable report from the House Judiciary Committee.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: Senate Bill 283, General Assembly of Maryland, 1994
House Bill 1060, General Assembly of Maryland, 1999
House Bill 263, General Assembly of Maryland, 2000
House Bill 2, General Assembly of Maryland, Sp. Sess.
2004
House Bill 606, General Assembly of Maryland, 2008



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ISSUE: LOCAL TORT CLAIMS ACT

SUMMARY: The Local Tort Claims Act was enacted in 1987, and has been amended several times since then, to provide citizens injured by local government officials with a remedy for compensation, while at the same time protecting local government employees from the threat of a multitude of lawsuits. Prior to enactment of this legislation a tort victim could not sue local governments because of the sovereign immunity doctrine, and had no recourse but to sue local government employees responsible for the tortuous act.

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 liability limit of local governments is set at \$200,000 per individual and \$500,000 per total claims that arise in each occurrence. Local governments may not be held liable for either direct or vicarious liability that may result in punitive damages, but may indemnify employees for judgments for punitive damages up to \$200,000 per person and \$500,000 per claim.

In principle, the Local Tort Claims Act is designed to mirror the Maryland Tort Claims Act in that it accepts responsibility for most acts or omissions of employees committed within the scope of employment while it requires employees to be responsible for any acts involving malice.

Bills that sought to further modify the liability of a local government for its employees were submitted in 1993 but were not passed. No action on this issue was taken in 1994, 1995, or 1996, but in 1997 a bill was approved to include the Baltimore City Police Department in the definition of local government under the Local Tort Claim Act. There were no bills affecting the Act in 1998. In 1999, adjustments to the Act were passed concerning indemnification of law enforcement officers and interest on judgments. In 2000, there were several bills dealing with the Local Tort Claims Act but only a minor change was enacted.

During the interim between the 2000 and 2001 sessions, the Court of Appeals, in a unanimous decision, voided the cap on damages for local governments (*Housing Authority of Baltimore City v. Crystal Bennett*). The 2001 General Assembly however, trumped the Court by passing a bill to make the Local Government Tort Claims Act apply retroactively to 1987. Additional challenges to retroactive legislation presently are pending in the Court of Appeals. Although several bills concerning the Local Tort Claims Act were filed in 2002 and 2003, none of these were approved.

MSBA 2009 POSITION: Monitor specific bills that would modify the Local Tort Claims Act and oppose any additional restrictions on a citizen's right to civil justice.

SAMPLE LEGISLATION: Senate Bill 486, General Assembly of Maryland, 1997
Senate Bill 715, General Assembly of Maryland, 2000
Senate Bill 264, General Assembly of Maryland, 2001



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ISSUE: MARYLAND TORT CLAIMS ACT

SUMMARY: The Maryland Tort Claims Act was enacted in 1981, and amended in 1985, 1989, 1992, 1994, 1995, and 1999 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 the sovereign immunity doctrine, and had no recourse but to sue the state employee responsible for the tortuous act.

In the amended version of the Maryland Tort Claims Act, the State has waived its immunity under certain circumstances and limits awards up to a specific monetary ceiling. For example, in cases involving ordinary negligence, the State may be sued; whereas, in actions involving gross negligence, the state employee is liable.

In 1994 legislation was successful to overrule a Court of Appeals decision (*Leppo v. State Highway Administration*) that held that the 180 day written notice of claim requirement applied to third party claims. The statute adds third party claims to cross-claims and counterclaims as types of claims exempted from the limit. In 1995, the 180 day written notice provision was extended to one year and the limit was raised to \$100,000 per individual claim. In 1997, language was added to the Maryland Tort Claims Act reversing a 1989 change and thereby provided coverage to personnel in State offices that are funded by local governments (e.g. state attorneys, Circuit Court employees, Orphans' Court judges). There were no changes in the Maryland Tort Claims Act proposed in 1998. In 1999 the limit was raised to \$200,000 thus making the State Tort Claims Act cap consistent with that of the Local Tort Claims Act. No changes to the Act passed in the last four sessions.

MSBA 2009 POSITION: Support legislation that makes the cap in tort cases involving the state consistent with the limit in local government suits. Closely follow other bills that would modify the Maryland Tort Claims Act and oppose any additional restrictions on a citizen's right to sue.

SAMPLE LEGISLATION: House Bill 1275, General Assembly of Maryland, 1997
House Bill 466, General Assembly of Maryland, 1999



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ISSUE: PRODUCT LIABILITY

SUMMARY: 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 in recent years.

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. Among the proposals offered by those who favor restrictions on plaintiffs' rights are:

1. Abolishing or severely limiting punitive damages;
2. Adopting a "state of the art defense" which holds that manufacturers are not 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;
3. Requiring victims to discover and prove what was "knowable" and "feasible" about a product's design;
4. Barring recovery to all victims who have been injured by a product over a specific age;
5. Establishing a less stringent standard of negligence; and,
6. Reducing awards by any amount paid by workers' compensation.

In 1981 the ABA House of Delegates passed a resolution that opposed a broad federal products liability statute on the grounds that it restricted the rights of U.S. consumers by depriving them of the advice of carefully defined product liability laws in their respective states and would prevent them from improving their laws through state courts and legislatures.

Because Maryland products liability law has been established primarily in the courts, supporters of limits have indicated that legislation may be proposed 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.

Legislation was filed during the 1990 session that proposed extensive changes in

Maryland product liability law, but was withdrawn soon after introduction. Since that time no new bills specifically relating to products liability law have been introduced.

In 1996, Congress passed significant changes in product liability law that would have had a dramatic effect on the handling of cases in state courts, but the proposal was vetoed by President Clinton. Pressure to enact broad changes in tort law at the federal level persists and may include product liability provisions which may pass Congress and survive Presidential scrutiny.

MSBA 2009 POSITION: Oppose legislation that would replace Maryland common law with regard to product liability, recognizing that if change is to be made it should be affected uniformly.

SAMPLE LEGISLATION: House Bill 27, General Assembly of Maryland, 1990



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ISSUES: PUNITIVE DAMAGES

SUMMARY: Punitive or exemplary damages are designed to punish a defendant and to deter others from similar conduct. During the past few years national media attention on punitive damages has increased due in part to recommendations of former President Bush's Council on Competitiveness to change the process for awarding punitive damages, and as a consequence of a U.S. Supreme Court decision on the issue, *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). The debate on the federal level was reflected in Maryland both in the courts and in the legislature.

The Council on Competitiveness Recommendations 25-29 urged that punitive damages should be awarded rationally and consistently within a coherent system; that specific dollar amounts should not be assigned; that awards be established in a separate proceeding; that punitive damages be warranted only when "clear and convincing" evidence supports the award; that the trial judge determine the amount of the award; and, that the amount of punitive damages should not exceed the amount of compensatory damages.

The American Bar Association through its ABA Blueprint for Improving the Civil Justice System objected to some of the Council's recommendations, referred some of the Council's points to various ABA sections and committees and has supported a few of the proposed changes. In general, the ABA favored greater flexibility than the Council in the punitive damage process. For example, whereas the Council favored entirely separate proceedings for the trial and the award, the ABA supported discretionary bifurcation. On one point, however, the Council and the ABA agreed: Punitive damages should be awarded when the evidence is "clear and convincing."

In the courts, the U.S. Supreme Court focused attention on punitive damages when it announced a decision in the *Pacific Mutual v. Haslip* case. In that decision the Court said that in the future, due process may limit the amount of punitive damage awards, awards must be based upon articulated standards, a reasonable relationship must exist between the amount of compensatory and punitive damage awards, and punitive damages must be "reasonable in amount and rational in light of their purpose." Following the directives of *Haslip*, supporters of changes in the law of punitive damages proposed legislation in the 1992 General Assembly which they felt would bring state law into line with the principles espoused in the decision.

Opponents of changing punitive damages law strongly disagreed that Maryland needed to pass a statute to comply with *Haslip* because present law already satisfied the requirements articulated in the case. The foes countered that the policy reason for

the proposal (viz. the business climate of the state is harmed by the availability of excessive punitive damage awards) was bogus, and the legal directives were unnecessary in light of the Court of Special Appeals decision, *Alexander & Alexander, Inc. v. Evander*, 88 Md. App. 672, 599 A. 2d 687 (1991), that found Maryland practice to be consistent with the Supreme Court requirements.

To a large extent, the punitive damages debate was simplified when the Maryland Court of Appeals issued its decision in mid-February 1992 in the *Owens-Illinois, Inc. et al. v. William Zenobia, Sr. et al.* case. The Court of Appeals decision in *Zenobia* established a "clear and convincing" standard of proof for the award of punitive damages, and that the standard of conduct, at least in products liability cases, must be characterized as "actual malice" or "actual knowledge of the defect and deliberate disregard of the consequences." With this action, the Court established in law one of the key objectives of the legislation, leaving only those sections of the bill that would effectively remove business owners and managers from liability for the harmful acts of subordinates.

The debate on punitive damage awards in the 1993 session vaulted beyond the issues raised in the 1992 session to include the question of applying punitive damages in drunk and drugged driving cases. A bill was filed to overrule *Zenobia* by establishing an implied malice standard of conduct in actions involving negligent operation or entrustment of a conveyance (e.g., vehicles, vessels, locomotives, streetcars, trains, aircraft). Approval of this proposal would have meant that the standard of conduct for all common law non-intentional torts established in *Zenobia* would be replaced by the implied malice standard that had been in place for almost twenty years prior to that ruling [*Smith v. Gray Concrete Pipe Co.*, 267 Md. 167 (1972)].

The General Assembly decided that delaying action on punitive damage bills until the Court of Appeals ruled on some important cases was the appropriate approach. Consequently, no action on the drunk driving/punitive damage issue was taken in 1993 because a case (*Komornik v. Sparks*) dealing with the subject was pending before the Court of Appeals. Although the Circuit Court decision in *Komornik* that juries in civil drunk driving cases cannot consider punitive damages was affirmed, plaintiff's lawyers decided to forego efforts to push bills to override the courts for the 1994 and 1995 sessions. Both supporters of greater restrictions on punitive damages and advocates of greater access to these awards accepted a truce on the issue in hopes that another pending appellate case (*Charles Ellerin, et al. v. Fairfax Savings F.S.B.*) would favor their respective views.

In the middle of the 1995 session, the *Ellerin* case was announced in favor of the defendants. Not only did this opinion affirm that "actual malice" in fraud cases must be proven to allow punitive damages, but in a footnote the Court cited the cap on criminal fines (\$1 million for drug kingpins, \$500,000 for commercial crimes in the antitrust area, \$10,000 for fraud) as a guide for legislative intent on punitive damage awards. Because of the timing of the decision, pro-plaintiffs advocates decided not to go to extremes in the General Assembly in any attempt to override this decision. With the focus of the punitives debate moving to Congress, the effort to override the Court's views was half-

hearted in 1996. General Assembly leaders appeared reluctant to engage in a bloody struggle over punitive damages, especially since neither side appeared to have the votes to pass a bill. This approach was repeated in the 1997 and 1998 sessions.

The calm on the legislative front has not been reflected in the judicial arena. Two significant court rulings, one in the U.S. Supreme Court and the other in the Maryland Court of Appeals, have had an impact on the award of punitive damages in Maryland.

In *BMW of North America, Inc. v. Gore* [116 S.Ct.1589 (1996)], the U.S. Supreme Court reversed the Alabama Supreme Court punitive damage award of \$2,000,000 in a case involving an automobile purchaser who had not been informed by the foreign manufacturer, American distributor, and dealer that the car had been repainted after being damaged prior to delivery. In a five to four decision, the Court determined that the due process clause of the 14th Amendment prohibits a State from imposing a grossly excessive punishment on a tort-feasor, and that while each state may use punitive damages to protect its own consumers, it may not use this deterrent to regulate behavior in other states or the entire nation.

The Maryland Court of Appeals in *Bowden v. Caldor* [350 Md. 4 (1998).], provided a comprehensive restatement of numerous rulings concerning punitive damages in prior cases, and significantly based its opinion on principles of Maryland common law. By doing the latter, the Court asserted that the question of punitive damages for excessiveness in Maryland is adequate and independent of any action in federal courts. Untouched by the opinion was any action in this area that may be taken by the Maryland General Assembly to either restrict or expand the availability of punitive damage awards in the state.

Over the past few sessions, the MSBA has gone to great lengths to bring civility and reasonableness to the punitive damages debate, as competing interests have engaged in heated public relations and lobbying campaigns. In 1994, for example, when the punitive damages controversy was at its height, the MSBA brokered a “procedural cease fire” and convinced advocates for plaintiffs and defendants to withdraw support for their respective bills until the Maryland Court of Appeals had resolved a pending case involving punitive damages. In following sessions, the MSBA did not participate in the drafting of punitive damage bills, and urged proponents of these bills to focus their efforts on other issues that would pass the General Assembly rather than pursuing punitive damage bills that would create a great deal of anger with few results.

This posture was modified somewhat in the 1999 session when the MSBA decided to support with amendments a bill that would enact an implied malice standard for punitive damages only in drunk driving cases. The MSBA’s proposed amendments would have expanded this principle to drugged driving and enraged driving cases by using a “driving behavior” standard rather than a “specific substance” standard. While these amendments were considered by some members of the House Judiciary Committee as reasonable in theory, political considerations dictated that any change in punitive damage law at this time was unwise and the bill was rejected. The bill was reintroduced in 2000 and was defeated. Owing to the failure of the measure the year

before, the MSBA chose to remain neutral. In 2001, the MSBA also remained neutral on a bill that would have allowed crime victims to collect punitive damages. The legislation was withdrawn and not introduced in 2002 or 2003.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: House Bill 224, pages 1-3, General Assembly of Maryland, 1992

House Bill 329, pages 1-7, General Assembly of Maryland, 1992

House Bill 323, (MSBA Redraft with Cover Letter, March 18, 1999), General Assembly of Maryland, 1999

House Bill 459, General Assembly of Maryland 2001



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: STRATEGIC LAWSUITS AIMED AT PUBLIC PARTICIPATION (SLAPP)

SUMMARY: 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 are seeking 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."

In opposing the SLAPP suit legislation during the 1992 session, the MSBA did not object to the stated objectives of the bills--to protect the right of free speech. The issues of concern were the absence of a clear definition of SLAPP suits in the bills and the availability of a remedy to discourage these types of actions (Rule 1-341 Bad Faith--Unjustified Proceeding). The measures were defeated, but because the goal of the bills was commendable, the MSBA Committee on Laws offered to study the issue to examine ways to make the legislation acceptable.

Although hundreds of SLAPP suits have been identified in the U.S., few have resulted in appellate decisions. In 1992, a Circuit Court decision in Frederick County granted a motion for summary judgment to dismiss a SLAPP suit. In granting the motion the Court concurred with the defendants that the plaintiff's suit was intended to "harass those seeking petition to the government, one of our basic First Amendment rights." In its memorandum in support of the motion for summary judgment, counsel for the defendants identified four criteria to distinguish SLAPP suits from legitimate civil suits. The suit must:

1. Be a civil complaint or counter claim for monetary damages and/or an injunction;
2. Be filed against non-governmental individuals or groups;
3. Result from communications to a government body or official or the public; and,
4. Address an issue of some public interest or concern.

In June 1993, the Court of Special Appeals affirmed the decision granting summary judgment, but found it unnecessary to deal with the SLAPP suit issue in its opinion.

Among the suggestions of alternatives to legislation banning SLAPP suits have



been the recommendations that the courts strengthen rules pertaining to bad faith litigation or that the legislature pass a statute enabling defendants in SLAPP suits to file a countersuit against plaintiffs to, in effect, SLAPP back.

Legislation as originally submitted in the 1994 General Assembly contained a broad affirmation of the SLAPP suit principle. The MSBA worked with sponsors of the proposal to modify the bill to permit a defendant to request a stay in court proceedings to give a judge time to determine the validity of the alleged SLAPP suit. The modified bill passed the House of Delegates but did not come up for a vote in the Senate Judicial Proceedings Committee before the session ended. The bill has suffered the same fate in every session between 1995 and 1999, and was not filed in 2000, 2001 or 2002.

In 2003, despite overwhelming support for a SLAPP suit bill in the House of Delegates, and a favorable vote from the new chairman of the Senate Judicial Proceedings Committee, the legislation failed to obtain a favorable report by the narrowest of margins.

In 2004 legislation was introduced again to provide limited immunity against SLAPP suits. The bill included the provisions supported by the MSBA in the 2003 bill. This time the bill passed in the Senate Judicial Proceedings Committee, and went on to pass by wide margins in both chambers. The bill establishes that a lawsuit is a 'strategic lawsuit against public participation' (SLAPP) suit if it is: (1) brought in bad faith against a party who has exercised specified federal or State constitutional rights of free speech in communicating with a government body or the public at large; (2) materially related to the defendant's communication; and (3) intended to inhibit the exercise of free speech rights. The bill provides immunity from civil liability to a defendant in a SLAPP suit who acts without constitutional malice in exercising rights protected by the first amendment of the U.S. Constitution, and Articles 10, 13, and 40 of the Maryland Declaration of Rights. A defendant in an alleged SLAPP suit may move to dismiss the suit, or move to stay all court proceedings until the matter about which the defendant communicated to the government body or the public at large is resolved.

MSBA 2009 POSITION: Monitor. Closely follow legislation addressing this issue.

SAMPLE LEGISLATION: House Bill 930, General Assembly of Maryland, 2004
House Bill 134, pp 1-2, General Assembly of Maryland, 1997

**2009
STATE LEGISLATIVE**

PROGRAM

MARYLAND STATE BAR ASSOCIATION, INC.

ISSUE: STRUCTURED PAYMENTS

SUMMARY: 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 contend 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 go instead to insurance companies.

There has been little interest since the mid-1980's in pursuing legislation to mandate structured payments, although a bill to allow the State to enter into structured payment arrangements was passed in 1996. In 1999, however, another area of the structured settlement system emerged. A bill that was filed late in the session proposed to curb the practice of transferring structured settlement payment rights unless certain conditions were met by the parties involved in the transfer. The goal of the bill was to protect the interests of the beneficiaries of the structured settlements from those who were seeking to trade quick cash payments that were far below the value of the structured settlement. While the bill died in the 1999 session, it built support for the concept so that when it was reintroduced in 2000 it passed. No structured payment legislation was filed in 2001 or 2002, but a bill to permit defendants to design their own settlements to suit themselves was introduced in 2003. The measure failed to obtain a favorable Judiciary Committee vote.

MSBA 2009 POSITION: Oppose mandate of structured payments.

SAMPLE LEGISLATION: House Bill 320, General Assembly of Maryland, 1996
House Bill 357, General Assembly of Maryland, 2000
House Bill 832, General Assembly of Maryland, 2003

INSURANCE



MARYLAND STATE BAR ASSOCIATION, INC.

2009
STATE LEGISLATIVE
PROGRAM

ISSUE: NO FAULT AUTO INSURANCE

SUMMARY: No fault auto 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 the "monetary threshold" approach, claimants are required to submit medical expenses over a certain amount prior to initiating litigation.

The battle over no fault insurance in Maryland began in the early 1970's. The issue was defused in 1976 when the General Assembly approved a Personal Injury Protection

(PIP) bill that provided for no fault insurance up to \$2500 worth of coverage. A broadened no fault concept resurfaced in 1989 where it was used as a bargaining chip to obtain favorable consideration of choices within PIP insurance. The mandatory no fault bill, and another measure that proposed to set up a voluntary no fault system, both died in committee.

In the 1990 and 1991 sessions, the only no fault bills to be filed died in committee. No fault bills were introduced in the House of Delegates in 1992 and 1993 but were not even afforded the opportunity for a hearing. There were no bills concerning no-fault insurance in the 1994 session, and the 1995, 1996, 1997 and 1998 versions were killed in committee. There have not been any No Fault bills filed since 1998, but that does not mean that interest in the concept has evaporated.

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.

The goals of the supporters of no fault insurance are 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. Proponents of no fault insurance base their arguments on the assumption that increased litigation is 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 per cent of all premium dollars. They suggest that Maryland drivers could save as much as \$87 per car under a true no fault insurance system.

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. No fault opponents emphasize the importance of maintaining a citizen's right to seek compensation for injuries, and the necessity of making drivers responsible for their actions. Defenders of the traditional tort approach believe that requiring drivers to have insurance that pays for damages to others serves as a deterrent, and that 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.

As a means of increasing support for their arguments, advocates of no fault laws have shifted their attention from broad statutes that would require all drivers to purchase no fault insurance, to a system whereby consumers could select between no fault and traditional liability policies, the so-called CHOICE PROPOSALS. Under this approach, a policyholder may give up the right to sue and in return be protected from the suits of other drivers except in well defined and very limited circumstances.

Critics of CHOICE PROPOSALS cite the structural bias of this approach in favor of those who select no fault. In accidents involving a no fault automobile operator and a driver with traditional liability insurance, advocates of CHOICE contend that the insured party with no fault should be protected against lawsuits. The consumer who paid for the right to sue may exercise that option by seeking payment for their damages from their own insurance company under uninsured motorist coverage. The consequences of this approach, claim opponents, would be a dramatic increase in the liability insurance option premiums in comparison to the payments of no fault drivers.

At the federal level, legislation to enact federal no fault automobile insurance with an "opt-out" provision for states not wishing to participate was introduced in 1997. The American Bar Association successfully opposed this bill, preferring instead to let states decide their own form of motor vehicle accident reparation system.

AUTOMOBILE INSURANCE SYSTEMS STATE-BY-STATE COMPARISON

PURE TORT Injured parties may sue other drivers for the full extent of injuries: Alabama, Alaska, Arizona, California, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, Wyoming (29).

ADD ON Automobile accident victims receive "Personal Injury Protection" (PIP) benefits from their own insurance company up to a specified limit: Arkansas, Delaware, Maryland, Oregon, Pennsylvania, South Carolina, Texas, Washington (8).

VERBAL THRESHOLD Injured drivers must demonstrate that damages fit the definition of "serious" as described in the statute in order to sue for their damages. All other damages are compensated by a driver's own company: New York, Michigan, Florida (3).

MONETARY THRESHOLD Injured victims' medical expenses must exceed a specific dollar amount or meet a verbal threshold in order to bring a lawsuit: Colorado, Connecticut, Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, New Jersey, North Dakota, Utah (10).

MSBA 2009 POSITION: Strongly oppose all no fault proposals. The specter of no fault insurance will haunt Maryland for the next few years as policy makers grapple with ways to lower auto insurance premiums. Instead of tampering with the rights of victims to seek compensation for damages, elected and appointed officials should concentrate their attention on abuses within the tort system involving fraud, the impact of the antitrust exemption for insurance companies, the interaction between fluctuations in insurance company investments and premium increases, and the design of reliable, independent baseline studies to determine the underlying reasons for high automobile insurance premiums.

SAMPLE LEGISLATION: House Bill 341, pages 13-27, General Assembly of Maryland, 1997



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: PERSONAL INJURY PROTECTION COVERAGE (PIP)

SUMMARY: 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.

Advocates of optional PIP believe that the changes passed in 1989 will lower premiums for policyholders who have alternative insurance plans.

Supporters of mandatory PIP contend that the elimination of a significant percentage of policyholders under optional PIP will deprive the system of many low-risk drivers. The loss of the revenue from these drivers will cause the premiums of those remaining in the system to skyrocket, leaving many low-income drivers with no choice but to drop their coverage altogether.

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. A bill to place limits on insurers' ability to reduce or deny PIP claims passed the House of Delegates but died in the Senate Finance Committee in 2000. A bill to raise the PIP limit to \$3500 was filed in the 2001 session but failed. No bills concerning PIP were introduced in 2002 or 2003.

MSBA 2009 POSITION: Monitor any additional changes in the PIP system.

SAMPLE LEGISLATION: Senate Bill 637, General Assembly of Maryland, 1988
House Bill 841, General Assembly of Maryland, 2000



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: PEOPLE'S COUNSEL FOR INSURANCE

SUMMARY: 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 noncommercial 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 noncommercial utility users. The People's Counsel must be an attorney licensed to practice law in Maryland. The Governor has the right to appoint the People's Counsel with the advice and consent of the Senate.

In recent years, legislation has been introduced 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. Under these bills the new responsibilities would enable the People's Counsel to protect insurance policyholder interests by appearing before the Insurance Division or the courts on issues relating to insurance rates, services and procedures.

The concept of a public advocate on insurance issues has been fought vigorously by the insurance industry which claims that self-regulation is adequate. The MSBA decided to support the People's Counsel on Insurance late in the 1989 session, arguing that the industry had failed to provide adequate safeguards for consumer interests and that the threat of litigation would help lower insurance rates.

Calls for revisiting the idea of establishing an Office of People's Insurance Counsel, either as a freestanding agency, or as a unit within the Office of the Attorney General occurred again during the 2004 and 2005 Sessions, as part of the debate over escalating medical malpractice insurance premiums. Bills introduced in both years failed.

MSBA 2009 POSITION: Monitor legislation dealing with an Office of People's Counsel on Insurance.

SAMPLE LEGISLATION: House Bill 542, General Assembly of Maryland, 1989

TITLE COMPANY REGULATION



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: REGULATORY FRAMEWORK

SUMMARY: 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 unauthorized practice of law. Of specific concern to these attorneys are title company services that include: (1) conducting real estate closings without representation by attorneys; (2) preparing deeds and other documents affecting the title to real estate; (3) preparing lien instruments such as mortgages; and, (4) 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, Clients' Security Trust Fund, Rules of Practice and Procedure), title companies and title agents are under the scope of the Insurance Commissioner, and, prior to 1995, had few specific regulations covering their activities.

The general provisions relating to all insurers contained within Article 48A of the Maryland Code, commonly referred to as the Insurance Code, also 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. Additionally, the state has established certification qualifications common to all insurance agents.

The 1995 General Assembly significantly modified the regulation of the title insurance industry. News reports heightened public awareness of thefts from title company escrow accounts and the exemption given to lawyers from regulation by the Insurance Division. Under legislation that was approved, the Insurance Commissioner may refuse to certify title insurance agents and brokers who employ convicted felons in a fiduciary capacity. Additionally, bonding and continuing education requirements for title agents and brokers who are not lawyers have been stiffened, and financial oversight of the industry has been increased. Lawyers who sell title insurance must register with the Insurance Division but are exempt from all other licensing requirements unless they own a title company or work through title agents. A move to repeal this statute was thwarted in 1996.

Legislation passed in 1997 altered the method by which title company reserves are applied to contracts, but did not make changes in the basic regulatory structure of title companies. No effort has been made to overturn the Interest on Trust Accounts (IOTA) statute enacted in 1992 that requires title companies to distribute interest from their escrow accounts to the Maryland Affordable Housing Trust.

MSBA 2009 POSITION: Support legislation that will insure proper enforcement of the IOTA statute.

SAMPLE LEGISLATION: None.

**SUBSTITUTED SERVICE
OF PROCESS**



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: SUBSTITUTED SERVICE OF PROCESS

SUMMARY: The MSBA opposed a bill in the 1998 General Assembly that would have authorized substituted service of process in civil actions upon resident agents of insurance companies when defendants could not be located.

The 1998 legislation was proposed as a solution to the problem faced by plaintiffs who are unable to 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 Board of Governors, acting on the recommendation of the Committee on Laws and the Section of Litigation voted to oppose 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 would in all likelihood refuse to pay in these cases leaving plaintiffs no better off than before the substituted service of process.

After the 1998 measure was voted out of the House Judiciary Committee on a 13-7 vote, additional questions about how the law would affect existing Rules of Procedure were raised by the MSBA, the Maryland Judicial Conference and the insurance industry. These arguments found a more favorable reception with the full House of Delegates which voted to defeat the bill 72-55.

In 1999, proponents of the substituted service bill of the prior session offered to work with opponents of that measure to achieve a satisfactory statute to assist plaintiffs in locating hard to find defendants. The result was legislation that requires 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. A modest clarification of this bill passed in 2000. No bills on substituted service of process were submitted in 2001, 2002, or 2003

MSBA 2009 POSITION: Monitor substituted service of process legislation until a bill is available.

SAMPLE LEGISLATION: House Bill 273, General Assembly of Maryland, 1998
House Bill 603, General Assembly of Maryland, 1999

EMINENT DOMAIN



MARYLAND STATE BAR ASSOCIATION, INC.

**2009
STATE LEGISLATIVE
PROGRAM**

ISSUE: EMINENT DOMAIN

SUMMARY: Both the federal and state constitutions expressly limit condemnation authority by establishing two requirements for taking property through the power of eminent domain. First, the property taken must be for a “public use.” Maryland courts have broadly interpreted the term “public use.” Second, the party whose property is taken must receive “just compensation.” The damages to be awarded for the taking of land are determined by the land’s “fair market value,” a term defined by statute.

Historically, the State has used its 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.

In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) that New London, Connecticut’s use of its condemnation authority under a state law to require several homeowners in an economically depressed area to vacate their properties to make way for mixed use development did not violate the U.S. Constitution. In essence, the *Kelo* decision left the determination to state law as to whether eminent domain may be used for economic development purposes.

As a result of the *Kelo* decision, a large number of bills were introduced during the 2006 Session that were designed either to nullify the effect of the *Kelo* decision or to clarify its holding by providing, among other things, a more specific definition of damages and stricter provisions for computing them. Due to conflicting opinions on these bills, the Laws Committee recommended to the Board of Governors that the MSBA monitor all the bills. The Board approved that position. In considering the bills before it, the Laws Committee reached a consensus on several basic principles in connection with eminent domain legislation:

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

2009 MSBA POSITION: Monitor