ANNUAL REPORT

And

OFFICIAL OPINIONS

Of The

ATTORNEY GENERAL

Of

MARYLAND

1990

J. JOSEPH CURRAN, JR.

ATTORNEY GENERAL

CONTENTS

ATTORNEYS GENERAL OF MARYLAND

This office was permanently separated from that of Secretary in 1657. Under royal government (1690-1715) there were two Attorneys General, one for the Proprietary and one for the King. The office was continued under the Constitution of 1776. Other places held by any Attorney General during his incumbency are indicated in each case.

Lt. Richard Smith, Sr., of Calvert County (Prot.), appointed by the Provincial Court, 28 Sept. 1657.

Capt. Thomas Manning of Calvert County (Prot.), com. by the Let. Gen., 20 Feb. 1660/1.

Col. William Calvert of St. Mary's City (Cath.), sworn 12 June 1666.

Col. Vincent Lowe of Talbot County (Cath.), sworn 13 Dec. 1670. Resigned after appointed Sheriff of Talbot County.

Kenelm Cheseldyne of St. Mary's City (Prot.), sworn 6 April 1676.

Thomas Burford of Charles County (Prot.), appointed by His Lordship and sworn 4 Oct. 1681; died in office in March, 1686/7.

Robert Carvile of St. Mary's City (Cath.), com. by Chancellor Henry Darnall, pursuant to Lord Baltimore's instructions, 3 April 1688. Superseded by Carroll.

Charles Carroll of St. Mary's City and of Anne Arundel County (Cath.), formerly of the Inner Temple, London; com. by the Proprietary, to hold office during good behavior, 18 July 1688; arrived in Maryland 1 Oct. and was confirmed in office by the Deputy Governors, 13 Oct. 1688. After 1 Aug. 1689 he continued as Lord Baltimore's Attorney General until the restoration of Proprietary government. On the death 17 June 1711, of Col. Henry Darnall I, his father-in-law, he succeeded to the offices of Agent and Receiver General and Keeper of His Lordship's Great Seal.

Col. George Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.

Edward Wynne of St. Mary's County (Prot.), sworn crown Attorney General, 5 April 1692; died in office shortly before 8 Sept. 1692.

Col. George Plater I, sworn 8 Sept. 1692; resigned to be Naval Officer of Patuxent shortly before 21 Oct. 1698. He was Receiver of Patuxent and, until Nov. 1696, Collector of the Same. He married, about 1694, Anne, dau. of Thomas Burford above.

Maj. William Dent of Charles County (Prot.), com. by Gov. Nicholson, 22 Oct. 1698, resigned 8 May 1702. He was again commissioned by Gov. Seymour, 16 May 1704, and continued to serve until his death in Nov. 1704. He was also Naval Officer of North Potomac, and in May, 1704, he became joint Commissary General.

Col. William Bladen of Annapolis (Prot.), wife (Cath.), com. by Gov. Seymour as Her Majesty's Attorney General, succeeding Dent, 4 Dec. 1704; sworn His Lordship's Attorney General, succeeding Carroll, 1 May 1716; died in office 1 Aug. 1718. He was Naval Officer of Annapolis, and in Aug., 1708, he became sole Commissary General.

Thomas Bordley of Annapolis (Prot.), sworn 6 Sept. 1718; dismissed in September, 1721. He was sole Commissary General. He died 11 Oct. 1726.

Daniel Dulany, Sr., of Annapolis (Prot. protege and former clerk of George Plater above), succeeded Bordley, 10 Oct. 1721. Until July, 1724, he was joint Commissary General. He resigned in 1725.

Michael Howard of Talbot County (Prot.), sworn 19 Oct. 1725. He was appointed Surveyor General of the Eastern Shore in June, 1726, and Naval Officer of Oxford about 1727. He resigned in 1734.

Daniel Dulany, Sr., succeeded Howard in Oct. 1734, and was also sole Commissary General; resigned in 1744.

Henry Darnall III of Prince George's County (Prot., convert, wife and children Cath.), com. and sworn 19 April 1744; appointed Naval Officer of Patuxent, 24 May 1755; persuaded to resign early in 1756.

Stephen Bordley of Annapolis (Prot., son of Thomas Bordley above), com. 26 March and sworn 26 May 1756; suffered a paralytic stroke and resigned in Dec. 1763; died 6 Dec. 1764. He was Naval Officer of Annapolis until March, 1762, when he became sole Commissary General.

Edmund Key of Annapolis (Prot., mother Cath.) com. 26 Dec. 1763 and sworn 10 April 1764; resigned shortly before his death on 4 May 1766.

Robert Goldsborough of Dorchester County (Prot.), sworn 8 April and com. 4 June 1766. Resigned in October, 1768; member of the Continental Congress 1774-1776; High Sheriff of Dorchester County, September 1761 to 1764; member of the Council of Safety in 1775; member of the Provincial Assembly from 1764 to 1766; member of the Convention which framed Maryland's Constitution; State Senator from 1777 to 1782; Died Dec. 22, 1788.

Thomas Jennings of Annapolis (Prot.), sworn 18 Oct. and com. 27 Oct. 1768; recom. 29 April 1773. He was appointed State Attorney General in April 1777, but was succeeded, on 6 Jan. 1778, by Benjamin Galloway. He was a relative of former Deputy Secretary Edmund Jennings.

(Reprinted from "His Lordship's Patronage," pages 132-34, by permission of the author, Professor Donnell M. Owings, Department of History, University of Oklahoma.)

Luther Martin 1778

William Pinkney 1805

John Thomas Mason 1806

John Johnson 1806

John Montgomery 1811

Luther Martin 1818

[1]Nathanial Williams, Assistant Attorney General 1820

Thomas B. Dorsey 1822

Thomas Kell 1824

Roger B. Taney 1827

Josiah Bayley 1831

George R. Richardson 1845

Robert J. Brent 1851

[2]Alexander Randall 1864

Isaac D. Jones 1867

Andrew K. Syester 1871

Charles J. M. Gwynn 1875

Charles B. Roberts 1882

William Pinkney Whyte 1887

John P. Poe 1891

Harry M. Clabaugh 1896

---

[1] During the physical incapacity of Luther Martin, 1820-1822, the Governor appointed Nathanial Williams, Assistant Attorney General to act as Attorney General.

[2] The office of Attorney General was abolished by the Constitution of 1851, but was re-established by the Constitution of 1864 (Art. V. Sec. 1).

---

[3] During Mr. Ritchie's absence, June 1918-January 1919, while serving as General Counsel of the United States War Industries Board, Ogle Marbury became Acting Attorney General.

[4] On September 30, 1952, Mr. Hammond resigned as Attorney General to accept an appointment to the Court of Appeals of Maryland. Mr. Harvey was designated by Governor McKeldin to be Acting Attorney General until the new Attorney General qualified.

[5] *See* note 4.

[6] Mr. Edward D. E. Rollins qualified as Attorney General on the 14th of November, 1952.

[7]C. Ferdinand Sybert 1954

[8] [9] [10]Thomas B. Finan 1961

[11]Robert C. Murphy 1966

[12]Francis B. Burch 1966

Stephen H. Sachs 1979

J. Joseph Curran, Jr. 1987

---

[7] Resigned January 12, 1961, to accept an appointment to the Court of Appeals of Maryland.

[8] Appointed January 13, 1961, to serve unexpired term of former Attorney General.

[9] Elected at election of November, 1962.

[10] On October 13, 1966, Mr. Finan resigned as Attorney General to accept an appointment as an Associate Judge of the Court of Appeals of Maryland.

[11] October 13, 1966, Mr. Robert C. Murphy was sworn in as Attorney General to serve for Mr. Finan's unexpired term.

[12] Mr. Francis B. Burch was elected Attorney General in the November, 1966 election and was sworn in on December 16, 1966.

OFFICE OF THE ATTORNEY GENERAL

J. Joseph Curran, Jr. . . . . Attorney General

Judson P. Garrett, Jr. . . . . Deputy Attorney General

Dennis M. Sweeney . . . . Deputy Attorney General

Jack Schwartz . . . . Chief Counsel, Opinions and Advice

Ralph S. Tyler . . . . Chief of Litigation

Robert A. Zarnoch . . . . Chief Counsel, Legislation

*James G. Klair . . . . Chief Counsel, Administration;
Counsel to the Courts

Evelyn O. Cannon . . . . Principal Counsel, Trial Litigation

Elizabeth L. Nilson . . . . Special Assistant to the Attorney General

Karen U. Smith . . . . . . Special Assistant to the Attorney General

---

Offices: 200 Saint Paul Place
Baltimore, Maryland 21202

*Resigned

ASSISTANT ATTORNEYS GENERAL

ANTITRUST DIVISION —

*Michael F. Brockmeyer, *Chief*
Robert N. McDonald, *Chief*

Alan M. Barr
Ellen S. Cooper
Katharine M. Ebersberger
Dana H. Fox
*Craig J. Hornig
Laura C. McWeeney
R. Hartman Roemer
Meredyth A. Smith
John R. Tennis

ASBESTOS LITIGATION —

Janet E. LaBella, *Chief*
Marlene Trestman, *Deputy*

Deborah A. Donohue
David M. Kennedy
Amy B. Kushner
Steven P. Lemmey
Mary L. Lucasse
Shelley E. Mintz

CITIZEN INQUIRY AND VICTIM ASSISTANCE —

Stuart G. Buppert, II

CIVIL DIVISION —

Ralph S. Tyler, III, *Chief of Litigation*
Evelyn O. Cannon, *Principal Counsel, Trial Litigation*

Andrew H. Baida
Lucy A. Cardwell
Lawrence P. Fletcher-Hill
*Verna H. Glass
Diane Kresja
*Mark D. McCurdy
Elizabeth Nilson
Lawrence H. Norton
Carolyn Quattrocki
Carmen Shepard
Karen U. Smith

*Resigned

Correctional Litigation Unit —

Richard M. Kastendieck, *Supervising Attorney*

Glenn W. Bell
Maureen M. Dove
Stephanie Lane-Weber
Ronald M. Levitan
Timothy J. Paulus

CONSUMER PROTECTION DIVISION —

William Leibovici, *Chief*
Peter V. Berns, *Deputy*

James P. Abbott
Rebecca Bowman
Vincent DeMarco
*Hillary Sloane Gebler
William D. Gruhn
*Sayra Wells Meyerhoff
Jacqueline W. Mintz
John H. Nethercut
Steven M. Sakamoto-Wengel
Lucy Weisz

CONTRACT LITIGATION UNIT —

William A. Kahn, *Principal Counsel*
Jeffrey H. Myers, *Deputy*

Jay N. Bernstein
Brian W. Craver
Mark S. Dachille
Mark J. Davis
Joseph P. Gill
Edward S. Harris
Dana A. Reed
*Lawrence G. Rosenthal

COURTS AND JUDICIAL AFFAIRS —

*James G. Klair, *Counsel*
Alexander Wright, Jr., *Counsel*

Julia M. Freit
Susan P. Whiteford

*Resigned

Criminal Appeals Division —

Gary E. Bair, *Chief*
*Jillyn K. Schulze, *Deputy*
Mary Ellen Barbera, *Deputy*
Richard B. Rosenblatt, *Senior Counsel for Capital Litigation*

Ann N. Bosse
Cathleen C. Brockmeyer
Thomas K. Clancy
Audrey Creighton
Tarra R. DeShields
Kathryn Grill Graef
Kreg P. Greer
Beverly P. Griffith
Mary Ann Ince
Diane E. Keller
Gwynn X. Kinsey, Jr.
M. Jennifer Landis
Annabelle L. Lisic
Alfred Novotne
Sarah E. Page
Valerie M. Smith

Criminal Investigations Division —

Lynne A. Battaglia, *Chief*
Christopher J. Romano, *Deputy*

Ben C. Clyburn
Carolyn H. Henneman
Karen J. Kruger
Norman L. Smith

Educational Affairs Division —

John K. Anderson, *Chief Counsel*
Lawrence White, *Deputy*
William F. Howard, *Deputy*

Valerie V. Cloutier, *Principal Counsel*
Department of Education

James P. Abbott
Laura A. Burton-Graham
Toi Y. Carter
Caroline Emerson
Gerard J. Gaeng
Joann G. Goedert
Elena Langrill
Andrew M. McDonald
*Deborah M. Mason
*Mary L. Preis
Susan C. M. Somerville
Mary H. Tillman
Richard A. Weitzner
Rachel E. Zelkind

In-House Education Unit

John J. Capowski

*Resigned

Medicaid Fraud Control —

Gale R. Caplan, *Chief*
Daniel R. Anderson, *Deputy*

Linda K. Boyd
Carolyn J. McElroy
Timothy X. Sokas

Opinions and Advice —

Jack Schwartz, *Chief*
C.J. Messerschmidt

Savings and Loan —

Julia Davis
Susan Griisser
Suellen Wideman
*M. Jayne Wright

Securities —

Ellyn L. Brown, *Securities Commissioner*
*Sarah McCafferty, *Deputy*
Bradley S. Carroll, *Deputy*

T. Webster Brenner
Delia A. Burke
Margaret A. Dietrich
Melanie S. Lubin

*Resigned

DEPARTMENT AND AGENCY COUNSEL

Aging, Office On —

Margaret Ann Nolan, *Counsel*

*Michele E. Loewenthal
Rachel E. Pappafotis

Agriculture —

Craig A. Nielsen, *Principal Counsel*
Thomas F. Filbert

Assessments and Taxation —

Kaye Brooks Bushel, *Principal Counsel*

William K. Hammond
David M. Lyon
Jane E. Pilliod

Budget and Fiscal Planning —

Cecilia Januszkiewicz, *Principal Counsel*
Margaret Lee Norton, *Principal Counsel*
Gail Rudie Cohn

Special Litigation Unit —

Norman E. Johnson, *Supervising Attorney*
Jean Baron
Nicolette H. Prevost

Comptroller of the Treasury —

Gerald I. Langbaum, *Principal Counsel*
John K. Barry

*Resigned

Sales and Use Tax Division

Deborah B. Bacharach, *Deputy*
Sheldon H. Laskin
Gaylin Soponis

ECONOMIC AND EMPLOYMENT DEVELOPMENT —

Alexander Wright, Jr., *Principal Counsel*
Norman E. Parker, Jr., *Principal Counsel*
Laila K. Atallah, *Deputy*

James G. Davis
Illene S. Garten
Sheila McDonald Gill
Anita Eley Hilson
Barbara C. Kountz
Elizabeth S. Roese
Amy S. Scherr
Barbara G. Swain
Lynn Weiskittel

ENVIRONMENT —

Michael C. Powell, *Principal Counsel*
Denise Ferguson-Southard, *Deputy*
Ann Marie DeBiase, *Deputy*

Susan M. Carrier
Richard W. Emory, Jr.
*Catherine M. Flanagan
Neile Sue Friedman
Jeffrey E. Howard
Kathy M. Kinsey
Pamela D. Marks
Paul T. O'Connell
Neil F. Quinter
Patricia A. Smith
Mary Rosewin Sweeney
Nancy W. Young

Environmental Crimes Unit —

Elizabeth B. Volz, *Supervising Attorney*

*Nathan Braverman
Howard P. Nicholson
Bernard A. Penner

*Resigned

General Assembly —

Robert A. Zarnoch, *Counsel*
Richard E. Israel
Kathryn M. Rowe

General Services —

Allan B. Blumberg, *Counsel*
Michael P. Kenney
John H. Thornton

Health and Mental Hygiene —

Daniel F. O'Brien, *Counsel*
Carl F. Ameringer, *Deputy Counsel for Administrative Prosecutions*

Lawrence J. Ageloff
Geoffrey J.C. Boyd
Janet Klein Brown
Patricia M.C. Brown
Dawna Cobb
Nancy K. Dowling
Susan Feldman
Barbara Hull Foster
D. Michal Freedman
Robert J. Gilbert
Roberta L. Gill
*Larry J. Goldberg
Alice D. Ike
Elizabeth M. Kameen
Sharon Krevor-Weisbaum
Steven P. Lemmey
Harry J. Matz
C. J. Messerschmidt
David Rowland Morgan
*Susan S. Nathan
Jane E. Pilliod
Ann L. Rasenberger
C. Frederick Ryland
Martha H. Somerville
Judith K. Sykes
Nancy P. Tennis
Romaine N. Williams
Debra G. Woodruff

Health Services Cost Review Commission —

Stanley Lustman, *Supervising Attorney*

*Resigned

Housing and Community Development —

Margaret McFarland, *Principal Counsel*
Judith W. Price, *Deputy*

Sandra J. Cohen
Lawrence S. Conn
Philip J. Deters
Elizabeth M. Dunn
Roger L. Fink
Beth Woodland Hargrove
George E. Hughes
C. Dale Janney
Judy K. Maistrellis
Joyce R. Stern

Human Resources —

Nancy B. Shuger, *Principal Counsel*
Catherine M. Shultz, *Deputy*

Mark J. Davis
Wendy J. Greenberg
Donna R. Heller
Stephanie R. Henderson
Steven D. Keller
Sherry A. Kendall
Kathleen A. Morse
Joseph B. Spillman

Injured Workers Insurance Fund —

Thomas J. Michels, *Supervising Attorney*

A. Raymond Bevans, Jr.
Rona S. Dadds
Terrence G. Doyle
James A. Haynes
J. Kent Leonnig
Timothy P. McGough
M. Bernadine Myles
Brett M. Schaffer
Wilbert Lee Taylor
Barbara S. Zerolnick

Juvenile Services Agency —

*Ellen A. Callegary, *Principal Counsel*
Ronald M. Levitan, *Principal Counsel*
Deborah Farmer Minot, *Deputy*
Robert T. Fontaine

*Resigned

Licensing and Regulation —

Francis X. Pugh, *Counsel*
Dennis W. Carroll, Jr., *Deputy*
Elizabeth Hartley Trimble, *Chief, Financial Regulation and Advice*

Jonathan W. Acton, II
David P. Bird
Susan M. Cherry
Susan Cohen
*John C. Heubeck
Joel A. Jacobson
Jonathan R. Krasnoff
J. Steven Lovejoy
*John J. Lucas
Dorothy Mara
Peter Martin
Alma L. Borenstein-Ohly
Elaine Patrick
David M. Porter
Randi F. Reichel
Meg R. Rosthal
Gaston J. Sigur, III
Bruce C. Spizler
William Tutton, Jr.

Lottery Agency, Maryland State —

Romaine Williams, *Counsel*

Maryland Automobile Insurance Fund —

James W. Himes, *Supervising Attorney*
Victoria M. Burgess

Natural Resources —

Thomas A. Deming, *Principal Counsel*
Marianne D. Mason, *Deputy*

Pamela D. Andersen
Sharon B. Benzil
Olga M. Bruning
Lee R. Epstein
Maureen O'Ferrall Gardner
George E. H. Gay
Meredith Ellen Gibbs
M. Brent Hare
*Jodi Rae O'Day
Judith F. Plymyer
Pamela P. Quinn

Environmental Services —

Sean L. Coleman

*Resigned

Personnel —

James F. Truitt, Jr., *Principal Counsel*
David R. Durfee
Michael N. Gambrill

Planning, Office Of —

Shelley S. Wasserman, *Counsel*

Public Safety and Correctional Services —

Emory A. Plitt, Jr., *Principal Counsel*
Stuart M. Nathan, *Deputy*

George A. Eichhorn
Steven G. Hildenbrand

Division of Correction —

Alan D. Eason
*Scott S. Oakley

Maryland State Police —

Millicent E. Gordon, *Supervising Attorney*
Mark H. Bowen
Betty A. Stemley

Retirement Systems, Maryland State —

*Carol S. Sugar, *Counsel*
Harriet Granet, *Counsel*

Carla Goldman Katzenberg
Lindsay S. Waite

Stadium Authority, Maryland —

Alison L. Asti, *Principal Counsel*
Norman E. Parker, Jr., *Principal Counsel*
Nolan H. Rogers, *Principal Counsel*

*Resigned

State Treasurer's Office —

Margaret Lee Norton, *Principal Counsel*
Leland S. VanKoten

Subsequent Injury Fund —

Sophia L. Swope, *Principal Counsel*

George E. Barrett,Jr.
*Michael H. Bereston
Michael G. Comeau
Ellen M. Dunn
David R. Jones
Irving B. Klitzner
Joanne F. Voelkel

Transportation —

Robert N. McDonald, *Principal Counsel*
Thomas G. Peter, *Deputy*

Paul J. Ballard
Patricia Ann Logan

Aviation Administration —

Louisa H. Goldstein, *Counsel*
Charles M. Bell

Maryland Transportation Authority —

Steven W. Vanderbosch

Mass Transit Administration —

Irwin Brown, *Counsel*
Rebecca A. Laws
William B. Tittsworth, Jr.

*Resigned

Motor Vehicle Administration —

Edward R.K. Hargadon, *Supervising Attorney*

Risselle R. Fleisher
John R. Hargrove
*Ann E. Singleton

Port Administration —

Donald A. Krach, *Counsel*
Tracy V. Drake
Janice G. Salzman

State Highway Administration —

Edward S. Harris, *Principal Counsel*

Pamila J. Brown
Jean A. Colburn
Douglas N. Silber

Interstate Division —

Omar v. Melehy

Special Attorneys —

James R. Avnet
Richard T. Brice, IV
Sidney S. Campen, Jr.
James K. Eagan, III
Robert L. Gray
Lloyd J. Hammond
Janet Bush Handy
Henry F. Leonnig
Daniel F. McMullen, Jr.
Nancy P. Miller
Peyton Paul Phillips
George H. White
Frank W. Wilson

*Resigned

Uninsured Employers Fund —

Charles R. Goldsborough, Jr., *Supervising Attorney*
*George W. Elder
Esther Goldring Herman

*Resigned

EXCEPTIONAL SERVICE AWARDS

In 1981, Attorney General Stephen H. Sachs inaugurated a special awards program to recognize unique achievements on behalf of the State. Each year, Exceptional Service Awards are presented to Assistant Attorneys General who have demonstrated special "ability, dedication, leadership and imagination" in carrying out their work for the State. The recipients of these awards are:

1990

Andrew H. Baida	Civil Division
Alan Barr	Antitrust Division
Sean Coleman	Maryland Environmental Services
Carolyn Henneman	Criminal Investigations Division
Jonathan R. Krasnoff	Department of Licensing and Regulation
Kathryn M. Rowe	General Assembly
Timothy X. Sokas	Medicaid Fraud Division

1989

Ann Bosse	Criminal Appeals Division
Susan Cherry	Department of Licensing and Regulation
Mark J. Davis	Department of Human Resources
Alan Eason	Division of Correction, Department of Public Safety and Correctional Services
Maureen Dove	Correctional Litigation Unit
Richard Israel	General Assembly of Maryland
Mary Lucasse	Asbestos Litigation Unit
Carmen Shepard	Civil Division
Lucy Weisz	Consumer Protection Division

1988

James P. Abbott	Consumer Protection Division
Sandra J. Cohen	Department of Housing and Community Development
Andrea D. Johnson	State Highway Administration, Department of Transportation
C.J. Messerschmidt	Opinions Division
Kathleen N. Sweeney	Department of Licensing and Regulation

1987

Delia Anne Burke	Securities Division
Ellen S. Cooper	Antitrust Division
Ann Marie DeBiase	Department of the Environment
Susan J. Mathias	Educational Affairs Division
Anthony K. Waters	Department of Licensing and Regulation

1986

Peter V. Berns	Consumer Protection Division
Edward S. Harris	Contract Litigation Unit, Department of Transportation and General Services
Peter Keith	Civil Division
Norman E. Parker, Jr.	Department of Economic and Community Development
Christine Steiner	Educational Affairs Division

1985

Jane F. Barrett	Hazardous Waste Unit, Department of Health and Mental Hygiene
Ben C. Clyburn	Department of Transportation
Louise H. Goldstein	State Highway Administration, Department of Transportation
Illona Sheffey-Rawlings	Department of Personnel
Richard B. Rosenblatt	Criminal Appeals and Correctional Litigation Division
David M. Sheehan	Civil Division
Marlene Trestman	Civil Division
Susan Z. Whitman	Maryland Industrial Development Financing Authority, Department of Economic and Community Development

1984

Gertrude Bartel	Criminal Appals and Correctional Litigation Division
Stefan D. Cassella	Medicaid Fraud Control Unit
Bruce P. Martin	Department of Personnel
Kathleen Howard Meredith	Civil Division
Frederick G. Savage	Educational Affairs Division

Michael J. Scibinico	Department of Natural Resources
Catherine M. Shultz	Civil Division
Ralph S. Tyler	Department of Human Resources

1983

Alma L. Borenstein	Department of Licensing and Regulation
Michael F. Brockmeyer	Antitrust Division
Brian Cohen	Mass Transit Administration, Department of Transportation
Susan K. Gauvey	Civil Division
Diane G. Goldsmith	Criminal Appeals and Correctional Litigation Division
Nancy Knisley	Department of Personnel
Daniel J. O'Brien, Jr.	Department of Health and Mental Hygiene
Jennifer L. Robbins	Department of Health and Mental Hygiene

1982

Philip M. Andrews	Criminal Appeals Division
Robert deV. Frierson	Department of Licensing and Regulation
Paul W. Grimm	Department of Licensing and Regulation
Linda H. Lamone	Maryland General Assembly
Thomas M. Meachum	Central Collection Unit, Department of Budget and Fiscal Planning
James L. Shea	Civil Division
Alexander Wright, Jr.	Department of Personnel

1981

Ellen A. Callegary	Department of Health and Mental Hygiene
Louis J. Kozlakowski, Jr.	Department of Transportation
Cheri Wyron Levin	Consumer Protection Division
James J. Mingle	Educational Affairs Division
Peter W. Taliaferro	Department of Assessments and Taxation
Charles R. Taylor	Department of Personnel

JENNIFER LAUTERBACH ROBBINS AWARD

In 1987, the Attorney General established an award in honor and memory of former Assistant Attorney General, Jennifer Lauterbach Robbins. Annually, the Attorney General selects one Assistant Attorney General to receive this award in recognition of special achievement in the field of health, human services or education. The award recognizes a special achievement that demonstrates the same high level of commitment to public service and law as that demonstrated by Jennifer Robbins throughout her professional career and particularly her service with the Office of the Attorney General.

The recipients of this award are:

1990 . . . . C. Frederick Ryland

1989 . . . . Barbara Hull Foster

1988 . . . . James J. Mingle

1987 . . . . Susan Sugar Nathan

THE ATTORNEY GENERAL'S PRO BONO AWARD

In 1989, the Attorney General established a community service award to honor an attorney in the Attorney General's office who has made a significant contribution, whether of time, effort, or accomplishment, to organizations or individuals in need of free legal assistance.

The recipients of this award are:

1990 . . . . Evelyn O. Cannon

1989 . . . . Daniel R. Anderson

Annual Report for 1990

December 31, 1990

The Honorable William Donald Schaefer
Governor
State House
Annapolis, Maryland 21401

Dear Governor Schaefer:

In accordance with Section 6-108(b) of the State Government Article, I am submitting this report of the business and proceedings of the Office of the Attorney General for the calendar year 1990. A detailed financial statement of the Office and caseload statistics follow this report.

In carrying out its role under the Constitution and laws of Maryland, the Attorney General's Office engages in an extraordinary variety of activities. Rather than attempt a comprehensive (and unduly lengthy) catalog, I shall select but a small sample of our cases and other initiatives during 1990. In this way, I hope to illustrate the work that we do on behalf of the people of Maryland and our State agency clients.

Law Enforcement

♦ The Criminal Investigations Division indicted or filed charges against 36 different individuals and achieved a 100% conviction rate with 83% of the defendants actually serving a jail sentence, while the remaining 17% received suspended jail sentences. In addition, the Division was responsible for obtaining total restitution and fines amounting to more than $2.75 million.

The types of cases that were prosecuted included bribery, misconduct in office, theft, fraudulent misappropriation by a fiduciary, insurance fraud, securities fraud, welfare fraud, as well as criminal tax violations of both the income tax and sales tax laws.

♦ The Medicaid Fraud Control Unit of the Office of the Attorney General was recognized "for efficient and effective management practices in combatting fraud and abuse in the Medicaid Program" when it received the Inspector General's State Fraud Award from the Inspector General of the Department of Health and Human Services in April of 1990. Its prosecutions included a conviction of a Baltimore pharmacist for Medicaid fraud based on his having submitted false prescription invoices to the State's Medicaid Program in order to receive payment for expensive drugs that were never dispensed to customers. The pharmacist was ordered to pay $300,000 in fines and restitution. His co-conspirator, who obtained Medicaid cards that were used to generate false prescription invoices, was sentenced to three years in prison and to make restitution of $249,000 following his conviction for felony Medicaid fraud and failure to file State income tax returns. The Unit also prosecuted a physician for selling prescriptions for controlled drugs, Medicaid fraud and obstruction of justice, among its prosecutions in 1990.

Perhaps the most important activity of the Unit in 1990 was to initiate a project to investigate and prosecute cases of patient abuse in institutions where Medicaid recipients reside. In a striking example of the need to vigorously investigate and prosecute these offenses, the Unit prosecuted one individual for three different assaults against elderly residents of nursing homes. The defendant was sentenced to a term of imprisonment for those assaults.

Finally, in another prosecution of a psychiatrist for illegally permitting non-physicians to practice medicine and to prescribe controlled medications, the Medicaid Fraud Control Unit obtained a maximum fine of $100,000 against the physician for violating medical standards in prescribing controlled drugs.

♦ In 1990, the Criminal Appeals Division continued to represent the State in all appeals in criminal cases before the Court of Special Appeals, the Court of Appeals, and the United State's Supreme Court. Assistant Attorneys General in the Division wrote briefs in some 900 cases, or nearly one-half of the entire docket of the State appellate courts. In addition, Assistant Attorneys General in the Division answered nearly 100 habeas corpus petitions filed by State prisoners in the United State's District Court, and also handled cases in the Fourth Circuit Court of Appeals and the United States Supreme Court.

Attorneys for the Division continued to work closely with prosecutors in the 24 State's Attorneys' Offices, participated in training programs, reviewed proposed legislation, responded to citizen inquiries, and generally shared their expertise in the area of criminal law and procedure.

♦ My office won an important Fourth Amendment case in the United States Supreme Court in 1990. We successfully urged the Court to vacate the decision of the Court of Appeals of Maryland in *Maryland v. Buie* to reverse Jerome Edward Buie's 1986 armed robbery conviction, arguing that a "protective sweep" of a home, incident to lawful arrest of the homeowner, is constitutional if based upon reasonable articulable suspicion that the area to be swept harbors someone who poses danger to those at the arrest scene. The Supreme

Court ruled that the sweep may last no longer than is necessary to dispel the reasonable suspicion of danger and, in any event, no longer than it takes to complete the arrest and leave the premises. The high court remanded the case to the Court of Appeals to determine whether the sweep at issue satisfied the Supreme Court's newly established standard.

♦ In *Maryland v. Craig*, the Supreme Court upheld the constitutionality of the procedure whereby child witnesses testify by way of closed-circuit television in child abuse cases.

I am pleased to have personally appeared before the Supreme Court to argue this crucial case for the protection of victims of child abuse. The Court's decision in *Maryland v. Craig* overturns a ruling by the Maryland Court of Appeals that vacated the child abuse conviction of Sandra A. Craig who was found guilty of sexually, psychologically and physically abusing a 6-year old girl at the now-defunct Craig's Pre-School day care center in Clarksville. In reversing the Court of Appeals' decision, the Supreme Court agreed with our contention that an adequate showing of necessity for the closed-circuit procedure had been made in the *Craig* case, concluding "that a state's interest in the physical and psychological well being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." Maryland's procedure for allowing allegedly abused youngsters to testify via one-way TV "preserved all the essential elements" of a defendant's Sixth Amendment right to confront his or her accuser.

I'm particularly proud of our victory in the *Craig* case. The Supreme Court's decision is a victory for abused children not only in Maryland but throughout the country.

♦ Protection of our natural environment is an ever-growing concern and challenge. Through the efforts of our Environmental Crimes Unit this year, violators of our State's environmental protection laws are increasingly on notice that they have nowhere to hide.

Criminal convictions were imposed three times this year on one such violator, Interstate General Co., a land development company in Charles and St. Mary's counties. In the first sediment pollution case prosecuted by the Environmental Crimes Unit, IGC received the maximum $50,000 fine after a St. Mary's Circuit Court jury convicted it in February of two counts of pumping sediment into a stream. IGC was also found guilty of unlawful clearing and grading and was fined $2,500.

♦ For several years, the Antitrust Division conducted a joint investigation with the State's Attorney for Baltimore City into bid-rigging in the asbestos abatement industry. In 1990, this investigation resulted in the convictions of Applied Construction, Inc., Coastal Insulation, Inc., ARC Asbestos Removal Co., Inc., Nicholas D. Thrappas and Lawrence Kaskel. Thrappas and Kaskel each plead guilty to charges that they had conspired to rig the bidding on a $205,325 contract to remove asbestos from the Maryland State House in Annapolis. Coastal and ARC entered guilty pleas to charges of conspiracy to rig bids on State asbestos contracts worth approximately $233,000.00. Finally, Applied pled guilty to charges that it had conspired to rig bids on approximately $140,000 worth of asbestos removal contracts at Morgan State University and Western Maryland Hospital in Hagerstown.

As part of the plea agreements, the asbestos removal firms are to pay the State a total of $195,000 in fines, restitution and damages. Thrappas received a six-month suspended jail sentence and probation, and will perform 200 hours of community service. Kaskel was also placed on probation and ordered to perform 100 hours of community service. My office will seek to disqualify ARC, Thrappas, Kaskel and Edwin J. Hayes, President of Coastal, form future business dealings with the State. As part of its agreement, Coastal will not bid on State contracts for two years. Applied and its owner, Bobby E. Leonard, have agreed to permanent disqualification from future business dealings with the State.

The Antitrust Division brought a *parens patriae* suit on behalf of subscribers of the CareFirst prescription drug plan against PNM and four pharmacy chains in federal court alleging violations of the Sherman Act and parallel provisions of the Maryland Antitrust Act. Ultimately all defendants settled. The settlements provided for an injunction against similar activities in the future and for the pharmacies to pay a total of $230,000 in refunds to CareFirst subscribers.

♦ The Antitrust Division has frequently cooperated on investigations and cases with other state antitrust divisions. For example, during 1990, the Antitrust Division, together with thirteen other states, sued VISA and MasterCard. The complaints charged that VISA and MasterCard had conspired to create a monopoly in the emerging point-of-sale debit card industry through a joint venture called Entree. The complaints alleged that this was an effort by VISA and MasterCard to maintain their position in credit cards and related payment systems. In May, 1990, the States reached a settlement agreement with the defendants, which was approved by a federal district judge in New York. In addition to the dissolution of the Entree joint venture, the defendants agreed to give prior notice of future joint activities, acquisitions, and certain on-line, point-of-sale debit programs.

Consumer Protection

♦ In terms of sheer numbers, the Consumer Protection Division saved over $3.7 million for more than 12,400 Marylanders in 1990 by responding to 90,900 telephone calls and 8,520 written complaints, as well as by mediating disputes and instituting legal actions. Of the 5,233 complaints for which mediation was completed in 1990, 58% were resolved to the satisfaction of both the consumer and the business, with $673,142 in refunds and savings to consumers being obtained. That represents a 77% increase over the $381,268 obtained through our mediation efforts in 1989, suggesting that our Complaint Handling Unit is doing an even better job resolving disputes. In addition to its fulltime staff, the Complaint Handling Unit uses volunteers from all walks of life and every age range. They put in a total of 19,730 hours in 1990, doing the work of 11 fulltime employees. They provide their fellow Marylanders with a service of exceptional quality.

During 1990, the law enforcement activities of the Consumer Protection Division's attorneys and investigators involved us in 55 court cases, 44 administrative proceedings and 74 investigations. Through these efforts, more than $2.8 million in awards were obtained for consumers, as well as $225,275 in penalties and $31,000 in consumer education funds earmarked for the State.

Among key enforcement actions in which significant developments occurred in 1990 were the cases we concluded against a number of major automobile dealerships for selling unnecessary aftermarket rustproofing, as well as damaged, and in some cases rental vehicles and stolen cars, as "new"; a large civil penalty in our case against Cottman Transmission Systems; and both civil penalties and restitution orders in deceptive sales practices cases against Woolworth, Outdoor World and Tri-Marketing.

♦ The number of complaints handled by our Health Education and Advocacy Unit more than doubled between 1989 and 1990, reaching 1,103. This unit, which provides specialized mediation for consumer complaints involving health goods and services, mediated 809 complaints in 1990, resolving 88% of them to the satisfaction of both the consumer and the business while obtaining $234,249 in refunds and savings for consumers. That represents an increase of 144% over the amount obtained on behalf of consumers in 1989.

In addition to its impressive mediation activities, our Health Education and Advocacy Unit (HEAU) has identified and resolved some significant problems affecting large numbers of consumers, especially members of health maintenance organizations (HMOs).

The HEAU uncovered a major problem that was routinely afflicting numerous HMO members, who were systematically being billed by both hospitals and health care providers for services their HMOs were responsible for covering. Consumers were getting caught in the middle of a dispute between the health care providers and the HMO industry about delays in payments to HMOs, to which an estimated 850,000 Marylanders belong. The HEAU had received dozens of complaints this year in which 17 different hospitals and 41 different medical practitioners billed consumers directly rather than pursue payments from the responsible HMOs. In one especially tragic case of which we became aware, $10,000 in bills were improperly sent to a man dying of cancer, instead of to his HMO, because of problems with claims filing and processing. When the terminally ill man failed to pay, the hospital sued him and actually obtained a lien against his home. It was only after the man's death, when his daughter came to our Health Education and Advocacy Unit for help, that the hospital agreed to allow the judgment against the man's estate to be vacated and the lien on his home lifted.

This widespread practice of billing the consumers instead of the HMO violates both the State's health code and the Consumer Protection Act. On November 13, I issued a consumer alert, advising HMO members to beware of these bills being sent to them improperly and offering them the help of the HEAU in resolving any related disputes. I simultaneously sent business advisories to the appropriate trade associations, warning the providers and hospitals to cease the illegal billing practices.

In another major instance of a medical billing bureaucracy run amok, the HEAU negotiated an agreement last month in which Dr. Jose Martinez, a Harford County radiologist, has promised to resolve disputes involving more than $218,000 in medical bills sent by a collection agency on his behalf to thousands of Marylanders who had never heard of him nor received previous bills from him. Since last summer, we had received complaints from more than 130 consumers who were among the 2,300 Marylanders to whom the I.C. Systems, a Minnesota-based collection agency, sent dunning notices for $45 to $50 to cover services rendered by Dr. Martinez at Fallston General Hospital between 1974 and 1989. As an analyst of x-rays and other radiology procedures at the hospital, Dr. Martinez had no personal contact with many of the patients, which is why he was unknown to them. The bills went to the consumers were improper for a wide variety of reasons, among them being the consumers' membership in an HMO, which should have been billed instead; a failure on Dr. Martinez's part to file an insurance claim; and the previous payment of the bill by either the consumer's insurer of the consumer. Under the agreement we reached with Dr. Martinez, the improper billings will be abandoned, and those consumers who already paid will receive refunds.

♦ The Arbitration Unit in the Consumer Protection Division provides free, binding arbitration of consumer complaints for businesses. It handled 305 cases in 1990 and rendered 270 decisions. Seventeen businesses signed up to precommit themselves to having consumer disputes resolved through arbitration, bringing the total number of businesses now using the program to 836.

♦ The Health Club Registration Program administers more than $8 million in security posted by some 429 facilities in Maryland that are subject to the State law's registration requirements. This money is held by us to protect consumers in case the clubs they join either close unexpectedly or never open. During the past year, the health club registration program obtained the issuance of ex parte cease and desist orders against five clubs and filed statements of charges against another 20 facilities, accusing them of failing to fulfil their responsibilities under the law. As a result of these proceedings, $31,000 in consumer education money, in lieu of civil penalties, was obtained for the State, as well as reimbursement of $4,150 in administrative costs.

Our Health Club Registration Program has established a streamlined enforcement program that has been vigorously monitoring the industry's compliance with the law. In doing so this year, we resolved charges filed earlier against Spa Lady, a Virginia-based firm, and its 14 subsidiaries in Maryland, providing for the posting of $148,000 in security to protect the membership fees of the consumers belonging to the firm's 23 health clubs here. Spa Lady, the largest health club chain in Maryland ever accused of violating the State's health club law, had allowed tens of thousands of dollars in advance membership payments to go unprotected since August 1, 1989, when it failed to renew its original $300,000 bond.

In an action against Jasken Fitness Center, the Division for the first time obtained civil penalties from a court in the course of enforcing an administrative order to comply with the law.

♦ In May, we obtained the largest settlement so far from auto dealers who sold unnecessary rustproofing. Jerry's Chevrolet in Towson and Jerry's Toyota in Perry Hall have agreed to establish a $700,000 restitution fund to pay refunds and provide service credits for all consumers who say the dealerships sold them extra rustproofing for their 1987, 1988, and 1989 cars without telling them that the automobiles' manufacturers said such "aftermarket" rustproofing is not needed. This settlement brings to more than $1.5 million the total amount of refunds and service credits obtained for consumers since I issued my initial alert about unnecessary rustproofing in January 1989. And in another settlement on the same day this past May, Jerry's Mitsubishi, a third dealership owned by Gerald Stautberg, signed an agreement providing up to $68,000 in refunds to as many as 46 consumers who were sold previously damaged and, in some cases, stolen cars that were labelled as "new."

In an unrelated settlement, Thacker Oldsmobile-Cadillac, an Anne Arundel County dealership, provided $80,000 in restitution to the purchasers of 59 automobiles that were sold to them as new "demonstrator" models, but which were used cars that had belonged to rental firms.

♦ In our ongoing case against Cottman Transmission Systems, the Baltimore Circuit Court has imposed a $100,000 civil penalty on the Pennsylvania-based firm that earlier was found in violation of Maryland's consumer law. The court found that Cottman deceived consumers by requiring its Maryland franchisers to withhold important information from customers while trying to sell them new transmission jobs. The court held that Cottman had been "living a lie" because in the overwhelming majority of cases, its employees could tell from a road test and external check of a car's transmission whether an overhaul was needed, but they were required to withhold that information about the need for an overhaul and its cost until after the customer had agreed to a procedure for removing and inspecting the transmission at a cost of between $85 and $250. The court ordered Cottman to revise its procedures and provide its Maryland customers with diagnostic and price information before the consumers agree to pay for an internal inspection of their vehicles' transmissions.

♦ In June, we concluded our long-standing lawsuit against F.W. Woolworth Company, which was fined $125,000 for false and deceptive advertising and for destroying company records that the State had sought. The Prince George's County Circuit Court imposed a $100,000 penalty on Woolworth for its 1982-83 advertisements that deceptively promoted price reductions from bogus "regular prices" that were higher than the actual prices at which items really were sold. An additional $25,000 fine was imposed on the firm for destroying documents about these sales after we had asked for the papers.

♦ This September, the Consumer Protection Division issued an order directing Outdoor World, a Pennsylvania-based campgrounds marketer dubbed "a Michelangelo, in the ...[the] art of deception," to establish a procedure to provide possibly millions of dollars in refunds to consumers. Following five days of administrative hearings, it was determined that the firm used misleading promotions to persuade thousands of Marylanders to visit its out-of-state campgrounds and then pressured them into purchasing expensive memberships they did not want. Outdoor World has appealed our restitution order to the Baltimore County Circuit Court.

♦ In another marketing scam, we obtained an agreement from Tri Marketing Concepts, a Virginia-based company that sold bulk quantities of soap in Maryland by using an illegal "prize" promotion scheme, to give some 270 Marylanders the opportunity to cancel their contracts to buy several years' worth of detergents, disinfectants and other cleaning products for some $3,000 apiece. Tri Marketing failed to inform consumers that they did not have to submit to a sales promotion in order to obtain their "prize," while in addition falsely claimed that it had been in business for 30 years when in fact it was only a year old. It also failed to comply with federal safety and labeling requirements that would have alerted consumers to the potentially hazardous nature of the concentrated substances they bought. Tri Marketing since has ceased doing business in Maryland.

♦ Finally, during 1990, the Education Unit of the Consumer Protection Division released two major publications, the *Nursing Home Guide* and a revised edition of our acclaimed *Health Care Shoppers Guide*; produced and distributed two more issues of our award-winning *Maryland Consumer Courier* newspaper; issued four new releases in our "I'll Buy That" series of consumer advisories, covering such subjects as health spas, mobile homes, renting-to-own deals and making major purchases; and issued a brochure on mail order marketing.

Defending State Agencies

♦ The Contract Litigation Unit in 1990 continued to defend the State against contract claims made against the State by construction companies, consultants, and other contractors. One significant example was *State Highway Administration v. Greiner Engineering Sciences, Inc.*, in which the Court of Special Appeals reversed a Board of Contract Appeals' decision that refused to enforce a clause in a design services contract providing that the engineering firm would receive no additional compensation for delays to the project's completion. Because of reduced funding, changes had been made to the contract by the State Highway Administration to decrease the project scope; the consequence was that the project was extended five years past its anticipated completion date. The contractor then filed a $148,000 claim against SHA for lost efficiency damages allegedly resulting from project delays. The Court held that, absent intentional wrongdoing, gross negligence, fraud or misrepresentation on the part of the State, a "no damages for delay" clause is enforceable and bars all claims for delay damages.

♦ During 1990, the attorneys assigned to the Department of Human Resources continued to provide representation on many issues of critical importance to the low-income citizens of Maryland. Some of the more notable matters they handled included:

- Participating with counsel for three other agencies in achieving interim settlement of a suit under which the State agreed to take numerous initiatives to enhance the mental heath services provided to children in institutional and community treatment settings.

- Obtaining an injunction to enjoin the provision of unlawful and unsafe child care in a center where 54 children had been at risk, and assisting their parents to find safe substitute care.

- Bringing a significant employment discrimination case to successful conclusion after five years of litigation. The local department of social services was found to be a State agency with immunity from suit under the Eleventh Amendment, and nondiscrimination was found in the agency's promotion decision at issue.

- Obtaining an unprecedented win before the federal HHS Grant Appeals Board in a case involving reimbursement for health-related services provided to Maryland's medical assistance recipients. This victory brought $5.2 million dollars to the State.

♦ Assistant Attorneys General assigned to the Department of Transportation worked closely with a State task force to develop a response to the threatened withholding by the United States Department of Transportation of over $5,000,000 in federal highway funds. This sanction was threatened because of the State's failure to prevent over 50% of motorists traveling on certain highways from exceeding the 55 mph speed limit during FY '89. This issue was ultimately resolved through the passage of federal legislation in which DOT attorneys and other members of the task force played an important advisory role.

♦ Assistant Attorneys General at the State Highway Administration defended the Administration in an environmental suit in connection with the proposed replacement of the deteriorating Wiley Ford Bridge which connects the City of Cumberland to its municipal airport located just across the Potomac River in West Virginia.

Four environmental groups filed an action for declaratory judgment and injunctive relief in the U.S. District Court for the District of Columbia naming the State Highway Administration and the Federal Highway Administration as defendants. The plaintiffs claimed that the defendants failed to give adequate consideration to the environmental impact of this bridge replacement project.

The SHA attorneys successfully opposed the plaintiffs' request for a temporary restraining order. Ultimately SHA's and FHWA's joint motion for summary judgment was granted, thereby enabling construction to continue.

♦ Attorneys at the Motor Vehicle Administration successfully defended against a lawsuit filed in the U.S. District Court for the District of Maryland by the International Caucus of Labor Committees. In granting the motion for summary judgment in favor of MVA, the District Court ruled on the extent to which MVA could restrict speech activities on its property. The Court held that sidewalk areas in connection with MVA facilities were not public fora and that the restrictions which MVA placed on distribution of literature in those areas were reasonable and, therefore, permissible.

♦ In June, the federal court in Baltimore, finding that the plaintiff lacked standing, dismissed the lawsuit brought by the Maryland Highway Contractors Association challenging the State's Minority Business Enterprise (MBE) law. The highway contractors' association filed its lawsuit last August in the wake of a January, 1989 Supreme Court decision holding that the minority business enterprise ordinance in Richmond, Virginia, was unconstitutional. (*City of Richmond v. J.A. Croson Co.*)

Following the high court ruling, I issued an opinion concluding that Maryland's "narrowly tailored" MBE law would pass the "strict scrutiny test" used by the Supreme Court to strike down the Richmond minority set-aside law.

I also strongly recommended that the General Assembly reexamine the need for the MBE program and as a result of a new study, the General Assembly enacted a new MBE law during its recent session that became effective July 1 of this year.

♦ The Court of Special Appeals agreed with the arguments of the Attorney General's counsel to the Comptroller that a domestic international sales corporation (DISC) subsidiary of a multistate, multinational corporation would properly be taxed by Maryland when the DISC's parent was engaged in business in Maryland, the parent was a unitary with the DISC, and the formula used to apportion the income of the DISC was fair. The Court thus rejected contentions of the DISC subsidiaries of Armco., Inc., General Motors Corporation, and Morton Thiokol, Inc. The Court of Appeals of Maryland declined to review the decision of the Court of Special Appeals.

Numerous other DISCs had agreed to have their tax liabilities determined on the outcome of this case. Therefore, the outcome of this case resulted in the collection of corporate income taxes in excess of $4 million.

Business Development and Special Projects

♦ Companies that wish to market franchises in Maryland must register with the Securities Division office and provide detailed disclosures to potential purchasers that give complete and accurate information about the franchise that is offered for sale. In the past seven years, the number of initial and renewal franchise registrations filed with the Securities Division has nearly doubled, going from 456 in 1982 to more than 800 in 1989. Franchising has gone far beyond the opening of fast food outlets. The industry now includes everything from art galleries to airplane washing services, and from dental office management consultants to interior decoration.

During the past three years, I have formed a number of "round table" groups representing a variety of business interests in order to open lines of communication between the Attorney General's office and the business community. These groups have included representatives of Maryland's manufacturing industries, securities dealers, real estate sellers and retail merchants, among others.

♦ The legal staff to the Department of Economic and Employment Development experienced a productive year, participating in 145 financial transactions. DEED had its usual high level of activity pursuing its broad and diverse mission, culminating in many achievements, all of which were accomplished with assistance by the Attorney General's Office.

♦ The Attorney General's counsel to the Maryland State Lottery Agency provided legal guidance and assistance to the Lottery Agency on several 1990 initiatives. Significant actions which directly affected consumers include: 1) a new Lottery Winner Claim form was developed to streamline the process for claiming lottery winnings and; 2) a regulation was promulgated to prohibit Lottery agents from extending credit to lottery players, thus discouraging the possibility of compulsive gambling. Additionally, in 1990 the Lottery was advised on the legal feasibility of the concept of Lottery Co-operative Advertising with other State government agencies or business entities. Implementation of co-operative advertising enhanced the marketability of some Lottery games and contributed to revenue for the State.

♦ Attorneys in the Office of the General Counsel to the Department of Transportation provided a multitude of legal services to the State Railroad Administration, which provides the Maryland Rail Commuter (MARC) service between Baltimore and Washington and between Washington and the Maryland suburbs. DOT attorneys were actively involved in the purchase and lease of properties for additional stations, construction contracts for new buildings, equipment contracts for new and refurbished equipment and a variety of service agreements to provide better and more efficient information to the public.

♦ Assistant Attorneys General at the Maryland Port Administration negotiated, drafted and filed with the Federal Maritime Commission a number of lease agreements with national and international shipping companies for space at various MPA port facilities. They also drafted and gave advice on various terminal leases with stevedore companies, warehousemen and governmental agencies. The attorneys also represented MPA in a number of actions filed in State and Federal courts to collect from various shipping companies for damage to various Port facilities.

♦ Of paramount importance are the rights of all citizens to express our own decisions regarding the use of life-sustaining treatment in the various medical situations that confront us. This year, particularly in light of the Supreme Court's decision in *Cruzan v. Director, Missouri Department of Health*, a case involving Missouri's refusal to allow the family of a woman in a permanent vegetative state to stop her artificially supplied food and water, my office spearheaded a major effort not only to clarify the status of Maryland's "right-to-die" provisions but also to make all Maryland residents aware of their rights to decline life-sustaining treatment.

In addition to issuing comprehensive opinions of the Attorney General, members of my staff have coordinated efforts with members of the legal and medical communities to devise and distribute advance medical directive information. With assistance from the Health Law Section of the Maryland State Bar Association, which devised a model durable power of attorney for health care form, and the Department of Legislative Reference, which printed an informational packet and living will form, my office has distributed 20,000 of these brochures since the Supreme Court's ruling in the *Cruzan* case in June.

Tragedies such as terminal illness or irreversible unconsciousness are difficult subjects for anyone to deal with. These forms enable Maryland residents to state their wishes regarding the use of life-sustaining measures, particularly artificially supplied food and water, in a way that may relieve at least some of the burden from their loved ones in the future.

I am pleased to report these accomplishments and I am grateful to all of the lawyers and support staff of the office for their dedication and professionalism. I also wish to take this opportunity to thank you and the members of your staff and cabinet for the courtesies extended to me and my staff during this past year.

J. Joseph Curran, Jr.
Attorney General

Cases In Which The
Office of the Attorney General Has Participated

Calendar Year 1990

Supreme Court of the United States	42
United States Court of Appeals for the Fourth Circuit	227
Other United States Courts of Appeal	13
TOTAL	282
United States District Court for the District of Maryland	1,265
Other United States District Courts	60
TOTAL	1,325
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	110
Criminal Appeals	151
TOTAL	261
Court of Special Appeals of Maryland	
Civil Appeals	250
Criminal Appeals	1,173
TOTAL	1,423
Circuit Courts of Maryland	5,506
District Courts of Maryland	2,375
Maryland Tax Court	1,242
Workmen's Compensation Hearings	11,738
Miscellaneous Administrative Hearings	3,588

7,477 of these cases have been completed

1,174 are in the process of trial/litigation

9,128 new cases have been opened

FINANCIAL STATEMENT
OFFICE OF THE ATTORNEY
For the Fiscal Year 1990

Appropriations and Budget Amendments

Program 001	$ 5,338,070
Program 002	1,087,629
Program 003	351,505
Program 004	711,904
Program 005	2,653,371
Program 006	927,742
Program 008	165,196
Program 009	1,235,849
Program 014	1,467,099
Program 015	1,076,839
Program 016	744,497
Program 017	746,344
Program 018	509,303
Total	$ 17,015,348

Program 001 - Legal Counsel & Advice

Appropriation	$ 5,331,705
Budget Amendments	6,365
Total funds available	$ 5,338,070

Salaries	
Attorney General	72,500
Deputy Attorney General (3)	155,942
Senior Executive Associate Atty General (2)	137,706
Program Executive III	61,600

Asst Attorney General VII, General Counsel (1)	55,869
Asst Attorney General VI, General Counsel (3)	125,912
Administrator IV (1)	47,898
Executive Associate Attorney General (1)	14,835
Asst Attorney General V, General Counsel (1)	77,377
Administrative Officer III (1)	19,365
Staff Attorney II (1)	32,526
Fiscal Specialist II (1)	35,287
Personnel Officer II (1)	35,287
Administrative Officer II (2)	65,528
Associate Librarian II (1)	32,764
Administrative Officer I (1)	25,762
Administrative Specialist III (2)	55,365
Legal Assistant II (2)	52,427
Fiscal Associate II	22,580
Personnel Clerk (1)	16,543
Library Assistant III (5)	14,593
Management Associate (5)	130,167
Administrative Aide I (3)	73,002
Stenographer, Law & Legislative (2)	29,795
Office Secretary II (1)	21,050
Fiscal Clerk II (1)	16,837
Office Secretary I	16,837
Office Clerk I (6)	86,665
Total Salaries	$ 1,532,019
Additional Salary Related Expenses	
Overtime	14,400
Miscellaneous Adjustments	5,827
Fringe Benefits	414,277
Other Adjustments/Turnover	5,183
Total Additional Expenses	$ 439,687
Total Salaries and Related Expenses	$ 1,971,706
Other Expenses	
Technical and Special Fees	140,581
Communications	222,100
Travel	20,767
Motor Vehicle Operation & Maintenance	73,710

Contractual Services	1,076,860
Supplies and Materials	93,723
Equipment - Additional	554,796
Fixed Charges	1,1183,827
Total Other Expenses	$ 3,366,364
TOTAL EXPENDITURES - 001	$ 5,338,070

Program 002 - Division of Asbestos

Appropriation	$ 1,086,247
Budget Amendments	1,382
Total Funds Available	$ 1,087,629
Salaries	
Division Director II (1)	63,753
Asst Atty General V, General Counsel (3)	85,523
Asst Atty General VI, General Counsel	109,498
Staff Attorney I (1)	223
Legal Assistant II (1)	21,151
Staff Attorney II (2)	57,552
Staff Attorney III	1,059
Administrative Aide I	24,334
Stenographer, Law & Legislative (3)	37,570
Total Salaries	$ 400,440
Additional Salary Related Expenses	
Overtime	25,221
Fringe Benefits	101,739
Total Additional Expenses	$ 125,155
Total Salaries & Related Expenses	$ 528,595
Other Expenses	
Technical & Special Fees	105,686
Communication	4,463
Travel	23,281

Motor Vehicle Operation & Maintenance	2,953
Contractual Services	403,654
Supplies & Materials	1,142
Equipment - Additional	790
Fixed Charges	17,065
Total Other Expenses	$ 559,034
TOTAL EXPENDITURES - 002	$ 1,087,629

Program 003 - Division of Savings and Loan

Appropriation	$ 897,560
Less Reversion	(546,055)
Total Funds Available	$ 351,505
Salaries	
Asst Atty General VI, General Counsel	90,026
Asst Atty General V, General Counsel (2)	51,617
Administrator II (1)	2,813
Fiscal Specialist III (3)	2,247
Staff Attorney II	30,684
Legal Assistant I (1)	22,166
Stenographer, Law & Legislative (1)	20,477
Total Salaries	$ 220,030
Additional Salary Related Expenses	
Overtime	658
Fringe Benefits	58,310
Total Additional Expenses	$ 58,968
Total Salaries & Related Expenses	$ 278,992
Other Expenses	
Technical and Special Fees	15,460
Communication	1,412
Travel	1,084

Motor Vehicle Operation & Maintenance	1,584
Contractual Services	23,648
Supplies and Materials	3,233
Equipment - Additional	8,309
Fixed Charges	17,777
Total Other Expenses	$ 72,507
TOTAL EXPENDITURES - 003	$ 351,505

Program 004 - Division of Securities

Appropriation	$ 710,522
Budget Amendments	1,382
Total Funds Available	$ 711,904
Salaries	
Division Director II (1)	63,753
Asst Atty General VI, General Counsel (2)	103,460
Asst Atty General V, General Counsel (1)	41,665
Staff Attorney II (1)	980
Administrative Specialist III (3)	80,133
Legal Assistant II (1)	25,954
Administrative Aide I	24,334
Office Secretary III (2)	45,218
Stenographer, Law & Legislative (1)	18,708
Typist Clerk IV (1)	14,556
Total Salaries	$ 418,761
Additional Salary Related Expenses	
Overtime	10,548
Fringe Benefits	121,011
Other Adjustments/Turnover	1
Total Additional Expenses	$ 131,560
Total Salaries & Related Expenses	$ 550,321

Other Expenses	
Technical and Special Fees	99,080
Communication	6,470
Travel	1,280
Motor Vehicle Operation & Maintenance	3,942
Contractual Services	37,217
Supplies and Materials	6,675
Equipment - Additional	3,145
Fixed Charges	3,774
Total Other Expenses	$ 161,583
TOTAL EXPENDITURES - 004	$ 711,904

Program 005 - Division of Consumer Protection

Appropriation	$ 2,354,590
Budget Amendments	1,382
Total	$ 2,355,972
Special Fund Expenditure	297,399
Total Funds Available	$ 2,653,371
Salaries	
Division Director II (1)	63,753
Asst Atty General VII, General Counsel (1)	55,869
Asst Atty General VI, General Counsel (3)	217,446
Asst Atty General V, General Counsel (3)	116,470
Administrator II (2)	76,651
Chief Investigator Consumer Fraud (1)	38,023
Administrative Officer III (2)	56,235
Public Affairs Officer II (1)	35,287
Administrative Officer II (2)	52,602
Administrative Officer I (2)	60,822
Consumer Affairs Supervisor (4)	112,929
Public Affairs Specialist III (1)	28,612
Administrative Specialist II (1)	19,883
Consumer Affairs Specialist III (10)	214,977

Publications Specialist II (1)	24,334
Data Processing Operations Technician II	21,050
Data Processing Operations Technician I (1)	14,362
Consumer Affairs Specialist II (2)	39,810
Administrative Aide I (1)	24,334
Office Secretary III, Stenographic (1)	22,609
Stenographer, Law & Legislative (6)	112,748
Office Secretary II (1)	16,119
Office Clerk II (1)	10,972
Total Salaries	$ 1,435,897
Additional Salary Related Expenses	
Overtime	9.900
Miscellaneous Adjustments	60
Fringe Benefits	389,313
Other Adjustments/Turnovers	(29,326)
Total Additional Charges	$ 369,947
Total Salaries & Related Expenses	$ 1,805,844
Other Expenses	
Technical and Special Fees	155,865
Communication	69,365
Travel	10,034
Motor Vehicle Operation & Maintenance	22,060
Contractual Services	492,297
Supplies and Materials	30,694
Equipment - Additional	51,405
Fixed Charges	15,807
Total Other Expenses	$ 847,527
TOTAL EXPENDITURES - 005	$ 2,653,371

Program 006 - Antitrust Division

Appropriation	$ 926,360
Budget Amendments	1,382
Total	$ 927,742
Salaries	
Division Director II (1)	63,753
Asst Atty General VII, General Counsel	54,297
Asst Atty General VI, General Counsel (3)	128,651
Asst Atty General V, General Counsel (4)	164,015
Legal Assistant II (2)	47,350
Administrative Aide I (1)	24,334
Stenographer, Law & Legislative (2)	44,995
Office Secretary I (1)	11,283
Total Salaries	$ 538,678
Additional Salary Related Expenses	
Overtime	1,314
Miscellaneous Adjustments	3,542
Fringe Benefits	132,875
Other Adjustments/Turnover	(612)
Total Additional Expenses	$ 137,119
Total Salaries and Related Expenses	$ 675,797
Other Expenses	
Technical and Special Fees	1,998
Communication	1,365
Travel	17,761
Motor Vehicle Operation & Maintenance	3,244
Contractual Services	218,100
Supplies and Materials	3,048
Equipment - Additional	432
Fixed Charges	5,997
Total Other Expenses	$ 251,885
TOTAL EXPENDITURES - 006	$ 927,742

Program 008 - State's Attorneys' Coordinator

Appropriation	$ 175,785
General Fund Revision/Reduction	(10,589)
Total Funds Available	$ 165,196
Salaries	
State's Attorneys' Coordinator (1)	53,800
Administrative Aide I	24,334
Total Salaries	$ 78,134
Additional Salary Related Expenses	
Overtime	265
Fringe Benefits	21,334
Total Additional Expenses	$ 21,599
Total Salaries and Related Epenses	$ 99,733
Other Expenses	
Technical and Special Fees	3,396
Communication	2,143
Travel	3,214
Motor Vehicle Operation & Maintenance	1,183
Contractual Services	52,921
Supplies and Materials	283
Equipment - Additional	1,021
Fixed Charges	1,302
Total Other Expenses	$ 65,463
TOTAL EXPENDITURES - 008	$ 165,196

Program 009 - Medicaid Fraud Control Unit

General Fund Appropriation	$ 312,544
General Fund/Reduction	(863)
Total	$ 311,681
Federal Fund Expenditure	924,168
Total Funds Available	$ 1,235,849
Salaries	
Division Director II	24,880
Principal Counsel (1)	35,850
Asst Atty General VII, General Counsel (1)	55,869
Asst Atty General VI, General Counsel (3)	129,271
Chief Investigator, Medicaid Fraud (1)	41,000
Fiscal Administrator II (1)	44,300
Fiscal Administrator I (1)	35,237
Fiscal Specialist III (3)	107,819
Staff Attorney I	367
Medicaid Fraud Investigator III (3)	84,644
Medicaid Fraud Investigator II (5)	130,617
Administrative Aide I (1)	24,334
Stenographer, Law & Legislative (3)	52,372
Total Salaries	$ 766,610
Additional Salary Related Expenses	
Miscellaneous Adjustments	8,570
Overtime	112
Fringe Benefits	208,021
Total Additional Expenses	$ 216,703
Total Salaries & Related Expenses	$ 983,313
Other Expenses	
Technical Specialist	3,942
Communication	1,191
Travel	13,256
Motor Vehicle Operation & Maintenance	28,007

Contractual Services	77,290
Supplies and Materials	7,763
Equipment - Additional	(1,189)
Grants, Subsidies and Contributions	88,181
Fixed Charges	34,185
Total Other Expenses	$ 252,536
TOTAL EXPENDITURES - 009	$ 1,235,849

Program 014 - Civil Litigation Division

Appropriation	$ 1,462,878
Budget Amendments	4,221
Total Funds Available	$ 1,467,099
Salaries	
Senior Executive Associate Atty Gen (1)	68,853
Principal Counsel (1)	59,031
Asst Attorney General VII, General Counsel (4)	161,723
Asst Attorney General VI, General Counsel (5)	225,841
Asst Attorney General V, Special Counsel (3)	98,320
Executive Associate Atty	49,449
Staff Attorney II (1)	34,479
Legal Assistant II (1)	25,954
Administrative Aide I (3)	70,601
Stenographer, Law & Legislative (4)	51,355
Office Secretary III (1)	10,598
Total Salaries	$ 856,204
Additional Salary Related Expenses	
Overtime	4,605
Miscellaneous Adjustments	11,274
Fringe Benefits	224,081
Other Adjustments/Turnovers	14,177
Total Additional Expenses	$ 254,137
Total Salaries & Related Expenses	$ 1,110,341

Other Expenses	
Technical and Special Fees	121,327
Communication	6,402
Travel	6,384
Motor Vehicle Operation & Maintenance	16,425
Contractual Services	190,427
Supplies and Materials	11,363
Equipment - Additional	1,001
Fixed Charges	3,384
Total Other Expenses	$ 356,758
TOTAL EXPENDITURES - 014	$ 1,467,099

Program 015 - Criminal Appeals Division

Appropriation	$ 1,075,457
Budget Amendments	1,382
Total Funds Available	$ 1,076,839
Salaries	
Division Director II (1)	63,753
Asst Attorney General VII, General Counsel (2)	135,405
Asst Attorney General VI, General Counsel (2.5)	202,916
Asst Attorney General V, General Counsel (7.5)	176,640
Asst Attorney General IV, General Counsel (1)	42,192
Administrative Aide I (1)	24,334
Office Secretary III (2)	39,417
Stenographer, Law & Legislative (2)	43,989
Office Secretary II (1)	20,234
Total Salaries	$ 748,880

Additional Salary Related Expenses	
Miscellaneous Adjustments	1,002
Fringe Benefits	207,209
Other Adjustments/Turnovers	1
Total Additional Expenses	$ 208,212
Total Salaries & Related Expenses	$ 957,092
Other Expenses	
Technical and Special Fees	90,700
Communication	3,536
Travel	5,033
Motor Vehicle Operation & Maintenance	8,856
Contractual Services	847
Supplies and Materials	6,411
Equipment - Additional	1,007
Fixed Charges	3,357
Total Other Expenses	$ 119,747
TOTAL EXPENDITURES - 015	$ 1,076,839

Program 016 - Criminal Investigations Division

Appropriation	$ 743,115
Budget Amendments	1,382
Total Funds Available	$ 744,497
Salaries	
Division Director II (1)	63,753
Asst Attorney General VII, General Counsel (1)	55,869
Asst Attorney General VI, General Counsel (1)	92,547
Asst Attorney General V, General Counsel (2)	88,369
Fiscal Administrator II (1)	44,350
Administrator II (1)	36,598

Fiscal Specialist III (4)	141,739
Legal Assistant II	19,853
Administrative Aide I (1)	24,334
Stenographer, Law & Legislative (2)	33,159
Total Salaries	$ 600,571
Additional Salary Related Expenses	
Overtime	480
Miscellaneous Adjustments	5,577
Fringe Benefits	157,383
Other Adjustments/Turnovers	2
Total Additional Expenses	$ 163,442
Total Salaries & Related Expenses	$ 764,013
Other Expenses	
Technical and Special Fees	8,522
Communication	1,723
Travel	7,713
Motor Vehicle Operation & Maintenance	6,843
Contractual Services	(52,774)
Supplies and Materials	5,006
Equipment - Additional	1,157
Fixed Charges	2,294
Total Other Expenses	$ (19,516)
TOTAL EXPENDITURES - 016	$ 744,497

Program 017 - Educational Affairs Division

Appropriation	$ 744,962
Budget Amendments	1,382
Total Funds Available	$ 746,344

Salaries	
Division Director II (1)	63,753
Asst Attorney General VII, General Counsel (1)	37,465
Asst Attorney General VI, General Counsel (3)	100,378
Asst Attorney General V, General Counsel (2)	105,777
Staff Attorney II (1)	30,684
Administrative Aide I (1)	24,334
Office Secretary III (2)	43,078
Stenographer, Law & Legislative	22,121
Total Salaries	$ 427,590
Additional Salary Related Expenses	
Overtime	908
Miscellaneous Adjustments	(535)
Fringe Benefits	110,895
Other Adjustments/Turnovers	(200)
Total Additional Expenses	$ 11,068
Total Salaries & Related Expenses	$ 538,658
Other Expenses	
Technical and Special Fees	36,187
Communication	2,689
Travel	6,520
Motor Vehicle Operation & Maintenance	5,810
Contractual Services	143,175
Supplies and Materials	6,945
Equipment - Additional	2,058
Fixed Charges	4,302
Total Other Expenses	$ 207,686
TOTAL EXPENDITURES - 017	$ 746,344

Program - 018 Correctional Litigation Division

Total Funds Available	$ 509,303
Salaries	
Asst Attorney General VII, General Counsel (1)	55,869
Asst Attorney General VI, General Counsel (4)	184,734
Asst Attorney General V, General Counsel	37,910
Administrative Aide I (1)	24,334
Stenographer, Law & Legislative (2)	40,169
Total Salaries	$ 343,016
Additional Salary Related Expenses	
Overtime	398
Fringe Benefits	89,742
Miscellaneous Adjustments	84
Total Additional Expenses	$ 90,224
Total Salaries & Related Expenses	$ 433,240
Other Expenses	
Technical and Special Fees	9,428
Communication	2,084
Travel	2,687
Motor Vehicle Operation & Maintenance	6,012
Contractual Services	50,712
Supplies and Materials	4,146
Equipment - additional	243
Fixed Charges	751
Total Other Expenses	$ 76,063
TOTAL EXPENDITURES - 018	$ 509,303
Total FY 90 Expenditures	$ 17,015,348

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

OPINIONS PUBLISHED

IN FULL

See also page 485 for synopses of additional Opinions

ABORTIONS

BUDGETARY ADMINISTRATION — "LEGISLATING IN THE BUDGET" — RELATIONSHIP BETWEEN STATUTORY RESTRICTIONS ON ABORTION AND BUDGETARY LIMITATION ON MEDICAID FUNDING OF ABORTIONS

January 23, 1990

The Honorable R. Clayton Mitchell, Jr.
Speaker, Maryland House of Delegates

You have requested our opinion on three questions regarding the inclusion of restrictions on abortion in the annual budget bill. Your questions are prompted by the possibility that the Supreme Court might overrule *Roe v. Wade* in deciding two abortion cases now before the Court, *Ohio v. Akron Center for Reproductive Health*, No. 88-805, and *Hodgson v. Minnesota*, Nos. 88-1125 and 88-1309. The Court's decision last term in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), is regarded by many as signaling a willingness on the part of at least four members of the Court to overrule *Roe*. Specifically, you ask:

1. If the Supreme Court overrules *Roe*, with the result that existing statutory restrictions on abortions are again effective, would budgetary restrictions on funding abortions through the Maryland Medical Assistance Program ("Medicaid") like those in the current budget bill conflict with the statutory restrictions? If so, which provisions would prevail?

2. If the Court upholds the restrictions at issue in the cases before it but does not overrule *Roe*, what is the answer to the first question?

3. In either instance, could budget language regulate all abortions — for example, by regulating the circumstances under which abortions may be performed in clinics or hospitals that receive any State funds or that are regulated in some manner by the State?

For the reasons given below, we conclude as follows:

1. If *Roe v. Wade* were overruled, the statutory provisions would determine the legality of all abortions, including those funded through the Medicaid Program. In a few respects, the current budget bill language authorizes Medicaid reimbursement for abortions that would be prohibited by statute; those budget bill provisions would no longer be effective. Conversely, in a few other respects the budget bill is more restrictive than the statute, and the more restrictive provisions would remain effective for abortions funded through the Medicaid Program.

2. Because we cannot predict what principles the Supreme Court might adopt to determine the constitutionality of abortion restrictions if it does not overrule *Roe v. Wade*, we cannot predict what effect its decisions might have in that situation.

3. An attempt to regulate all abortions through budget conditions related to the Medicaid Program would violate the constitutional prohibition against legislating in the budget.

I

Budgetary and Statutory Restrictions on Abortions

A. Budgetary Restrictions

Since 1978, the annual appropriation for the Medicaid Program has included provisions limiting the circumstances under which Medicaid funds may be used to pay for abortions. *See* Chapter 44, Laws of Maryland 1978 at 760 (budget item 32.01.05.03).[1]

The current budget language prohibits Medicaid reimbursement for the cost of an abortion except in the following cases:

---

[1] In 1977, the Supreme Court for the first time held that the United States Constitution does not require state medical assistance programs to pay for abortions that are not medically necessary, even if those programs do pay all medical expenses incident to pregnancy and childbirth. *Maher v. Roe*, 432 U.S. 464 (1977). In 62 *Opinions of the Attorney General* 11, 12 (1977), Attorney General Burch concluded that the Maryland Constitution likewise does not require Medicaid funding for nontherapeutic abortions.

> [W]here continuation of the pregnancy is likely to result in the death of the woman; or where the woman is a victim of rape, sexual offense, or incest which has been reported to a law enforcement agency or a public health or social agency; or where it can be ascertained by the physician with a reasonable degree of medical certainty that the fetus is affected by genetic defect or serious deformity or abnormality; or where it can be ascertained by the physician with a reasonable degree of medical certainty that termination of pregnancy is medically necessary because there is substantial risk that continuation of the pregnancy could have a serious and adverse effect on the woman's present or future physical health; or before an abortion can be performed on the grounds of mental health there must be certification in writing by the physician or surgeon that in his or her professional judgment there exists medical evidence that continuation of the pregnancy is creating a serious effect on the woman's present mental health and if carried to term there is a substantial risk of a serious or long lasting effect on the woman's future mental health.

Chapter 14, Laws of Maryland 1989 at 1388-89 (budget item 32.17.01.03).[2] The same restrictions are embodied in the regulations adopted by the Department of Health and Mental Hygiene ("DHMH") to govern the administration of Medicaid. COMAR 10.09.02.04G, 10.09.06.04A(5), and 10.09.06.04B(2).

---

[2] The first restrictions on Medicaid funding for abortions limited payments to cases in which continuation of the pregnancy was likely to cause the woman's death or posed a risk of "a detrimental effect on the health of the woman"; when there was "a risk of the birth of the child with permanent physical deformity, genetic defect or mental retardation"; or when the pregnancy resulted from rape, sexual offense, or incest reported to a law enforcement agency or public or private health or social agency. Chapter 44, Laws of Maryland 1978 at 760. As originally introduced, the restrictions would have permitted Medicaid funding only when the woman's life would be endangered, when the pregnancy resulted from rape or incest promptly reported to a law enforcement agency, or when two physicians determined that "severe and long lasting physical health damage to the mother would result if the pregnancy were carried to term." Chapter 44, Laws of Maryland 1978 at 759-60.

These provisions do not purport to prohibit the performance of any abortion; rather, they prohibit the use of Medicaid funds to pay for abortions in cases other than those enumerated. Their limited scope is consistent with the principle that budgetary provisions may not amount to substantive legislation. The budget bill's "'function and effect is to appropriate money, not to legislate generally.'" *Bayne v. Secretary of State*, 283 Md. 560, 574, 392 A.2d 560 (1978) (quoting 37 *Opinions of the Attorney General* 139, 141 (1952)).

B. Statutory Restrictions

Section 20-208(a) of the Health-General Article ("HG" Article) restricts the cases in which abortions may be performed. During the first 26 weeks of gestation, that statute would authorize an abortion only if it is performed in an accredited, licensed hospital and only if one of the following conditions is met:

> (1) Continuation of the pregnancy is likely to result in the death of the mother;
>
> (2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;
>
> (3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
>
> (4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

HG §20-208(a). After the first 26 weeks, an abortion would be prohibited under HG §20-208(b)(1) unless the life of the woman were threatened or the fetus were dead. In addition, HG §20-208(b)(2) prohibits any abortion unless it has been authorized in writing by the abortion review authority of the hospital where the abortion is to be performed.

HG §20-208 is currently unenforceable. However, in 74 *Opinions of the Attorney General* 19 (1989) we concluded that, if *Roe v. Wade* is overruled, Maryland's statutes restricting abortions could be applied to all abortions performed after the date of the decision.

In that event, the statutory restrictions would be fully applicable to all abortions, whether funded through the Medicaid Program or not. Thus, to the extent that the current budget bill language permits reimbursement of the cost of abortions that would become illegal, those provisions of the budget bill would be moot. To the extent that the budget bill language prohibits reimbursement of the cost of abortions that would still be legal, those provisions would remain effective.[3]

Hence, we must consider in detail the two sets of provisions. With the exception of the first condition — where continuation of the pregnancy is likely to result in the woman's death — there are obvious differences in the wording of the conditions. Some of these differences can be harmonized. In other instances, those differences in language reflect substantive differences. In Part II below, we analyze each portion of the budget restriction together with its statutory counterpart.

II

Effect of Varying Provisions If *Roe v. Wade* Is Overruled

A. *Pregnancy Resulting From Rape or Other Sexual Offenses*

The budget language authorizes Medicaid reimbursement for an abortion "where the woman is a victim of rape, sexual offense, or incest which has been reported to a law enforcement agency or a public health or social agency ...." The comparable statutory provision allows an abortion only if the pregnancy resulted from a rape committed by force or the threat of force and only if the local State's Attorney provides written confirmation that the alleged rape in fact occurred. HG §20-208(a)(4).

These two provisions cannot be harmonized. The budget bill permits Medicaid reimbursement for an abortion under some circumstances in which HG §20-208(a)(4), if it were effective, would

---

[3] The State is not required to use its funds to pay for all abortions that may lawfully be performed. *Harris v. McRae*, 448 U.S. 297, 325 (1980).

prohibit the abortion — for example, when the pregnancy resulted from an act of incest that was not also a rape.[4] If *Roe v. Wade* were overruled, the Medicaid Program could no longer fund these abortions.

B. Fetal Abnormality

HG §20-208(a)(3) permits an abortion when "[t]here is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation ...." Medicaid reimbursement of the cost of an abortion is authorized "where it can be ascertained by the physician with a reasonable degree of medical certainty that the fetus is affected by genetic defect or serious deformity or abnormality ...."

One obvious difference between the two is that the budget bill requires "a reasonable degree of medical certainty" about the existence of the specified conditions; the statute does not contain this explicit requirement. This difference may be more apparent than real, however.

A "reasonable degree of medical certainty" is in general a medical judgment that the described condition most likely exists. *See Lane v. State Farm Mutual Auto. Ins. Co.*, 308 N.W.2d 503, 512 (Neb. 1981). That is, the attending physician may not rely on generalized evidence — for example, that children born to women in certain age groups are statistically more likely to suffer from birth defects or mental retardation — but must make a particularized assessment of the actual situation of the individual woman.

Although the statute does not contain similar wording, its requirement of authorization by a hospital review authority, HG §20-208(b)(2), might have been intended to achieve the same result. One main function of review was to assure that the attending physicians had properly related the patient's condition to the statutory criteria. Thus, the requirement of a careful exercise of medical judgment on the basis of objectively ascertainable medical evidence is at least implicit in HG §20-208(a)(3).

---

[4] In some cases, presumably, continuation of a pregnancy resulting from incest "would gravely impair the ... mental health of the mother"; if so, HG §20-208(a)(2) would permit the abortion. In other cases of pregnancy resulting from incest, however, presumably this standard would not be met and the abortion would be illegal.

In any case, the statute is the less restrictive of the provisions, to the extent of any practical difference. Hence, the budget bill provision will remain effective if the statute is once again enforceable.

One other difference in wording merits brief mention. The statute permits an abortion only if the child would likely be born with "grave and permanent physical deformity or mental retardation." If the budget bill language, referring to "genetic defect or serious deformity or abnormality ...," is intended to encompass cases beyond the statute (for instance, genetic defects not associated with mental retardation), the budget bill could no longer be given effect in that respect.

C. Health Effects

HG §20-208(a)(2) would authorize an abortion when "[t]here is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother ...." The budget bill authorizes Medicaid funding of an abortion when the attending physician can ascertain with a reasonable degree of medical certainty that there is substantial risk of "a serious and adverse effect on the woman's present or future physical health ...." Medicaid funding is also permitted when the physician certifies that, in the physician's professional judgment, there is medical evidence "that continuation of the pregnancy is creating a serious effect on the woman's present mental health and if carried to term there is a substantial risk of a serious or long lasting effect on the woman's future mental health ...."

So far as effect on the woman's physical health is concerned, the wording of the statutory and budgetary provisions varies little. As we explain in Part IIB above, we think that the requirement of individualized assessment based on objectively ascertainable medical evidence embodied in the budget bill restriction's reference to "a reasonable degree of medical certainty" is implicit in the statutory restrictions. Hence, the minor variation in the wording of the restrictions does not amount to any variation in substance.

With respect to the pregnancy's effect on the woman's mental health, the difference in the language of the two provisions is greater. The budget bill's language explicitly requires both medical evidence of a serious effect on the woman's *present* mental health and a substantial risk of a serious or long-lasting effect on her *future* mental health. HG §20-208(a) refers more generally to a substantial risk that continuation of the pregnancy "would gravely impair" the woman's mental health. Under some circumstances, presumably, continuation of a pregnancy to full term would have so serious an effect on a woman's future mental health as to "gravely impair" it, even though that degree of harm had not yet manifested itself in her present mental health.

Under those circumstances, HG §20-208(a)(2) would permit an abortion; the budgetary restriction would not. Because the budget bill may be more restrictive than the statute in limiting the use of State appropriations, the budgetary restriction could be given effect.[5]

D. Stage of Pregnancy

Neither the budget bill nor the regulations that govern the administration of the Medicaid Program distinguish the cases in which abortions may be funded on the basis of the stage of the pregnancy. However, HG §20-208(b)(1) would prohibit any abortion after 26 weeks of gestation unless the woman's life is threatened or the fetus is dead.

The budget bill thus authorizes Medicaid payment for an abortion after 26 weeks in some cases in which HG §20-208(b)(1) would prohibit the abortion — for example, when the pregnancy seriously and adversely affects the woman's health but is not actually life-threatening. This authorization could not be given effect if *Roe v. Wade* were overruled.

III

Effect of Varying Provisions If *Roe v. Wade* Is Not Overruled

You have also asked about the relation between the budgetary and statutory provisions if the laws at issue in the cases now before the Supreme Court were upheld without overruling *Roe v. Wade*. In 74 *Opinions of the Attorney General* 19 at 27-28, we explained that we cannot predict the basis on which the Court might uphold those laws if it does not overrule *Roe*. Consequently, we are unable to speculate on the status of Maryland's laws in that event.

Likewise, we are unable to provide a precise answer to your question. The most we can say is that any statutory abortion restriction

---

[5] The budget bill's requirement that the physician provide written certification of his or her judgment would also be effective.

again effective as a result of the Court's actions would be applicable to Medicaid-funded abortions.

IV

Imposition of Additional Abortion Restrictions in Budget Bill

Article III, §52(6) of the Maryland Constitution authorizes the General Assembly to "strike out or reduce items" in the budget for the Executive Branch. That power includes the power to impose limitations on the use of funds appropriated or on the use of a facility for which the funds are appropriated.

However, the General Assembly may not use the budget bill as a vehicle for the enactment of substantive legislation that is otherwise subject to the constitutional requirements for the enactment of legislation. *See* Article III, §30 of the Constitution (presentment to the Governor); Article II, §17 (veto power of the Governor). To be valid, a condition or limitation on an appropriation must be "directly related to the expenditure of the sum appropriated, [must] not, in essence, amend either substantive legislation or administrative rules adopted pursuant to legislative mandate, and [must be] effective only during the fiscal year for which the appropriation is made." *Bayne v. Secretary of State*, 283 Md. 560 at 574. A provision that oversteps these bounds is an invalid attempt to "legislate in the budget" and is not legally binding. 74 *Opinions of the Attorney General* 53, 55-56 (1989).

You have identified two possible means by which the performance of all abortions might be restricted by provisions of a future budget bill: a limitation on the conditions under which abortions may be performed in clinics or hospitals that receive State funds; or a limitation on the conditions under which abortions may be performed in clinics or hospitals that are regulated in some manner by the State. In our view, either of these would be impermissible "legislating in the budget."

A limitation on the use of State funds in the performance of abortions is certainly permissible. 63 *Opinions of the Attorney General* 60, 73-74 (1978). However, the limitation must be "directly related to the expenditure of the sum appropriated." *Bayne*, 283 Md. at 574. Here, the "sum appropriated" is for "provider reimbursements" — that is, payments to hospitals, physicians, and other health care providers pursuant to contracts between the providers and DHMH. *See generally*

75 *Opinions of the Attorney General* 3 (1990); 62 *Opinions of the Attorney General* 11 (1977). In our view, a budget bill provision seeking to restrict not only Medicaid reimbursements but also the availability of medical services wholly outside the Medicaid Program would be insufficiently related to that item of appropriation.[6]

The second kind of restriction about which you inquire — a restriction on the performance of abortions in clinics or hospitals that are regulated in some manner by the State — would be even more clearly "legislating in the budget." That restriction would not be related to the expenditure of any appropriation. Moreover, every health facility is regulated "in some manner" by the State. *See, e.g.*, HG Title 19, Subtitles 3 and 3A. The attempted imposition of general abortion restrictions through budget language based on the fact of regulation alone would thus constitute an attempt to establish general policy through the budget bill.

Because the budget bill is not subject to gubernatorial veto and its function is solely to appropriate money, it may not be used to "legislate generally." 37 *Opinions of the Attorney General* at 141 (1952). Hence, we believe that budget bill language restricting the activities of all clinics or hospitals regulated by the State would be impermissible "legislating in the budget."

IV

Conclusion

In summary, our opinion is as follows:

1. If *Roe v. Wade* were overruled, the statutory provisions would determine the legality of all abortions, including those funded through the Medicaid Program. In a few respects, the current budget bill language authorizes Medicaid reimbursement for abortions that would be prohibited by statute; those budget bill provisions would no longer be effective. Conversely, in a few other respects, the budget bill is more restrictive than the statute, and the more restrictive provisions

---

[6] In light of this conclusion, we need not consider whether a restriction of this kind would violate the federal constitution, assuming that *Roe v. Wade* is not overruled. *See Planned Parenthood v. State of Arizona*, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986) (holding unconstitutional a comparable appropriations rider).

would remain effective for abortions funded through the Medicaid Program.

2. Because we cannot predict what principles the Supreme Court might adopt to determine the constitutionality of abortion restrictions if it does not overrule *Roe v. Wade*, we cannot predict what effect its decisions might have in that situation.

3. An attempt to regulate all abortions through budget conditions related to the Medicaid Program would violate the constitutional prohibition against legislating in the budget.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

The two Supreme Court decisions referred to at the beginning of this opinion, *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502 (1990), and *Hodgson v. Minnesota*, 497 U.S. 417 (1990), did not overrule *Roe v. Wade* and had no effect on Maryland law.

The statutory restrictions on abortion discussed in this opinion were repealed by Chapter 1 (Senate Bill 162) of the Laws of Maryland 1991.

ABORTION — PARENTAL NOTIFICATION REQUIREMENTS — EFFECT OF RECENT SUPREME COURT DECISIONS — CURRENT PARENTAL NOTIFICATION STATUTE REMAINS UNENFORCEABLE

August 30, 1990

The Honorable Lawrence A. LaMotte
The Honorable Samuel I. Rosenberg
Maryland House of Delegates

Each of you has requested an opinion on the effect of two recent Supreme Court decisions on abortion laws, *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926 (1990), and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972 (1990). Specifically, you ask (i) whether the parental notification requirement now in the statute, §20-103 of the Health-General Article ("HG" Article), has become enforceable; and (ii) whether the parental notification requirements of Senate Bill 356 (1990) or Senate Bill 836 (1990), as adopted by the Senate, would now have become enforceable if either had been enacted.

For the reasons given below, we conclude that the decisions in *Hodgson* and *Akron Center* have not changed the current standards for determining the constitutionality of parental notification requirements. Therefore, the existing requirement in HG §20-103 is still unenforceable, and the proposed requirement in Senate Bill 836 also would be unenforceable if it had been enacted. However, the proposed requirement in Senate Bill 356, because it would have been consistent with current constitutional standards, would be enforceable had it been enacted.

I

Existing and Proposed Parental Notification Requirements

A. *Current Law*

HG §20-103 requires a physician who contemplates performing an abortion upon an unmarried minor to first notify a parent or guardian of the minor.[1] Even if the minor does not live with a parent or guardian, notice is not excused unless a reasonable effort to give notice is unsuccessful. HG §20-103(b). The only circumstance in which a physician is not required to attempt to notify the minor's parent or guardian is when, in the physician's professional judgment, notice may lead to the physical or emotional abuse of the pregnant minor. HG §20-103(c).

In 70 *Opinions of the Attorney General* 3, 10 (1985), the Attorney General, relying on *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), concluded that a parental notice statute, like a parental consent statute, must include a bypass procedure for mature minors and those whose best interests are contrary to parental notification.[2] *See also Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979). Because HG §20-103 does not allow bypass when a minor is mature or bypass is in the minor's best interests for reasons other than the risk of abuse, the Attorney General concluded that the statute's bypass provision is not adequate to validate the notice requirement. 70 *Opinions of the Attorney General* at 12.[3]

---

[1] Unlike the Minnesota law at issue in *Hodgson*, HG §20-103 would be satisfied by notice to only one parent; unlike both that law and the Ohio law at issue in *Akron Center*, HG §20-103 does not impose a waiting period after notice. 74 *Opinions of the Attorney General* 19, 25 (1989). *See also* Part II below.

[2] The statute at issue in *City of Akron* required the consent of one parent to the performance of an abortion on a minor under the age of 15. 462 U.S. at 422 n.4. *See also* 462 U.S. at 439 n. 29 (parental notice provision relating to minors 15 to 18 not challenged in Supreme Court). The city urged validation of the statute on the ground that a minor could seek authorization for an abortion from the juvenile court. 462 U.S. at 441. However, the Supreme Court noted that, even if the state law governing juvenile proceedings was applicable, that law required notice to the minor's parents of the filing of a petition — "a requirement that in the case of a mature minor would be unconstitutional." 462 U.S. at 441 n. 31.

[3] During the last session of the General Assembly, Assistant Attorney General Kathryn M. Rowe pointed out a potential additional shortcoming of HG §20-103. If a minor seeks an abortion, the physician determines that parental notice is required, and the minor then decides not to have an abortion, the statute does not prohibit the physician from notifying her parent or guardian of her initial decision. Because a bypass procedure must assure the minor of anonymity, Ms. Rowe concluded that a specific guarantee of confidentiality in this situation may be constitutionally required. Letter to
(continued...)

B. Senate Bill 356 (1990)

Senate Bill 356 (1990) proposed to amend HG §20-103(c) by adding new HG §20-103(c)(1)(i) and (ii) authorizing a physician to perform an abortion on a minor without notice to her parent or guardian if, in the physician's professional judgment, "the minor is mature and capable of giving informed consent to an abortion; or ... [n]otification would not be in the best interest of the minor." Senate Bill 356, at 3. The bill would also have added a new HG §20-103(e) prohibiting the physician from notifying the minor's parent or guardian if she decided not to have an abortion. *Id.*

During the consideration of this bill, we advised that its provisions would be constitutional under current standards. Letter from J. Joseph Curran, Jr., Attorney General, to Delegate Timothy F. Maloney (March 23, 1990).[4] Although the various statutes that the Supreme Court has considered all involved judicial bypass provisions, no opinion in those cases has concluded that a court proceeding is constitutionally required. Indeed, the plurality in *Bellotti v. Baird*, 443 U.S. at 643 n. 22, pointed out that "much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction." *See also Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1134 (7th Cir. 1983) (physician bypass procedure "would be simpler, quicker, and undoubtedly less distressing for a minor than requiring her to go to court"). The proposed amendments to HG §20-103(c) would make the bypass available to any minor who is mature or for whom parental notification would not be in her best interests, thereby curing the defects identified in 70 *Opinions of the Attorney General* at 12. Moreover, the proposed new HG §20-103(e) would have assured complete confidentiality of the bypass procedure.

---

[3](...continued)
Delegate Peter Franchot at 4 n.3 (March 15, 1990); letter to Senator Walter M. Baker at 4 (March 9, 1990). With this conclusion we concurred. Letter from J. Joseph Curran, Jr., Attorney General, to Delegate Timothy F. Maloney at 3-4 (March 23, 1990).

[4] This letter concurred in advice previously given to different members of the General Assembly by Assistant Attorney General Kathryn M. Rowe. Letter to Senator John A. Cade (March 19, 1990); letter to Delegate Peter Franchot (March 15, 1990); and letter to Senator Walter M. Baker (March 9, 1990).

C. Senate Bill 836 (1990)

Senate Bill 836 (1990) would have amended HG §20-103 by requiring the physician in nonemergency situations to give written notice of a contemplated abortion on a minor to "all responsible parents" or to the guardian or conservator of the minor. Senate Bill 836, at 5 (proposed HG §20-103(b)(1)(ii)).[5] The bill would have provided for judicial authorization of the abortion without notice to one or both parents under only two circumstances: (i) if the required notice could not be given or (ii) if the minor alleged that she had been neglected or physically or sexually abused by a person entitled to the notice and had reported the abuse or neglect to "the appropriate legal authorities." Senate Bill 836, at 6 and 7 (proposed HG §20-103(b)(3) and (d)).

In the judicial proceeding, the court would be permitted, but not required, to authorize the abortion if it determined that the minor was mature and capable of giving informed consent. In making that determination:

> [A] court shall consider evidence relating to the emotional development, maturity, intellect, and understanding of the pregnant minor, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to abortion, and any other evidence that the court may find useful in determining whether the minor should be determined to be mature for the purpose of consenting to the abortion.

Senate Bill 836, at 6 (proposed HG §20-103(b)(3)(iii)2). Alternatively, the court would be empowered to authorize the abortion if, "balancing the best interests of the pregnant minor against those of her unborn child," the court determined that the abortion should be performed. *Id.* (proposed HG §20-103(b)(3)(i)2). The physician would have been prohibited from notifying the minor's parent or guardian if she decided not to have the abortion. Senate Bill 836, at 7 (proposed HG §20-103(e)).

---

[5] "Responsible parent" would have been defined as a "parent who has legal responsibility for a pregnant minor." *Id.* (proposed HG §20-103(a)(5)).

During consideration of this bill, we advised that these provisions did not meet current constitutional standards and, if enacted, would not be currently enforceable. Letter from J. Joseph Curran, Jr., Attorney General, to Delegate John S. Arnick at 2 (March 23, 1990).[6] The bypass procedure would not have been available to a mature minor or a minor whose best interests would not be served by parental involvement unless notice could not be given or she was a victim of past neglect or physical abuse and had reported the neglect or abuse. *See* 70 *Opinions of the Attorney General* at 10 (bypass procedure must give every minor opportunity to make showing of maturity or best interests). In a proceeding for judicial authorization of an abortion, the judge determining the minor's maturity would have been required to consider evidence not relevant to her maturity, in addition to that bearing on her "emotional development, maturity, intellect, and understanding."[7] The judge would have been permitted to withhold authorization even if the judge found that the minor was mature. *See Bellotti v. Baird*, 443 U.S. at 651 (judicial authorization may not be withheld from mature minor). Moreover, the bill would have required a judge making a "best interests" determination to "balanc[e] the best interests of the pregnant minor against those of her unborn child" — a balancing that is unconstitutional before viability. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 542 (1989) (Blackmun, J., dissenting) (acknowledging that *Roe* permits states to regulate abortions to promote interest in potential human life after viability).

---

[6] In light of the unstable state of the law regarding abortion restrictions, however, we advised that we would not recommend a veto of the bill on the ground that it was "clearly unconstitutional." Letter from J. Joseph Curran, Jr., at 4. This letter concurred in advice given with respect to an earlier version of the same proposal by Assistant Attorney General Kathryn M. Rowe. Letter to Senators Barbara Hoffman and Paula C. Hollinger and Delegates Samuel I. Rosenberg and Patricia R. Sher at 8-9 (February 26, 1990).

[7] A provision requiring a judge to consider essentially the same factors in determining a minor's maturity or best interests was upheld in *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983). However, the statute at issue in that case had been construed to require judicial authorization of the abortion if, on the basis of the evidence regarding "the emotional development, maturity, intellect and understanding of the minor," the court found that she was mature. 462 U.S. at 493.

II

Supreme Court Opinions

A. *Introduction*

In 74 *Opinions of the Attorney General* 19, 27-28 (1989), we noted that we could not predict what, if any, effect on constitutional doctrine regarding abortion the decisions in *Hodgson* and *Akron Center* might have if the Supreme Court should uphold the state laws at issue in those cases without overruling *Roe v. Wade*, 410 U.S. 113 (1973). In light of the uncertain state of the law in this area, we have also advised that enactments proposed during the last session of the General Assembly that would restrict abortions in ways inconsistent with *Roe* and its progeny, although not enforceable unless constitutional doctrine changes, would probably not be "clearly unconstitutional," our standard for bill review. , letter from J. Joseph Curran, Jr., Attorney General, to Delegate John S. Arnick (March 23, 1990). Your questions arise because the Supreme Court in *Hodgson* and *Akron Center* did uphold state parental notification statues without overruling *Roe*.[8]

B. *Hodgson v. Minnesota*

In this case, the Supreme Court held that a law requiring notice of a minor's contemplated abortion to both parents is constitutional only if it includes a bypass procedure by which the minor may avoid notifying one or both parents.[9]

Subdivision 2 of the statute at issue in this case requires that 48 hours' notice of an unemancipated minor's contemplated abortion be given to both parents, unless one is deceased or cannot be located, or to her guardian or conservator. This subdivision of the statute makes no provision for bypass of the notice to either parent. Subdivision 6 of the statute embodies the same two-parent notice requirement but includes a procedure for judicial authorization of an abortion without notice to one or both parents. Subdivision 6 was enacted conditionally,

---

[8] Justice Scalia, writing separately in both cases, again urged that *Roe* be overruled, as he had in *Webster v. Reproductive Health Services*. *See Hodgson*, 497 U.S. ___, 110 S.Ct. at 2960-61 (concurrence in judgment in part and dissent in part). *Akron Center*, 497 U.S. ___, 110 S.Ct. at 2984 (concurrence).

[9] The Court thus affirmed in all respects the decision of the United States Court of Appeals for the Eighth Circuit. *See* 853 F.2d 1452 (8th Cir. 1988).

to take effect only if enforcement of the notice requirement without the bypass procedure were restrained or enjoined. 110 S.Ct. at 2933 n.9.[10]

A majority of the Supreme Court (comprised of Justices Stevens, Brennan, Marshall, Blackmun, and O'Connor) held subdivision 2 of the statute, requiring notice to both parents in all cases, unconstitutional. In this majority's view, the state's interest in ensuring that the minor's decision to terminate her pregnancy is "knowing, intelligent, and deliberate" would be fully served by requiring notice to one parent, and the state has no legitimate interest in overruling the judgment of that parent if he or she decides not to consult the other parent. 110 S.Ct. at 2945. Further, the state's interest in protecting the second parent's authority over the minor cannot "overcome the liberty interests of a minor acting with the consent of a single parent." 110 S.Ct. at 2946.[11]

A different majority (comprised of Chief Justice Rehnquist and Justices O'Connor, Kennedy, White, and Scalia) held that subdivision 6's two-parent notice requirement with a procedure for bypass of the notice to one or both parents is constitutional.[12] However, those

---

[10] The bypass provision in the Minnesota law requires the judge to authorize the abortion if the judge finds the minor to be mature and capable of giving informed consent or finds that an abortion without notification to her parents would be in her best interest. The judge must make written "specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions." Both at the trial and appellate levels, the proceedings must be confidential and expeditious, without filing fees, and with a guardian ad litem or court-appointed counsel available to the young woman. Both trial and appellate courts must be available for the filing of bypass petitions or appeals at all times. 110 S.Ct. at 2933 n.9.

[11] Justice Marshall, joined by Justices Brennan and Blackmun, concurred in this part of the majority opinion "on the understanding that the opinion does not dispute that a minor's liberty interest alone outweighs the interest of the second parent in shaping a child's values and life styles, regardless of the interest of the first parent." 110 S.Ct. at 2951 n.1. (Marshall, J., concurring).

[12] Six members of the Court — Chief Justice Rehnquist and Justices Stevens, O'Connor, Kennedy, White, and Scalia — also held that the 48-hour waiting period following notice to the minor's parents is constitutional. 110 S.Ct. at 2944 (opinion of Stevens, J.) and 2969 (opinion of Kennedy, J.)

members of the Court did not agree on a single rationale for their holding.

Justice Kennedy, writing for himself, Chief Justice Rehnquist, and Justices White and Scalia, concluded that the judicial bypass procedure necessarily validated the notice requirement because the Court had indicated in *Bellotti v. Baird*, 443 U.S. 622 (1979), that a similar bypass procedure would validate a two-parent consent requirement. 110 S.Ct. at 2970. Indeed, the plurality would have held that no bypass is required for a statute that requires parental notice rather than consent, for a notice requirement "does not give any third party the legal right to make the minor's decision for her, or to prevent her from obtaining an abortion should she choose to have one performed." 110 S.Ct. at 2969. Justice O'Connor, in a separate concurrence, concluded that a two-parent notice requirement with provisions for bypass is constitutional "because the interference with the internal operation of the family required by subdivision 2 simply does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure." 110 S.Ct. at 2951.

C. Ohio v. Akron Center for Reproductive Health

In this case, the Supreme Court upheld the adequacy of a challenged judicial bypass procedure in a statute requiring notice of a minor's contemplated abortion to one parent, without addressing whether the one-parent notice requirement would be constitutional without a bypass procedure.[13]

The statute at issue in this case generally requires a physician who is to perform an abortion on an unemancipated minor to give notice to a parent, guardian, or custodian of the minor. The minor may instead seek judicial authorization for her abortion by filing one of three complaint forms: the first alleging that she is mature and able to make an informed decision, the second alleging that notice would not be in her best interests, and the third making both allegations. 110 S.Ct. at 2982. The pleading forms require the minor to sign her full name and to give the name of her parent, guardian, or custodian at four different places, although the hearing on her petition and any appeal must be

---

[13] The Court thus declined to review the conclusion of the United States Court of Appeals for the Sixth Circuit that a bypass procedure is constitutionally required in this situation and reversed the Sixth Circuit's conclusion that the particular procedure enacted by Ohio is inadequate. *See Akron Center For Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988).

conducted in a way that will preserve her anonymity, and all records of the proceedings must be kept confidential. 110 S.Ct. at 2979-80. In the hearing, the minor may attempt to prove both her maturity and her best interests only if she chose the pleading form making both allegations, and she must in any case prove her allegations by clear and convincing evidence. 110 S.Ct. at 2981-82. The failure of a trial or appellate court to render a decision on her petition within a specified time is deemed constructive authorization for the abortion. 110 S.Ct. at 2981.

The Supreme Court, in an opinion written by Justice Kennedy, held that this procedure, at least on its face, meets the standards for facial constitutionality of parental consent statutes enunciated in *Bellotti v. Baird* and therefore necessarily passes constitutional muster in a parental notice statute. 110 S.Ct. at 2789-90.[14] Requiring the minor to supply identifying information in her petition does not violate the constitutional requirement of anonymity in a bypass procedure because the statute requires that the minor's identity be kept confidential. *Id.* *See Bellotti*, 443 U.S. at 644 (bypass must be anonymous).[15] While the provisions establishing three different pleading forms and restricting the minor to proof of only the allegations specifically made in her complaint may cause her some initial confusion, they are not facially unconstitutional because the minor must be provided with counsel at the hearing on her petition and may move for leave to amend the pleadings, thereby preserving her right to show both her maturity and her best interests. 110 S.Ct. at 2982. *See Bellotti*, 443 U.S. at 647-48. The requirement that the minor prove her allegations by clear and convincing evidence is acceptable because the judicial bypass proceeding is ex parte, so that a higher level of proof is justified, and because the minor is assisted by counsel. 110 S.Ct. at 2981-82. The judicial bypass proceeding is sufficiently expeditious to withstand a facial challenge, in the Court's view, even if in a rare case the entire

---

[14] The majority pointed out, and Justice Stevens's concurrence emphasized, that the Ohio law had not yet been applied in any case. Because it was challenged as unconstitutional on its face, the challengers "must show that 'no set of circumstances exists under which the Act would be valid.'" 110 S.Ct. at 2980-81 (quoting *Webster v. Reproductive Health Services*, 492 U.S. at 542 (O'Connor, J., concurring)).

[15] Although the Court acknowledged that "[c]onfidentiality differs from anonymity," it concluded that the distinction has no constitutional significance in the context of procedures for judicial bypass of parental notification. *Id.*

procedure might take up to 22 days. 110 S.Ct. at 2980-81.[16] Further, the lack of a court order in cases of "constructive" judicial authorization for an abortion would not unconstitutionally deter a physician from performing the abortion because the physician could obtain documentation from the court to show that constructive authorization has occurred. 110 S.Ct. at 2981.[17]

For the same reasons, the Court rejected the challengers' claim that the procedure as a whole is so unfair as to violate due process on its face. 110 S.Ct. at 2982. Finally, the Court held that a state may constitutionally impose on a physician a nondelegable duty to give parental notice, because the physician has greater ability than a nonphysician "to garner and use information supplied by the minor's parents" and to advise the parents. 110 S.Ct. at 2983.

III

Effect on Existing and Proposed Maryland Law

The holding of *Hodgson* is that a state may not constitutionally require notice to both parents unless it provides a bypass procedure — that is, an alternative procedure by which the minor may obtain an abortion without notice. The holding of *Akron Center* is that, if a bypass procedure is required for a notice requirement, the procedure is constitutional only if it meets the criteria enumerated by Justice Powell for the plurality in *Bellotti v. Baird*, 443 U.S. at 643-44 — that is, if the procedure allows any minor to avoid parental notice upon showing that she is mature and capable of making the abortion decision independently or that the abortion would be in her best interests, and if the procedure is confidential and expeditious.

We have previously noted that last year's decision in *Webster v. Reproductive Health Services* "is the precursor of a new constitutional doctrine on abortion, one that will be markedly more open to state

---

[16] The lower courts had held that the potential for proceedings to stretch to this period rendered the bypass procedure unconstitutional. The Supreme Court expressed doubt about the lower courts' calculation of the time, turning as it did on their construction of the word "days" to mean business days rather than calendar days. 110 S.Ct. at 2989.

[17] This documentation would take the form of a date-stamped copy of the minor's complaint and a docket sheet for the case showing no entry of a court order. 110 S.Ct. at 2989 (Blackmun, J. dissenting).

regulation than the doctrine of *Roe* and its progeny." 74 *Opinions of the Attorney General* 3, 14 (1989). That anticipated new doctrine has not yet been enunciated. To the contrary, the decisions in *Hodgson* and *Akron Center* essentially reaffirm the legal rules established in *Bellotti v. Baird, City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983), at least as applied to a two-parent notice requirement. *See* 70 *Opinions of the Attorney General* 3, 8-11 (1985) (discussing cases).

We are unable to predict, on the basis of these cases, whether in a future case the Supreme Court may conclude that a statute like HG §20-103, requiring notice to only one parent, must include a bypass procedure. As the majority pointed out in *Hodgson*, no opinion in any of the earlier cases concerning parental notice or consent requirements has focused on a possible distinction between two-parent and one-parent requirements in this regard. Nonetheless, notwithstanding the holding in *Hodgson* that a two-parent notice requirement is constitutional only if it includes a bypass procedure, Chief Justice Rehnquist and Justices Kennedy, White, and Scalia might well hold that a one-parent notice requirement is valid even without a bypass procedure. *See Hodgson*, 110 S.Ct. at 2961 (Kennedy, J., dissenting in part) (bypass procedure not necessary when state requires notice rather than consent). *Cf. Akron Center*, 110 S.Ct. at 2978-79 (leaving open question whether notice statutes must contain bypass procedure).[18]

Whether a majority would join in such a holding, however, is not at all clear. Justice Stevens's concurrence and Justice Blackmun's dissent (joined by Justices Brennan and Marshall) in *Akron Center* both express the view that some bypass mechanism is necessary to validate a one-parent notice requirement. *See* 110 S.Ct. at 2985 (opinion of Blackmun, J.) and 2984 (opinion of Stevens, J.). *See also Hodgson*, 110 S.Ct. at 2957 (Marshall, J., dissenting in part) (notice requirement with judicial bypass is unconstitutional because it gives parents or judge effective veto over decision of pregnant woman and her physician).

Justice O'Connor's view on this issue simply cannot be ascertained. In *Hodgson* she concluded that a two-parent notice requirement is constitutional only if it includes a bypass procedure. In

---

[18] In these two cases, Justice Stevens drew a somewhat different distinction. He concluded that a two-parent notice or consent requirement is unconstitutional even if it includes a bypass procedure but that a one-parent notice or consent requirement is constitutional so long as it includes a bypass procedure.

Akron Center she joined a majority opinion that went no further than to sustain the adequacy of an existing bypass procedure. In neither case did she offer any comment to indicate whether she would conclude that a bypass is necessary for a one-parent notice requirement. Nor have her opinions in prior cases concerning parental consent or notice requirements given any indication of her views in this regard. *See Planned Parenthood Ass'n Kansas City, Mo. v. Ashcroft*, 462 U.S. at 505 (O'Connor, J., concurring in judgment in part) (one-parent consent requirement with bypass imposes no undue burden on minor's right to abortion); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 469-70 (O'Connor, J., dissenting) (Court should abstain from ruling on parental notification requirement when statute had not yet been construed by state courts).

Under these circumstances, we cannot assume that the constitutionality of a one-parent notice requirement should be tested under any standard different from that which we applied in the past. *See* 74 *Opinions of the Attorney General* 3, 16 (1989) (speculation about possible future holdings of Supreme Court "is not a sufficient basis on which to go beyond the limits of the law today").[19] *See generally Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917, 1921-22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

The Court's willingness to approve, at least on its face, the complex procedure at issue in *Akron Center* may be a reflection of an increased openness to state regulation of abortion. *See* 74 *Opinions of the Attorney General* 3, 14 (1989). Nonetheless, nothing in either *Akron Center* or *Hodgson* changes any of the standards we have previously applied to Maryland's existing parental notice law or to the revisions of that law proposed in the last session of the General Assembly. Until the Supreme Court clearly enunciates a new rule of law, we must continue to rely on existing precedent indicating that any parental notice requirement must include a bypass procedure meeting the standards of *Bellotti v. Baird*. Accordingly, we adhere to our previous conclusions regarding HG §20-103, Senate Bill 356 (1990), and Senate Bill 836 (1990).

---

[19] Still less, of course, would it be appropriate for us to speculate on the possible views of an as-yet-unconfirmed Supreme Court nominee.

IV

Conclusion

In sum, we conclude that neither *Hodgson v. Minnesota* nor *Ohio v. Akron Center For Reproductive Health* has changed the standards for determining the constitutionality of parental notification requirements in abortion laws. Hence, HG §20-103 is still unenforceable, and the more restrictive parental notice requirement proposed in Senate Bill 836 (1990) would also be presently unenforceable if it had been enacted. However, the notice requirement proposed in Senate Bill 356 (1990), because it would have been consistent with current constitutional standards, would be enforceable if it had been enacted.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

The parental notification provision discussed in this opinion was amended by Chapter 1 (Senate Bill 162) of the Laws of Maryland 1991.

ADMINISTRATIVE LAW

RULEMAKING — REPUBLICATION OF REGULATION THAT IS CHANGED FROM ORIGINAL PROPOSAL

January 22, 1990

The Honorable Martin W. Walsh, Jr.
Secretary of the Environment

You have requested our opinion concerning the legal requirements for reproposal of regulations. Specifically, you have asked for guidance in determining the circumstances under which an agency need not republish a regulation that is changed from the text originally published for comment.

For the reasons stated below, it is our opinion that an agency need not repropose a portion of a regulation that is changed from the originally proposed language if both of the following tests are met:

1. The changed regulation must not include material that goes beyond the scope of the issues raised by the proposed rule. Provisions that could not reasonably have been anticipated by participants in the rulemaking must be republished.

2. The groups affected by the regulation, including the general public, must not be disadvantaged in any significant way by the changes, compared to their situation if the proposed regulation had been adopted without change. If any group's benefits are reduced or its burdens increased appreciably by the change, or if the agency is uncertain about the significance of the change, the agency must republish the changed part.

I

Background

Under §10-111 of the State Government Article ("SG" Article), a proposed regulation may not be adopted unless it has been submitted to the Joint Committee on Administrative, Executive, and Legislative

Review ("AELR Committee") and published in the Maryland Register for public comment. The procedures governing publication are set forth in SG §10-112.

If an agency has proposed a regulation and wishes to make a change after the period for public comment has ended, the requirements of SG §10-113 must be met. SG §10-113(a) provides as follows:

> If a unit wishes to change the text of a proposed regulation so that any part of the text differs substantively from the text previously published in the Register, the unit may not adopt the proposed regulation unless it is proposed anew and adopted in accordance with the requirements of §§10-111 and 10-112 of this subtitle.[1]

Since its enactment in 1986, this provision has resulted in occasional controversies between the AELR Committee and agencies that did not repropose a changed regulation. All agree that stylistic and clarifying changes need not be reproposed. *See* Memorandum from Robert J. Colborn, Jr., Division of State Documents, to Regulations Coordinators (July 1, 1986) ("Colborn Memorandum").[2] The issue to be discussed in this opinion is whether an agency may make other changes without republication.

II

The 1976 Attorney General's Opinion and Federal Case Law

In 1976, the Administrator of the Division of State Documents asked this office to clarify whether notice and a new opportunity for public comment were required when the final text of a regulation

---

[1] As part of the notice of final adoption, the Attorney General must certify that the final regulation does not differ substantively from the text originally proposed. SG §10-113. *See* Part V below.

[2] Changes in codification, punctuation, spelling, and grammar are not substantive and thus need not be republished. Colborn Memorandum at 2-3. To require republication in these situations would be of no benefit to the public. Similarly, a change that merely conveys a requirement already specified by statute does not require reproposal, since public comment could have no effect. *See Vega v. National Union Fire Insurance Co.*, 682 P.2d 73, 77 n.9 (Haw. 1984).

contained provisions that, in the Administrator's phrase, were "substantially different" from the text originally proposed.

At the time, no provision in State law governed an agency's duty to provide notice to the public before adopting a final regulation that differed from the published proposal. Nor had any Maryland court addressed the problem, as Attorney General Burch phrased it, of "what would constitute sufficient notice under the Administrative Procedure Act where the final version of a regulation differs substantially from its proposed version ...." 61 *Opinions of the Attorney General* at 8.

Surveying the leading federal cases on republication, the Attorney General stated as follows: "The crux of adequacy of notice seems to be not so much whether a substantially different rule is adopted than the one originally proposed, but whether the entire class actually affected by the adopted rule could reasonably have anticipated the possibility of its adoption by the notice given." 61 *Opinions of the Attorney General* 6, 9 (1976). Thus the guidance provided in the 1976 opinion was this: "Whenever the affected class reasonably could not have anticipated from the published notice the substance of a regulation finally proposed for adoption, the agency should treat its revised version as a newly proposed rule." 61 *Opinions of the Attorney General* at 10.

Southern Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646 (1st Cir. 1974), typifies the federal cases relied on by the Attorney General. In that case, the court held that, under the federal Administrative Procedure Act, notice was not insufficient simply because an agency's final plan differed markedly from the plan originally proposed. As long as the changes made "were in character with the original scheme" and "had been foreshadowed in proposals and comments advanced during the rulemaking," the public's opportunity to influence the rulemaking process was not negated by changing the proposal. 504 F.2d at 658. Similarly, in *Seneca Grape Juice Corp. v. United States*, 367 F.Supp. 1396 (Cust. Ct. 1973), the court held that where "[a]ll interested parties had sufficient notice of what was under consideration, and were given an opportunity to present their views," the agency's change in a product standard was valid. 367 F.Supp. at 1406.

The federal courts continue to take this approach. They evaluate whether changes to a proposed regulation are "in character with the original scheme" and whether the "final rule is a logical outgrowth of the notice and comments already given." *See Chocolate Manufacturers Association v. Block*, 755 F.2d 1098 (4th Cir. 1985). If the court determines that these criteria have been met, republication is unnecessary. *See Small Refineries Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

III

Subsequent Legislative Developments

A. *"Substantially Different"*

During the legislative session following the release of the Attorney General's opinion, the General Assembly adopted former Article 41, §256(F)(f) as follows:

> If, after the proposed rule has been published initially in the Register, the agency decides to alter the initial text so that the proposed rule is *substantially different* from the initial text, the agency shall submit the altered text as though for initial publication.

Chapter 848, Laws of Maryland 1977, sec. 2 (emphasis added). The General Assembly did not define "substantially different" in this legislation, and we are not aware of legislative history explaining the phrase or the legislative objective underlying it.[3]

It is possible that the use of the identical phrase as had been used a few months earlier in the predicate to the Attorney General's opinion reflects an intention to mirror the standard announced in that opinion, despite the fact that the Attorney General's conclusion did not give controlling weight to the degree of difference between the proposed and final regulations. At any rate, as a practical matter, the new statutory provision apparently was treated as if it did not add anything to the test set out in the 1976 opinion.[4]

---

[3] Chapter 848 largely dealt with the procedures of the AELR Committee; the provision on reproposal of regulations was not its focus.

[4] The same language, "substantially different," was used when the State Government Article was enacted in 1984. *See* Revisor's Note to SG §10-113.

B. "Differs Substantively"

In 1986 the General Assembly amended SG §10-113 "[f]or the purpose of altering the standard for determining whether an amendment of a regulation proposed for final adoption warrants republication for public comment." Chapter 654, Laws of Maryland 1986. SG §10-113(a) now provides as follows:

> If a unit wishes to change the text of a proposed regulation so that any part of the text *differs substantively* from the text previously published in the Register, the unit may not adopt the proposed regulation unless it is proposed anew and adopted in accordance with ... §§10-111 and 10-112 of this subtitle.

(Emphasis added.) As part of the 1986 amendment, the General Assembly also defined the term "substantively" to mean "in a manner substantially affecting the rights, duties, or obligations of: (i) a member of a regulated group or profession; or (ii) a member of the public." SG §10-101(f).

IV

Effect of the 1986 Amendment

As discussed in Parts II and IIIA above, prior to the 1986 amendment, the test for republication, derived from the 1976 opinion and in practice not altered by the 1977 legislation, was whether a change could reasonably have been anticipated from the notice originally published. If so, the change was not "substantially different." *See* 61 *Opinions of the Attorney General* at 10. The evil that this test sought to prevent was unfair surprise. As long as participants in the rulemaking were given notice of the issues to be resolved, the agency was left with considerable discretion to resolve those issues without republication, even if the final rule reflected a different balancing of benefits and burdens.

The 1986 amendment reflects legislative dissatisfaction with this degree of agency discretion. As the legislative history pointed out, amendments that "might seem to be an insubstantial change to the promulgating unit could have a significant impact on people affected by the regulation." Summary of Committee Report, Economic and Environmental Affairs Committee at 2 (1986). The Committee report further stated that the purpose of the change was to ensure "that proposed regulations that have had changes in wording will be adequately reviewed by the Office of the Attorney General, proposed anew, and republished when the changes will affect people covered by the regulations." *Id.*

Based on this legislative history, we believe that the 1986 amendment was intended to impose a more stringent test than had previously been used. To be sure, we perceive no intention by the General Assembly to abandon altogether the old standard. If a change in a proposed regulation would not likely have been anticipated by participants in the rulemaking, the change must be reproposed, just as it would have been prior to 1986. However, after the 1986 amendment, even some changes that might have been recognized by all as a possibility nevertheless no longer may be adopted without reproposal.

One possible interpretation of the 1986 amendment is that *any* change requires republication, apart from changes in codification, punctuation, spelling, and grammar and mere rewordings for the sake of clarity. Under this construction, only these sorts of minor changes are not "substantive" and therefore may be adopted without reproposal.

In its broadest sense, the word "substantive" refers to laws that create, define, or regulate rights. *See Emerson Electric Co. v. Schlesinger*, 609 F.2d 898, 902 (8th Cir. 1979); *Krause v. State*, 31 Ohio St. 2d 132, 285 N.E.2d 736, 744 (1972); *Black's Law Dictionary* 128 (5th ed. 1979). If the General Assembly had only amended SG §10-113 — that is, if it had simply replaced the phrase "substantially differs" in that section with the phrase "differs substantively" and left the latter term undefined - this broad meaning of the term "substantively" might have been intended. The result would have been that any change whatever touching on benefits or burdens would require republication, regardless of its significance. In our view, however, this construction of SG §10-113 is incorrect.

First, the General Assembly did *not* simply amend SG §10-113 and thereby import the broad meaning of "substantive." It also enacted its own definition of "substantively": "in a manner *substantially* affecting the rights, duties, or obligations of" members of a regulated group or the public. SG §10-101(f). The emphasized adverb requires consideration of degree: Some changes affecting rights, duties, or obligations are significant enough to be "substantial" and therefore are "substantive," as thus defined; others, though they might affect rights, duties, or obligations and therefore would be "substantive" in the broad sense of the term, are comparatively insubstantial and therefore are *not* "substantive" as defined in SG §10-101(f).

The phrase "substantially affects," in other words, requires assessment of the actual effect on the public and on those regulated, to determine the extent of that effect. For example, in *Herdeman v. City of Muskego*, 343 N.W.2d 814 (Wis. App. 1983), the court held that an amendment to a rezoning proposal decreasing the amount of land to be rezoned was not a "substantial change":

> [T]he amendment did not affect different landowners nor did it affect the same landowners in a different way. An additional public hearing could only have resulted in repetitive statements by the same parties. Nothing would have been accomplished by requiring another notice and public hearing, except delay.

343 N.W.2d at 816. *See also Inganamort v. Borough of Fort Lee*, 293 A.2d 720 (N.J. Super. 1972) (republication of ordinance not required under "substantial alteration" standard, because effect of amendment was insignificant). *Compare Concerned Citizens v. 32nd Dist. Agric. Ass'n*, 42 Cal. 3d 929, 727 P.2d 1029 (1986) (changes to public works project were significant enough to require new environmental impact statement under "substantial change" standard) *with Fund for Environ. Defense v. County of Orange*, 204 Cal. App. 3d 1538, 252 Cal. Rptr. 79 (1988) (project changes were not significant enough under same standard).[5]

---

[5] The current Model State Administrative Procedure Act requires republication if a rule "is substantially different from the proposed rule." To determine whether an adopted rule is substantially different the agency must consider:

> (1) The extent to which all persons affected by the adopted rule should have understood that the published rule would affect their interests;
> (2) The extent to which the subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule; and
> (3) The extent to which the effects of the adopted rule differ from the effects of the published proposed rule had it been adopted instead.

(continued...)

Although the legislative history does not explain why this definition of the term "substantively" was enacted, we infer legislative recognition of the harm that too rigid a republication requirement would cause. Agencies would be forced either to republish virtually all changes, thereby doubling the time involved in adopting a regulation, or to refuse to incorporate suggested comments - even ones that would lessen the regulatory burden without reducing the benefits of the regulation — because to do so would lead to too much delay. The latter result would do a great disservice to the public. As the D.C. Circuit has observed, an agency "undoubtedly has authority to promulgate a final rule that differs in some particulars from its proposed rule .... '[A] contrary rule would lead to the absurdity that the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.'" *Small Refineries*, 705 F.2d at 546-47 (quoting *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 n. 51 (D.C. Cir. 1973)).

Applying the definition of "substantive" in SG §10-101(b), we conclude that an agency can "learn from the comments on its proposals" and incorporate what it learns without republication if, but only if, the agency is convinced that the change would not substantially worsen the position of any group affected by the regulation, including the general public, compared to their position if the regulation had been adopted as proposed.

For example, suppose that an agency, as part of a regulation intended to limit a form of pollution, proposes to require that an industry use a particular type of filter. During the comment period, someone points out to the agency that another type of filter, less costly to install, would be just as effective. If that comment convinces the agency that use of the new filter would have substantially the same environmental effect as would use of the proposed filter, the agency may incorporate permission to use the new filter in the final regulation without republishing. In this example, no one will have been "substantially affect[ed]" by the difference between the proposed and

---

[5](...continued)

Comments to §3-107 of the Model Act recognize that this approach does not "eliminate all ambiguity as to the meaning of "substantially different"; but the proposed test creates "a more specific functional test relating the acceptability of any changes in the proposed rule as compared to the adopted rule to the extent to which affected parties have received fair notice by the proposed rule publication." *See* Comment to Model State Administrative Procedure Act (U.L.A.) §3-107(b).

final regulation.[6] Likewise, no one can reasonably claim surprise, given that the agency included a provision on filtration in its proposed regulation.

Another version of the example will illustrate when republication is required. Suppose that the agency recognizes the benefits to the industry of allowing use of the new filter but is not convinced by the comment that it really is as effective as the proposed filter. The significance of the environmental effect is debatable. In this case, in which adopting the comment might well involve a real policy trade-off between savings to the industry and significant environmental degradation, the agency must republish for comment. Unless the agency is able to conclude, on the basis of the rulemaking record, that the adverse effect on the environment would not be significant if the comment were adopted, republication is required.

In our view, this construction of SG §§10-101(f) and 10-113 better reflects the legislative intention. It will assure, as the Economic and Environmental Affairs Committee wanted, that a change will be reproposed when it "could have a significant impact on people affected by the regulation." Report at 2.[7]

V

Attorney General Certification

SG §10-113(c) requires the Attorney General to certify, prior to a regulation's final adoption, that it does not differ substantively from the

---

[6] It would be absurd to conclude that the *benefit* to the industry means that it is "substantially affect[ed]"; surely the General Assembly did not intend to delay by many months wholly beneficial changes in regulations. *See Inganamort v. Borough of Fort Lee*, 293 A.2d at 725.

[7] An agency must republish if "part of the text differs substantively from the text previously published in the Register ...." This language raises the question of whether the agency may make final, without republishing, the parts of a proposed regulation that are unchanged. We believe that it may. It makes no sense to suppose that the General Assembly meant to require a delay in the adoption of all aspects of a regulation even if only a single discrete part were controversial.

Likewise, an agency is free to make final the whole of a proposed regulation, without change, and then immediately initiate a new rulemaking proceeding to seek comments on a proposed amendment that was suggested in the first rulemaking.

original proposal. Typically, the certification is made by the Assistant Attorney General who counsels the agency adopting the regulation. A final regulation may not be adopted without this certification.

If the Attorney General certifies that a changed regulation does not differ substantively from the original proposal, the certification must explain the agency's basis for deciding that a change would not appreciably disadvantage interested parties and should summarize the comments that led to the change. Conclusory statements are insufficient; rather, the certification must explain how the rulemaking process influenced the change and why no one is adversely affected in any significant way.

IV

Conclusion

In summary, it is our opinion that an agency need not repropose a portion of a regulation that is changed from the originally proposed language if the change (i) could reasonably have been anticipated by participants in the rulemaking; (ii) does not decrease, in any significant way, the benefits that would have been achieved by the regulation as proposed; and (iii) does not increase, in any significant way, the burdens that would have been imposed by the regulation as proposed.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Sharon Krevor-Weisbaum
Staff Attorney

ADMINISTRATIVE LAW — RULEMAKING — MEDICAID PROGRAM TRANSMITTAL ABOUT PRESCRIPTION OF BRAND-NAME DRUGS FALLS WITHIN "INTERNAL MANAGEMENT" EXCEPTION TO DEFINITION OF "REGULATION" IN ADMINISTRATIVE PROCEDURE ACT

January 23, 1990

The Honorable Joel Chasnoff
Presiding Chairman
Joint Committee on Administrative,
Executive, and Legislative Review

The Committee has requested our opinion on whether the Maryland Medical Assistance Program's Physicians Transmittal No. 91, informing physicians of a new documentation requirement for prescriptions of brand-name drugs, constitutes a regulation subject to the adoption procedures of the Administrative Procedure Act ("APA").

For the reasons stated below, we conclude that Physicians Transmittal No. 91 falls within the "internal management" exception to the definition of "regulation" in the APA. Therefore, it is not subject to the adoption procedures of the APA.

I

Medicaid Reimbursement for Prescription Drugs

A. Background

Maryland's Medical Assistance Program, Medicaid, is a scheme of cooperative federalism founded in the Social Security Act. Title XIX of the Social Security Act provides for federal grants to participating states for medical assistance to certain low-income individuals. The program is administered by the states and funded jointly by the federal and state governments. "Within broad Federal rules, each State decides eligibility groups, types and ranges of services, payment levels for services, and administrative and operating procedures. Payments for services are made directly by the State to the individuals or entities that furnish the services." 42 C.F.R. §430.0.

Maryland has elected to participate in the program and has enacted a statutory framework for its administration in Title 15, Subtitle 1 of the Health-General Article ("HG" Article).

The Medicaid Program does not directly provide health care services to Medicaid recipients; rather, it "may contract for the provision of care under the Program" with health care providers. HG §15-103(c)(2). The Program has contracted with a variety of providers through what have been termed "reimbursement contracts."[1] Under these contracts, DHMH agrees to pay, and the providers agree to accept, certain payments for "covered" services to individuals eligible for Medicaid.

To participate in the program, physicians and pharmacists, the two categories of health care professionals involved in dispensing prescription drugs, must apply and be approved for participation in the program. COMAR 10.09.02.03A and B (physicians); COMAR 10.09.03.03B and C (pharmacies). Approval is manifested by a signed provider agreement.[2] The provider agrees, among other things, "[t]o comply with all of the applicable requirements of the Maryland Medical Assistance Program ('Program') as well as any other applicable regulations, transmittals and guidelines issued by the Department." Provider Agreement for Participation in the Title XIX Program ¶1A.

B. Generic and Brand-Name Drugs

Efforts to encourage the use of generic drugs in the Medicaid Program have a long history.

In Chapter 410 of the Laws of Maryland 1969, the General Assembly provided as follows: "Unless the physician indicates otherwise on the form, it is understood that the generic form of the

---

[1] These contracts are not subject to the Procurement Law. §11-101(m)(2)(iii) of the State Finance and Procurement Article.

[2] Under Medicaid regulations governing physicians' and pharmacy services, "provider" is defined as an individual or entity "who, *through appropriate agreement* with the Department, has been identified as a program provider by the issuance of an individual account number." COMAR 10.09.02.01B(25) (physicians) and 10.09.03.01B(25) (pharmacists) (emphasis added).

drug ... will be utilized in filling the prescription." Former Article 43, §42(a).[3]

Under the Pharmacy Act in effect at the time, the pharmacist who substituted a generic drug for a brand-name drug was required to notify the prescriber in writing of the substitution. Former Article 43, §254A(b). In Chapter 881 of the Laws of Maryland 1975, the General Assembly amended former Article 43, §254A(b) to excuse pharmacists from this duty to notify the prescriber, in the case of Medicaid prescriptions.[4]

Apparently concerned that physicians and pharmacists needed guidance about handling Medicaid prescriptions after the enactment of Chapter 881, DHMH issued Pharmacy Bulletin No. 13, dated July 7, 1975. This bulletin included the following language:

> In the case of a patient who, in the judgment of the prescriber based upon a *medical reason*, must have a particular brand of drug, the prescriber may indicate that no other brand may be dispensed, by personally writing on the face of the prescription, "Dispense as Written" or "Do Not Substitute" or some similarly worded phrase.

(Emphasis in original.)

At about the same time, the federal government adopted a regulation in essence establishing the cost of a generic drug as the maximum for reimbursement, except for a brand-name drug "prescribed for a patient which the prescriber has certified in his own handwriting is medically necessary for that patient." 40 Fed. Reg. 32302 (July 31, 1975); 40 Fed. Reg. 36342 (Aug. 20, 1975) (corrected version) (codified formerly at 45 C.F.R. §19.3(a)(3)). The Secretary of what was then the Department of Health, Education and Welfare

---

[3] The General Assembly apparently intended to authorize a check-off box on the prescription form, because Chapter 410 required that the Medicaid prescription form "include the following statement: This prescription shall be filled by a generic equivalent ... unless checked by the prescribing physician."

[4] Chapter 881 also amended former Article 43, §42(a) so that it read as follows: "Unless the prescriber indicates otherwise on the form or on an attached certificate of need, it is understood that the generic form of the drug ... will be utilized in filling the prescription." The recodified version of this provision appears at HG §15-118(b).

(now Health and Human Services) explained that "on the basis of a comparative medical judgment, prescribers will prescribe a particular brand of multi-source drug only when that brand of drug is better suited than the same drug from other sources to meet a patient's medical needs." 40 Fed. Reg. 32295. In response to criticism that the regulation failed to specify the exact form of certification, the Secretary of HEW commented that the regulation was merely "intended to be general in nature, outlining the basic requirements of the certification procedure." *Id.*

On June 9, 1976, DHMH proposed various amendments to its Medicaid pharmacy services regulation, to "bring the Program into conformity with federal requirements governing pharmaceuticals and pharmacy services." 3:12 Md. Reg. 663. The provision on brand-name prescriptions largely tracked the federal regulation, providing that the cost of the generic version of certain multiple source drugs establishes the limit on reimbursement, with this exception: "When a prescriber certifies in his own handwriting that, in his judgment, a specific brand is medically necessary," reimbursement of that cost is allowable. This regulation was adopted on September 1, 1976 (3:18 Md. Reg. 981) and is now codified at COMAR 10.09.03.07G(3).[5]

After this regulation became effective, DHMH issued further transmittals detailing the procedures to be followed if a brand-name drug were medically necessary. For example, Pharmacy Bulletin No. 17, dated June 10, 1977, advised providers that a generic form of penicillin was to be used. However: "If a prescriber feels that in his/her medical judgment, it is necessary for the brand name product to be dispensed by the pharmacist, the prescriber must certify by writing the words 'BRAND NECESSARY' on the prescription. This must be in the prescribers [*sic*] *own* handwriting." (Emphasis in original.) *See also, e.g.*, Pharmacy Guideline No. 7 (January 9, 1979), Pharmacy Guideline No. 18 (Sep. 27, 1979), and Pharmacy Guideline No. 36 (Nov. 19, 1980) (same language).

Then, in 1987, the federal government revised and recodified its regulation on this subject. As currently worded, the federal regulation sets maximum payment levels for "multiple source drugs" linked to "the published price for the least costly therapeutic equivalent ...." 42

---

[5] DHMH has broad authority to adopt regulations for the Medicaid Program in general and for the pharmacy services component in particular. HG §§15-105(a) and 15-118(d).

C.F.R. §447.332(b). However, reimbursement for a more costly brand-name drug is permitted under the following conditions:

> (1) The upper limit for payment for multiple source drugs ... does not apply if a physician certifies in his or her own handwriting that a specific brand is medically necessary for a particular recipient.
>
> (2) The agency must decide what certification form and procedure are used.
>
> (3) A checkoff box on a form is not acceptable but a notation like "brand necessary" is allowable.

42 C.F.R. §447.331(c).

This regulation merely repeats the long-established test for reimbursement of the cost of brand-name drugs: that the prescriber make the judgment that a brand-name drug is medically necessary and certify that judgment personally. The regulation forbids one form of certification of this judgment (a checkoff box), allows another (the words "brand necessary"), and generally leaves it to the states to decide the precise form of the certification. *See* 52 Fed. Reg. 28652 (July 31, 1987).

The document that is the subject of the Committee's request, Physicians Transmittal No. 91, is but another in the series of nonregulations through which DHMH communicated to its providers its specific certification requirements concerning the judgment of medical necessity. Issued on On February 23, 1989, the transmittal provides as follows in relevant part:

> Effective March 15, 1989, to comply with this regulation [*i.e.*, COMAR 10.09.03.07G(3)] when a specific brand-name drug is prescribed, the prescriber must write on the prescription 'Brand Medically Necessary' and also, the *specific* reason why a generic equivalent is not *medically* appropriate. Such reasons may include, but are not limited to, "adverse reaction to generic" or "considerable side-effect" etc. "Patient demand" for the brand-name drug is not an acceptable *medical* reason.

(Emphasis in original.)

Finally, on May 16, 1989, DHMH issued Pharmacy Transmittal No. 85, which superseded Physicians Transmittal No. 91. Pharmacy Transmittal No. 85 includes the same requirements as Physicians Transmittal No. 91; however, it excludes certain drugs from the requirement that the prescriber state why a generic equivalent is not medically appropriate. *See* Section 1(B) of Pharmacy Transmittal No. 85. Our analysis and advice apply equally to Physicians Transmittal No. 91 and Pharmacy Transmittal No. 85.

II

History and Purpose of Administrative Procedure Legislation

Administrative procedure legislation has its roots in the New Deal of the 1930's. As federal administrative agencies multiplied in size, both the public and the organized bar became concerned about the expanding power and authority of the federal bureaucracy. Several years of study and hearings (interrupted by the war) culminated in the federal Administrative Procedure Act of 1946, Pub. L. No. 404, 60 Stat. 237 (1946), now codified at 5 U.S.C. §551 *et seq.* The objective of the law, according to the United States Attorney General, was to achieve "reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government." *Attorney General's Manual on the Administrative Procedure Act* 6 (1947).

Parallel developments were taking place with respect to state administrative procedure legislation. In October 1946, following the enactment of the federal APA, the National Conference of Commissioners of Uniform State Laws adopted a "Model State Administrative Procedure Act." The Model Act was revised in 1961 and again in 1981. Today, more than half of the states have adopted administrative procedure acts based in whole or in part on the original or revised model acts.

Maryland's APA, enacted in 1957, is based on the 1946 Model State APA. *See 68 Opinions of the Attorney General* 9, 11 (1983). It is now codified as Title 10 of the State Government Article ("SG" Article).

The APA is not itself a grant of rulemaking authority. It does not give an agency the power to adopt a rule. Rather, the APA merely prescribes the procedures to be followed by an agency when it exercises the rulemaking authority given it by a substantive statute (unless, of course, the substantive statute provides exclusive or superceding rulemaking procedures). 68 *Opinions of the Attorney General* at 11; 62 *Opinions of the Attorney General* 36, 37 (1977).

With the growing frequency and complexity of administrative rulemaking, the right of the people to participate in such quasi-legislating is increasingly important. One of the "basic purposes" of the federal APA was to "provide for public participation in the rule making process." [*United States*] *Attorney General's Manual on the Administrative Procedures Act* 9. The same is true of Maryland's APA:

> The Maryland Administrative Procedure Act, with its requirement that rules be approved by the Attorney General, published in the *Maryland Register*, and laid before the AELR Committee, affords the public a significant opportunity to comment on or affect [agency] proposals and affords the [agency] the opportunity to detect any problems with such changes in policy.

64 *Opinions of the Attorney General* 208, 216-17 n. 12 (1979).

Thus, the heart of an APA's rulemaking requirements is its public notice and comment procedures. Designed to assure fairness and mature consideration of rules of general application, these significant provisions serve the important twin functions of safeguarding public rights and educating the administrative lawmakers.

III

Applicability of Rulemaking Requirements

A. *Introduction*

Maryland's APA applies to virtually every unit in the Executive Branch of State Government, SG §10-102(a), and prescribes a number of procedural requirements for the adoption of a regulation. For example, a proposed regulation must be submitted to the Administrator of the Division of State Documents, SG §10-112(a)(2); be filed with the Joint Committee on Administrative, Executive, and Legislative Review ("AELR Committee"), SG §10-112(a)(4); be submitted to the Attorney General for approval as to legality, SG §10-107; and be published in the Maryland Register at least 45 days prior to its adoption, SG §10-111(a).[6]

In order to be published in the Maryland Register, a proposed regulation must be accompanied by a notice that states the proposal's estimated economic impact on the State and local governments and other groups, such as taxpayers. The notice must give interested persons an opportunity to comment on the proposal by either setting a date, time, and place for a public hearing or giving the information necessary for telephone and written comments. SG §10-112(a)(2).

Once adopted, a regulation must be published first in the Maryland Register and ultimately in the Code of Maryland Regulations. SG §10-114.

As both this office and the Secretary of State's Division of State Documents have previously pointed out, if an agency's action constitutes a regulation, as that term is defined by the APA, "the action may be taken only in accordance with the rulemaking procedures contained in the [APA]." 68 *Opinions of the Attorney General* at 11. *See also* 65 *Opinions of the Attorney General* at 404.

Thus, if the agency fails to comply with the adoption requirements of the APA, the agency's action is void. *See* 57 *Opinions of the Attorney General* 478, 479-80 (1972) (Social Services Administration's AFDC eligibility requirement was invalid and unenforceable because it had never been adopted in accordance with APA requirements). *See also* letter from Robert J. Colburn, Jr., Administrator, Division of State Documents, Secretary of State's Office, to Executive Branch agency heads (February 6, 1987) ("[Agency] statements meeting the legal definition of 'regulation' but not adopted and promulgated as required by the APA have no legal standing in Maryland.").

Indeed, Maryland's APA, like most, expressly provides that agency rules shall be declared invalid, on appropriate petition, if the court finds that the agency "failed to comply with statutory requirements for procedures prescribed by statute." SG §10-125(d)(3). Although Maryland's appellate courts have not yet had occasion to address the exercise of this authority, other courts have not hesitated

---

[6] Proposed emergency regulations are not subject to this requirement.

to approve its use. *See Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 470 (D.C. Cir. 1980); *Hotch v. United States*, 212 F.2d 280, 283 (9th Cir. 1954); *Herron v. Heckler*, 576 F. Supp. 218, 232 (N.D. Calif. 1983); *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 470 N.E.2d 1029, 1035 (1984); *Board of Education v. Cooperman*, 209 N.J. Super. 174, 507 A.2d 253, 269 (1986);

B. Definition of "Regulation"

The Maryland APA defines the term "regulation" quite broadly:

> (1) 'Regulation' means a statement or an amendment or repeal of a statement that:
>
> (i) has general application;
>
> (ii) has future effect;
>
> (iii) is adopted by a unit to:
>
> 1. detail or carry out a law that the unit administers;
> 2. govern organization of the unit;
> 3. govern the procedure of the unit; or
> 4. govern practice before the unit; and
>
> (iv) is in any form, including:
>
> 1. a guideline;
> 2. a rule;
> 3. a standard;
> 4. a statement of interpretation; or
> 5. a statement of policy.
>
> (2) 'Regulation' does not include:
>
> (i) a statement that:
>
> 1. concerns only internal management of the unit; and
>
> 2. does not affect directly the rights of the public or the procedures available to the public.

SG §10-101(e).[7]

As we wrote not long ago: "This office has consistently construed the definition of 'regulation' as broadly as its language and apparent underlying intent direct." 72 *Opinions of the Attorney General* 230, 233 (1987). *See, e.g.*, 72 *Opinions of the Attorney General* 313 (1987) (Maryland Racing Commission's policy regarding Arabian racing); 70 *Opinions of the Attorney General* 208 (1985) (automatic waiver program as to certain tax penalties); 66 *Opinions of the Attorney General* 151 (1981) (Home Improvement Commission policy change); 65 *Opinions of the Attorney General* 396 (1980) (Racing Commission policy regarding Sunday racing); 64 *Opinions of the Attorney General* 208 (1979) (lottery prize structure); Opinion No. 75-099 (July 21, 1975) (Financial Disclosure Advisory Board procedures); Opinion No. 75-064 (May 22, 1975) (rules relating to state contracts); and Opinion 75-033 (March 4, 1975) (Central Collection Unit rules). *Cf.* 68 *Opinions of the Attorney General* 9 (1983) (narrow exception for proprietary price setting).

Although there is no reported Maryland case construing this statutory definition, courts in other states have broadly construed similar APA definitions. *See, e.g., Ex Parte Traylor Nursing Home, Inc.*, 543 So. 2d 1179, 1183 (Ala. 1988); *Senn Park Nursing Center v. Miller,* 118 Ill. App. 3d 504, 455 N.E.2d 153, 157 (1983), *aff'd in part and rev'd in part on other grounds*, 104 Ill. 2d 169, 470 N.E.2d 1029 (1984); *Burke v. Children's Services Division*, 552 P.2d 592 (Or. App. 1976) *aff'd* 607 P.2d 141 (1980). As one commentator states:

> [In a definition of the term "rule" or "regulation,"] the concept should be described in broadly inclusive terms (the word "statement" has been most popular). This has proved necessary to defeat the inclination shown by some agencies to label as "bulletins," "announcements," "guides," "interpretative bulletins," and the like, announcements which, in legal operation and effect, really amount to rules and then to assert that their promulgations are not technically rules but merely

---

[7] When Maryland's APA was recodified in 1984, the "word 'regulation' [was] substituted, as the defined term, for the former word 'rule,' to distinguish, to the extent possible, between regulations of executive units and rules of judicial and legislative units." Revisor's Note to SG Article §10-102(g). Because commentators and most courts use the term "rule," we use the two terms interchangeably in this opinion.

> policy statements, and hence may be issued without observance of the procedures required in connection with the adoption of rules.

1 Cooper, *State Administrative Law* 108 (1965).

C. Applicability of Definition to Physicians Transmittal No. 91

Transmittal No. 91 applies to every brand-name drug prescription written for a program beneficiary after a specified date.[8] It potentially affects physicians, pharmacists, and the patients for whom drugs are prescribed.[9] It was adopted by DHMH to detail and carry out the Medicaid Program, creating a new documentation requirement.

Before the issuance of Transmittal No. 91, providers were not called upon to write a specific reason for prescribing a brand-name drug as a prerequisite to reimbursement at the brand-name cost. Since the effective date of the transmittal, a provider cannot be reimbursed at brand-name cost unless the prescriber has written on the prescription the specific reason for not prescribing a generic equivalent.

Hence, Transmittal No. 91 meets the APA definition of "regulation" and therefore is subject to the APA's rulemaking requirements unless it is excluded from them either by another statutory provision or by case law.

D. Interpretative and Legislative Rules

There are several well-recognized categories of administrative rules (or, as the Maryland APA now calls them, regulations):

---

[8] In fiscal year 1988 alone, there were an estimated 46,602 prescriptions written for such drugs.

[9] In 72 *Opinions of the Attorney General* 230, 234 n.4 (1987), we suggested that when "a group of persons in a contractual relationship with a State agency [are] affected by agency directives authorized under the contract," those directives might not be of "general application" and hence might be outside the definition of "regulation" in the APA. That suggestion, however, did not have in mind directives under a complex program like Medicaid, having effects on a large group of providers and, potentially, on program beneficiaries as well. Thus, the better approach is to view Transmittal No. 91 as of "general applicability" and then analyze its effects in considering whether the internal management exception applies to it. *See* Part IV below.

> Some are legislative rules, which receive statutory force upon going into effect. Others are interpretative rules which only interpret the statute to guide the administrative agency in the performance of its duties until directed otherwise by decisions of the courts. Some rules are merely rules of procedure. Others implement the statute by stating the policy by which the agency will be governed in the exercise of its authority.

Comptroller v. M. E. Rockhill, Inc., 205 Md. 226, 234, 107 A.2d 93 (1954), *quoted with continuing approval in Waverly Press, Inc. v. Department of Assessments and Taxation*, 312 Md. 184, 191, 539 A.2d 223 (1988). These distinctions are important in determining whether an agency had the authority to issue a particular rule, as well as the legal effect of the rule.

According to Professor Davis, "A legislative rule is the product of an exercise of delegated legislative power to make law through rules." 2 Davis, *Administrative Law Treatise* §7:8, at 36 (2d ed. 1979) ("Davis Treatise"). "[L]egislative rules are those which create new law, usually implementary to an existing law ..." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952). Consequently, "express statutory authority is necessary to promulgate 'legislative' rules ...." 62 *Opinions of the Attorney General* 36, 37 (1977).

Because they are based on statutory authority, valid legislative rules have the force and effect of law. *Maryland Port Administration v. Brawner Contracting Co.*, 303 Md. 44, 60, 492 A.2d 281 (1985). In one of its leading cases on the respective roles of agencies and courts, the Supreme Court wrote as follows: "[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).[10] Professor Davis puts the point this way:

---

[10] The Supreme Court held that if a statute is ambiguous, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U.S. at 844.

> Valid legislative rules have about the same effect as valid statutes; they are binding on courts. They are valid if (a) within the granted power, (b) issued pursuant to proper procedures, and (c) reasonable as a matter of due process.

2 Davis Treatise §7:8, at 36.

By contrast, "'[i]nterpretative rules' are an administrative construction of a statutory provision on a question of law reviewable in the courts." *Herron v. Heckler*, 576 F. Supp. at 231. An interpretative rule "interprets or clarifies the nature of the duties previously created by passage of a statute or promulgation of a legislative rule. It does not create new duties." Pierce, Shapiro, & Verkuil, *Administrative Law and Process* §6.4.4a, at 308 (1985). Therefore, statutory authority is not necessary for the issuance of a valid interpretative rule. 62 *Opinions of the Attorney General* at 37.

The corollary is that interpretative rules do not bind courts in the way that legislative rules do: "Interpretative rules do not have the force of law and even though courts often defer to an agency's interpretative rule they are always free to choose otherwise." *Joseph v. United States Civil Service Comm'n*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977). *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979).[11]

The Committee's request for our opinion indicates that DHMH and the Committee disagree on whether Physician's Transmittal No. 91 must be adopted as a regulation because of their respective views on whether the transmittal is interpretative or legislative. DHMH issued the transmittal without satisfying the adoption requirements of the APA because, acting on advice of counsel, it saw the transmittal as merely an interpretation of an existing regulation, and it understood that interpretations of this kind are not subject to those requirements. The AELR Committee views the transmittal as going beyond a mere interpretation and actually imposing a new substantive requirement —

---

[11] The weight that a court will accord an interpretative rule "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later prenouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.* 323 U.S. 134, 140 (1944). *See also Comptroller v. M. E. Rockhill, Inc.*, 205 Md. at 233.

that is, as constituting a legislative rule.[12] However, whether the transmittal is properly viewed as interpretative or legislative in character is of no consequence under the Maryland APA's adoption requirements.

Unlike the federal APA, which exempts interpretative rules, general statements of policy, and rules of agency organization, procedure or practice from its notice and comment requirements, "the State APA and the State Documents Law make no distinction between legislative and interpretative rules." 62 *Opinions of the Attorney General* at 37. Rather, under Maryland's APA, a regulation can take any form, including a "statement of interpretation." SG §10-101(e)(1)(iv)4.[13]

The prudence of this exceedingly broad definition certainly is debatable. Indeed, the 1981 Model State Administrative Procedure Act, like the federal Act, exempts interpretative rules from the mandatory advance notice and public participation requirements. Model State Administrative Procedure Act §3-109.[14] "[S]ubstantially all of the state legislatures are in agreement with the concept of the Revised Model State Act, that rule making should be restricted to statements of a legislative nature and of general applicability." 1 Cooper, *State Administrative Law* 108.

It may well be that the General Assembly should amend Maryland's APA to reflect the policy choice made by the federal government and the majority of other states. Nevertheless, unless and until the APA is amended, interpretative rules, like legislative rules, are subject to its adoption procedures.

---

[12] A similar issue was raised but not reached in *Department of Health and Mental Hygiene v. Lion's Manor Nursing Home*, 281 Md. 425, 378 A.2d 1351 (1977).

[13] We note that although the definition of a regulation under Maryland's APA is very broad, not every piece of agency guidance about a statute is a regulation. For example, explanatory material that is merely informational would not require an agency to follow the APA's adoption procedures. *See, e.g., Barry Laboratories v. Wisconsin State Board of Pharmacy*, 132 N.W. 2d 833, 838 (Wis. 1965) (applying an APA definition similar to Maryland's).

[14] "[A]n Agency need not follow [the notice and comment requirements] in the adoption of a rule that only defines the meaning of a statute or other provision of law or precedent if the agency does not possess delegated authority to bind the courts to any extent with its definition."

IV

Criteria for Application of "Internal Management" Exception

A. Introduction

Maryland's definition of "regulation" contains three express exclusions: one for statements concerning internal management, another for responses to petitions for the adoption of regulations, and a third for declaratory rulings. SG §10-101(e)(2). Transmittal No. 91 was neither a response to a petition for adoption of a regulation nor a declaratory ruling. Therefore, it is expressly excluded from the APA's definition of regulation only if it meets both parts of the internal management exclusion — that is, if it (1) "concerns only [the] internal management of [DHMH]" and (2) "does not directly affect the rights of the public or the procedures available to the public." SG §10-101(e)(2)(i).

B. Internal Management Only

Ordinarily, a statement does not "concer[n] only internal management" if it is addressed to persons outside the agency. Certainly, the providers addressed by Transmittal No. 91 are not DHMH employees or agents simply because they participate in the Medicaid Program. Indeed, in the most important ways, the providers are wholly independent of DHMH. They decide on their own whether to participate in the program, not because DHMH orders them to do so; and they provide services to patients based on their own professional judgment, not because DHMH determines the needs of a particular patient.

As a consequence, for many purposes, providers cannot rightly be viewed as part of the "internal management" of the Medicaid Program. *See Senn Park Nursing Center v. Miller*, 470 N.E.2d at 1035.

However, when a provider agrees to participate in the program, he or she does enter into a contractual relationship with DHMH. *See* Part IA above. The contract expressly incorporates "all of the applicable requirements of the [program] as well as any other applicable regulations, transmittals and guidelines issued by [DHMH]." Provider Agreement ¶1A.

Indeed, the regulations themselves indicate that some details of the relationship between providers and DHMH are embodied in documents outside the regulations. For example, the regulation describing reimbursement procedures for physician services includes the following:

> A. The provider shall submit the request for payment on the form designated by the Department.
>
> B The Department reserves the right to return to the provider, before payment, all invoices not properly signed, completed and accompanied by properly completed forms required by the Department.

COMAR 10.09.02.07. *See also* COMAR 10.09.03.07D and E (comparable provision for pharmacists). When DHMH designs (or redesigns) a form and instructs providers to use it pursuant to these regulations, the instruction to the providers "concerns only the internal management" of the program, for it simply addresses providers in their capacity as contractors, to effectuate the details of a requirement that is already part of their contract.

We are not suggesting that providers have agreed to abide by transmittals that are inconsistent with applicable regulations incorporated by reference in the contract. They have not. *See DHMH v. Lions Manor Nursing Home*, 281 Md. 425, 429, 378 A.2d 1351 (1977). However, the contractual incorporation of nonregulatory "transmittals and guidelines" must be given some meaning. This provision is best understood as a reference to nonregulatory documents that follow from, or give additional detail about, regulatory requirements. So long as such documents are limited in this way, they are part of the contractual agreement and therefore concern only the agency's "internal management" of its relationship to its contractors.

As we see it, Transmittal No. 91 addresses providers about a detail of contract administration and therefore "concerns only ... internal management." As part of their contract, physicians agree to comply with the regulation that they certify medical necessity when they prescribe brand-name drugs. This requirement is set by federal law. The federal regulation leaves it to the State to decide exactly how a physician must document that he or she has complied with this requirement.

In its regulation, DHMH has done little more than repeat the federal requirement. COMAR 10.09.03.07G(3) states that a prescriber must certify that "a specific brand is medically necessary," but it does not state whether those words — "medically necessary" — must appear on the prescription or whether some other form of words is necessary or permissible. Given the fact that a transmittal embodying precisely this level of detail was in existence at the time that the regulation was adopted, the regulation unsurprisingly did not address the question of what form of words suffices. *See* Part IB above.

Physicians Transmittal No. 91, like its predecessors, supplies detail about the administration of this aspect of the provider's contract. It instructs physicians on a documentation requirement for reimbursement for brand-name drugs, just as certain other forms are a documentation requirement for reimbursement for physicians' services.

Instructions of this kind to a provider, about the specific way in which the provider is to demonstrate that he or she has complied with a regulatory requirement incorporated into the contract, concern solely agency management of its contract.

C. Effect on Public

As we wrote not long ago: "[W]hether a staff directive or other similar statement is exempt from rulemaking by virtue of the 'internal management' exception depends on the practical consequences for members of the public. The exception applies only if the internal guidance does not significantly affect either the procedural steps that interested persons must take in their dealings with an agency or the allocation of substantive benefits or burdens." 72 *Opinions of the Attorney General* 235-36 (1987) (State's smoking policy guidelines fall within "internal management" exception).

Thus, we have distinguished between management directives that have little direct effect on the public, and those that have a direct, substantial effect. Examples of the former include instructions that merely "spell out operational details like what forms to fill out, what approvals to obtain, or what evidence to look at to determine whether an applicant meets a statutory standard." 72 *Opinions of the Attorney General* at 235. Instructions that have a greater effect on the public include those that impose application procedures, establish eligibility criteria not set forth in a statute, restrict access to a statutory benefit, or impose fees. *Id.*

Cases from other states support our analysis of the exemption. For example, in *Walker v. Commissioner, Dept. of Income Maintenance*, 446 A.2d 822 (Conn. 1982), the Connecticut Supreme Court held that the state could not, on the basis of a prior approval policy that had never been adopted in accordance with that state's

APA, deny public assistance to pay the moving expenses of an otherwise qualified applicant. The court rejected the agency's contention that the prior approval policy was within the "internal management" exception. According to the Connecticut court, a policy is not exempt under the "internal management" exception if it "has substantial impact on the rights and obligations of parties who may appear before the agency in the future." 446 A.2d at 822. Connecticut's prior approval policy denied assistance to an otherwise qualified applicant; therefore it was not within the exception. *See also, e.g., Senn Park Nursing Center v. Miller*, 455 N.E.2d at 1035.

As our 1987 opinion on the Governor's smoking policy explained, however, "virtually every internal management directive will have at least some tangential effect on the public ...." 72 *Opinions of the Attorney General* at 235. The key in applying this part of the exemption, we wrote, "is to determine whether ... [a] management directive ... has significant direct effects on the public, as distinct from the inevitable indirect ones." *Id.*

The "public" are those outside the agency whose situation is changed as a result of the agency's internal management statement. Transmittal No. 91 potentially affects three different "publics": physicians, pharmacists, and patients.[15]

The rights of the physicians who participate in the program are defined by contract, which of course incorporates pertinent legal requirements. To be sure, DHMH may not unilaterally alter those rights by management directives. *DHMH v. Lions Manor Nursing Home*, 281 Md. at 429. Participating physicians have already agreed, however, to certify medical necessity when they prescribe brand-name drugs. They thus undertook an obligation: to evaluate the patient's

---

[15] A case currently pending before the United States Supreme Court involves the issue of whether the federal Medicaid Act was intended to benefit providers and so afford them a right of action under 42 U.S.C. §1983 to challenge aspects of a state's Medicaid plan. *Baliles v. Virginia Hospital Ass'n*, No. 88-2043. Maryland has joined 45 other states as *amici*, urging the Supreme Court to rule that providers do not have this right of action. In our view, the Medicaid program is intended to benefit poor people who need health care, not the providers of that care. *See, e.g., Case v. Weinberger*, 523 F.2d 602, 607 (2d Cir. 1975).

In terms of the APA, the same reasoning might lead to the conclusion that, while providers have rights as contractors, they have no rights as members of the "public." However, given our conclusion that the providers' rights are in any case not significantly affected, we need not decide whether the term "public" in SG §10-101(e)(2)(i)2 includes providers.

condition in order to decide whether the requisite medical necessity is present.

Transmittal No. 91 did not change that contractual obligation. Instead, it, like its predecessor transmittals, addresses a detail that is *not* addressed in the regulations, namely the precise way in which compliance with this obligation is to be documented.[16] It adds to the required documentation, it is true, but DHMH did not bind itself to one particular documentation requirement.[17]

Nor, for much the same reasons, are the rights of pharmacists impaired. The regulation applicable to pharmacists is the same as that applicable to physicians: It sets the reimbursement standard for brand-name drugs, medical necessity, without delineating the documentation that DHMH needs to establish compliance. COMAR 10.09.03.07G(3). For pharmacists, too, transmittals that merely call for one or another form of documentation leave the pharmacists' right to reimbursement substantially unaffected.

Finally, no right of program beneficiaries is detrimentally affected. Patients have a right to brand-name drugs only if those drugs are medically necessary. A requirement that a prescriber state why a brand-name drug is medically necessary does not affect that entitlement.[18] Moreover, both physicians and pharmacists must agree, as a condition for participation in the program, that they will not seek payment from the patient if DHMH denies reimbursement of a service because it was not medically necessary. COMAR 10.09.02.03I and 10.09.03.03K. Thus, the patient will not bear the cost of a provider's failure to comply with the requirements of Transmittal No. 91.

---

[16] The providers' agreement authorizes DHMH to issue new transmittals. "Even if [a] directive is not effective as a *rule*, the substance of the directive can still be effective as part of an *agreement* between the parties." *Lions Manor Nursing Home*, 281 Md. at 430 (emphasis in original).

[17] We understand that some of the complaints about Transmittal No. 91 stem not so much from its content as from the design of the Medicaid prescription form itself, which leaves too little space for the required statement of medical reason. DHMH, we are told, is aware of the problem and is taking steps to correct it.

[18] Certainly, no patient has a "right" to brand-name drugs that are in fact *not* medically necessary. One purpose of Transmittal No. 91 was to reduce instances in which physicians are coerced into prescribing brand-name drugs that the patient would later sell illegally.

D. Conclusion

For these reasons, we conclude that both elements of the APA's "internal management" exception, SG §10-101(e)(2)(i), are satisfied. Accordingly, the exception applies to Transmittal No. 91.

V

Conclusion

In summary, we conclude that Physicians Transmittal No. 91 falls within the "internal management" exception to the definition of "regulation" in the APA. Therefore, it is not subject to the notice and comment adoption procedures of the APA.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

Judson P. Garrett, Jr.
Deputy Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

ALCOHOLIC BEVERAGES

Liquor Licensing — Calvert County Board of License Commissioners May Not Issue Restricted License That Effectively Creates a Type of License Not Permitted in a County

January 8, 1990

John C. Prouty, Esquire

As counsel for the Calvert County Board of License Commissioners, you have requested our opinion on the legality of a particular type of restricted liquor license for which application has been made. The applicant, a grocery store/delicatessen, desires to sell beer and light wine only for consumption off the premises.

You point out that the Calvert County Board has no specific authority to issue a license of this type. Instead, the applicant proposes that the board issue a Class A license (beer, wine and liquor), subject to the restriction that no liquor be sold. You indicate that the board's authority to do so is not clear and you have asked us to resolve seemingly conflicting authority on the matter through issuance of an opinion.

For the reasons stated below, we conclude that, notwithstanding the board's general authority to issue restricted licenses, it is not allowed to issue the type of license sought in this case — a *de facto* Class A beer and light wine license that is achieved through issuance of a Class A beer, wine and liquor license, with a simultaneous restriction eliminating the right to sell liquor.

I

Background

The sale and consumption of alcoholic beverages in Maryland is controlled by Article 2B of the Maryland Code. Article 2B contains a detailed (not to say exhaustive) scheme for regulating alcoholic beverages. The general purpose of Article 2B is expressed in §§1 and 3; taken together, these sections reverse, for the liquor trade, the common approach in law toward the conduct of ordinary business affairs.

That normal approach is to view a particular course of conduct as legal and permitted unless it is forbidden. Article 2B, in contrast, expressly forbids most types of activity relating to liquor unless done "(i) by a consumer or (ii) by a licensee as provided in this article...." §3(a).[1] The statutory scheme is, in the words of *Green v. State*, 170 Md. 134, 139, 183 A. 526 (1936), "prohibitory" as well as "regulatory"; and we need not describe the history of the American temperance movement or the 18th and 21st amendments to the United States Constitution to convey the import of this philosophy. *See generally* 45 Am. Jur. 2d *Intoxicating Liquors* §§22 and 24, at 500-503 (1969).

Article 2B provides for a great variety of licenses to be issued and the methods by which they are issued. The statutory scheme, in general, is that licenses for the retail trade (on- or off-premises) are issued upon approval by the county liquor boards or authorities; that the counties (or Baltimore City) differ greatly in the various types of licenses they are allowed to issue, or the fees they are allowed to collect; and that these types of licenses, differing by county, are all set forth in Article 2B.

For example, §8 allows the issuance of a Class A Beer license for consumption off the premises. It provides for different fees depending upon the county of issuance and imposes additional restrictions upon place of issuance in some of the counties. It also provides that this type of license may not be issued at all in some local jurisdictions. §8(n). A similar pattern occurs throughout the license law. *Compare, e.g.*, §12A *with* §12B (light wine only licenses).

Section 13 provides for issuance of licenses allowing the sale of beer and light wine for consumption off the premises; it is structured in an identical fashion. It provides for the conditions of license issuance on a county by county basis. Section 13(n) specifically provides that such beer and light wine licenses may not be issued in several named counties — including Calvert County.

---

[1] All statutory references in this opinion are to Article 2B.

The question is therefore whether other statutory language generally providing that "licenses shall be subject to ... restriction ...," §72(a), overcomes this prohibition.[2] We conclude that it does not.

II

Analysis

The authority of local liquor boards to impose restrictions on licenses has been described as "broad." *Sullivan v. Board of License Comm'rs*, 293 Md. 113, 442 A.2d 558 (1982). The cases also recognize the obvious pattern of Article 2B: Although much authority is delegated to particular localities, such delegation is only pursuant to a particular State statute. *See, e.g., Montgomery County v. Board of Supervisors*, 53 Md. App. 123, 451 A.2d 1279 (1982) (county voters not authorized to eliminate State-granted authority to county to sell alcoholic beverages.)

The purpose of statutory construction is to give effect to the "legislative purpose or goal." *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515, 525 A.2d 628 (1987). It is generally the rule that in doing so one must consider not only the plain meaning of the statutory words (here, the authority to impose "restrictions") but also the context of the statutory scheme taken as a whole, so as to make all pertinent provisions work together in harmony. *See Kaczorowski*, 309 Md. at 511-515; *State v. One 1983 Chervolet Van*, 309 Md. 329, 524 A.2d 51 (1987); *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983).

In this light, the construction of §72(a) sought by the applicant would defeat the clear prohibition of §13(n); it would allow a local board to expand the types of licenses that the board is allowed to issue, notwithstanding an express legislative prohibition against a particular type of license and an overall legislative intent that only the General Assembly is to decide the types of licenses available in any particular jurisdiction. We do not believe that the power to "restrict" a license was intended to have this result.

---

[2] Section 72(a) provides in full as follows: "Licenses issued under provisions of this article shall not be regarded as property or as conferring any property rights. All such licenses shall be subject to suspension, restriction or revocation, and to all rules and regulations that may be adopted as herein provided". *See also* Article 2B, §§1(a)(3) and 68(b).

A similar conclusion was reached in 44 *Opinions of the Attorney General* 225 (1959). There, an applicant sought a seven-day tavern license that ordinarily allowed both on- and off-premises sale, but the applicant was willing to agree that the license would be restricted to off-premises sale only.

The Attorney General pointed out that "the law does not permit the operation of a package goods store on Sunday in Anne Arundel County. This being the case, we do not believe that the Board has the authority to achieve the same result by issuing a tavern license which, on its face, permits the sale of beer and light wine seven days a week for both on-premises and off-premises consumption, upon the understanding that the licensee will in fact not operate a tavern but only a package goods store." 44 *Opinions of the Attorney General* at 226-27. That arrangement, the Attorney General wrote, would permit the local board "to accomplish by indirection that which it is not authorized to accomplish directly and to create an entirely new kind of license by its own fiat." 44 *Opinions of the Attorney General* at 227.

The opinion correctly noted that other restrictions must be judged according to their own circumstances. We reaffirm this view and point out that we are not opining on the general power of local boards to impose restrictions on the manner and mode of operation of licensed establishments. *See generally* Opinion No. 79-014 (March 6, 1979) (unpublished). Such power, undoubtedly possessed, nevertheless does not include authority to issue a type of license that the General Assembly has expressly stated cannot be issued in a specific county.

III

Conclusion

In summary, it is our opinion that the Calvert County Board of License Commissioners may not create the equivalent of a license for the sale of beer and wine only off the premises through a restriction on the grant of a Class A (beer, wine and liquor) license.

J. Joseph Curran, Jr.
Attorney General

John K. Barry
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

Chapter 178 (House Bill 779) of the Laws of Maryland 1993 created a Class A beer and light wine license in Calvert County.

ALCOHOLIC BEVERAGES — LICENSES — BOARD OF LICENSE COMMISSIONERS — CLERK OF THE CIRCUIT COURT — ALLOCATION OF RESPONSIBILITIES RELATED TO ISSUANCE OF LICENSE

May 29, 1990

Thomas C. Hayden, Esquire
County Attorney for Charles County

You have requested our opinion on whether alcoholic beverages licenses in Charles County are to be issued by the Board of License Commissioners of Charles County or by the Clerk of the Circuit Court for Charles County.

For the reasons given below, we conclude that in Charles County the board must perform the discretionary act of approving or disapproving a license application and, if it approves an application, must certify that approval to the clerk. However, the clerk must perform the ministerial acts of collecting the license fee and delivering the license itself in accordance with the board's approval.

I

Background

The provisions of Article 2B of the Maryland Code that create various locally issued classes of alcoholic beverages licenses provide that those licenses "shall be issued by the clerk of the circuit court of the county in which the place of business is located ...." *See, e.g.*, Article 2B, §§8(a) (class A beer license), 13(a) (class A beer and light wine license), and 18(a) (class A beer, wine, and liquor license).[1]

However, Article 2B, §54(a) requires that an application for an alcoholic beverages license "shall be filed with the board of license commissioners, if any, or the clerk of the circuit court of the county

[1] Some kinds of licenses are issued solely on the State level, by the Comptroller of the Treasury. *See, e.g.*, Article 2B, §§5 (manufacturer's license) and 23 (beer, wine, and liquor license for railroads).

in which the place of business is to be located, if there be no such board." Article 2B, §60(a) establishes the general procedure for approval of a license application by a board of license commissioners, requiring the board to publish notice of the application, hold a public hearing, and make findings as to the existence of reasons to deny the application.[2] If the board does not find reasons to disapprove the application:

> [T]he board shall issue its certificate of approval for presentation to the clerk of the court of the county in which the place of business is to be located. The clerk shall issue the license applied for upon presentation of the certificate, and the payment of the fee required. In Carroll County, if the board approves the application, the board shall issue the license upon payment to the board of the fee required. For purposes of this article, in Carroll County the term "clerk" shall be deemed to mean "board of license commissioners". In Prince George's County, the certificate of approval may not be presented to nor payment made to the clerk of the court. If no such findings are made by the board, then the application shall be approved and the board shall issue the license applied for, after payment of the required fee to the treasurer of Prince George's County, and the board shall maintain a record of licenses issued.[3]

The administrative provisions concerning the boards of license commissioners in the various counties are set out in Article 2B, §§148 through 158. The enumeration of the boards' powers in §158 specifically provides that "[t]he several boards of license commissioners herewith are authorized and empowered to issue the alcoholic beverages licenses provided for by this article in their respective jurisdictions." Article 2B, §158(a).

---

[2] In counties where there is no board of license commissioners, the procedure to be followed is that set out in §61, under which the application is received by the clerk of the circuit court, who must publish notice of the application and issue the license if no timely and proper written protest of its issuance is received.

[3] Article 2B, §63 requires the clerk of the circuit court to remit the license fee, less a commission for collecting the fee, to the jurisdiction for which the fee was collected.

In Charles County, the procedure for issuing alcoholic beverages licenses currently followed is that established by §60(a). The person desiring a license files an application with the board of license commissioners. If the board determines that the license should be issued, the board provides the applicant with a certificate evidencing its approval, which the applicant presents to the clerk of the circuit court. Upon payment of the prescribed fee, the clerk delivers the license to the applicant.

Some consideration has been given to the board's taking over collection of the fees and delivery of the licenses, giving rise to a question of the board's authority to perform those functions. The converse question has also been raised — whether the board in actuality is required to handle those matters as part of its responsibility for issuing alcoholic beverages licenses.

II

Analysis

These questions regarding the respective powers and duties of the clerks of the circuit court and the boards of license commissioners arise from the apparent conflict between the various provisions creating different types of licenses, under which the licenses "shall be issued by the clerk of the circuit court," and §158(a), under which the boards "are authorized and empowered to issue the alcoholic beverages licenses provided for by this article ...." On the one hand, the first set of provisions appears to put the responsibility solely on the clerks, without exception for counties in which there is a board of license commissioners; on the other hand, §158(a) appears to put the responsibility solely on the board, without reference to any role of the clerk, in any county in which a board of license commissioners has been established.

These various provisions, as well as §69(a)'s general procedure for issuing licenses, all were enacted by Chapter 501 of the Laws of Maryland 1947, which established the State's system for regulating sales of alcoholic beverages in essentially its present form. Hence, these provisions unquestionably were intended to be consistent with each other. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 516, 525 A.2d 628 (1987) (statutes concerning same subject matter should be read together).

We think that the apparent conflict stems from the fact that the term "issue," with regard to licenses, is capable of being used (and in Article 2B evidently was used) in two ways: to refer to the formal decision to approve an application for a license and to refer to the physical delivery of the license itself to a successful applicant. In counties without boards of license commissioners, both the decisionmaking and delivery aspects of license issuance are performed by the clerk of the circuit court. However, we believe that §60(a) evidences the legislative intent that, in counties that have boards of license commissioners, those two aspects of license issuance are separated. The board "issues" the license in the sense that it decides whether the license should be granted, and the clerk may not deliver a license without the board's approval; at the same time, the clerk in those counties "issues" the license in the sense that he or she delivers the actual license — the physical evidence of the board's approval in return for the licensee's payment of the required fees and taxes — without which an alcoholic beverages business may not be conducted. Article 2B, §3(a).

Moreover, we think that the provisions of §60(a) evidence a further legislative intent that neither the board nor the clerk may perform the function of the other without express statutory authorization. As originally enacted, §60(a) did not include any special provisions for particular counties. *See* Chapter 501, Laws of Maryland 1947 at 940-41 (enacting former Article 2B, §52(a)). The provision eliminating any role for the clerk in Prince George's County and requiring that the license fee be paid to the county treasurer was enacted by Chapter 301 of the Laws of Maryland 1966. The title of that act states that it was enacted for the purpose of "changing the procedure by which alcoholic beverages licenses are issued, the fees for the same are paid for, and the record for the same is maintained." The provisions regarding Carroll County were enacted by Chapter 98 of the Laws of Maryland 1987, an act "authorizing the Board of License Commissioners of Carroll County to issue certain licenses ...." That the General Assembly believed it necessary to enact these express provisions to transfer the ministerial aspect of license issuance from the clerk to the board in these counties reflects the General Assembly's understanding that the procedure established by §60(a) is mandatory and may be diverged from only pursuant to express authorization.

To be sure, the procedure established by §60(a) is less streamlined than approval of a license application, collection of the license fee, and delivery of the license by a single entity. Nonetheless, §60(a)'s procedure is by no means so cumbersome that it could not reasonably have been intended. *Cf. Kaczorowski*, 309 Md. at 518 (statute should be construed to avoid unreasonable results). Indeed, the General Assembly may well have concluded that boards of license commissioners are generally better equipped than clerks of the circuit courts to hold hearings, while clerks — already required to collect various fees and keep a variety of records — are generally better equipped to handle the ministerial aspects of license issuance.

III

Conclusion

In sum, it is our opinion that the Board of License Commissioners of Charles County must approve or disapprove alcoholic beverages license applications and, if it approves an application, certify its approval to the Clerk of the Circuit Court for Charles County. The Clerk must collect the prescribed license fee and deliver the license itself to the successful applicant.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

The procedure for the issuance of alcoholic beverages licenses was significantly modified by Chapter 594 (House Bill 1247) of the Laws of Maryland 1993.

BUDGETARY ADMINISTRATION

GOVERNOR — BOARD OF PUBLIC WORKS — GIFTS — ONLY THE GOVERNOR NEED APPROVE A GIFT TO THE STATE

October 5, 1990

The Honorable Charles L. Benton
Secretary of Budget and Fiscal Planning

You have requested our opinion about the approvals required to accept a gift to the State. Specifically, you ask whether the Board of Public Works must approve the acceptance of gifts of real property.

For the reasons set forth below, we conclude that, except as otherwise specifically provided by statute, only the Governor need approve a gift to the State, whether the gift is of real or personal property.

I

Analysis

The authority to accept gifts on behalf of the State is not addressed by the Maryland Constitution but is conferred by statute. The general rule governing the acceptance of gifts is found in §2-201(c) of the State Finance and Procurement Article ("SF" Article):

> If the Governor assents to the acceptance of a gift by an officer or unit, the officer or unit may use the gift in accordance with its terms. If the gift is money or generates money, the officer or unit may not spend the money until it is appropriated as provided in Title 7.

In addition, various units of the State government are authorized to accept gifts to be used for limited purposes in accordance with the applicable appropriation.[1]

If a specific statute governs the gift, only those approvals required by that statute are necessary to accept the gift. In the absence of a statute governing a gift to a particular unit, only the Governor's consent is required by SF §2-201(c).

With respect to the required approval, SF §2-201(c) does not distinguish between gifts of personal or real property and gifts of money.[2] Unless otherwise provided by statute, before a gift of any nature may be used by a unit of the State government, the Governor must consent to the acceptance of the gift.

The Board of Public Works need not take any action to accept a gift of real property. The Board has only such duties as are enacted by the General Assembly. Article XII, §2 of the Maryland Constitution. *See* 62 *Opinions of the Attorney General* 716, 725 (1977). No statute confers authority regarding the acceptance of gifts on the Board of Public Works.[3]

---

[1] A non-exhaustive list includes §§2-308 (Maryland Geological Survey Commission for matters within its jurisdiction), 5-207 (Secretary of Natural Resources for gifts of land for parks, forests, or other reserves), 5-1217 (Secretary of Natural Resources for wetlands), and 9-504 (Secretary of Natural Resources for phragmite management) of the Natural Resources Article; Article 78D, §19 (Baltimore Regional Council of Governments for its purposes); Article 83B, §5-607(a)(12) (Maryland Historical Trust for Trust purposes); §§5-402 (Secretary of Agriculture for mosquito control) and 9-705 (Secretary of Agriculture for multiflora rose management) of the Agriculture Article; §9-929 of the State Government Article (Veteran's Home Commission for commission purposes); and §13-711 of the Financial Institutions Article (Maryland Stadium Authority for facility purposes).

[2] SF 2-201(c) does require that before gifts of money or money generated from gifts are expended, not only must the Governor approve but the funds must also be appropriated in accordance with SF Title 7.

[3] If acceptance of a gift of real property entails any expenditure of appropriated funds for what could reasonably be termed "acquisition" costs, the Board of Public Works "shall supervise" that expenditure. SF §4-415(c). Moreover, if a gift necessitated any transfer of property between State agencies, the Board's approval would be required. SF §10-304(b).

II

Conclusion

In summary, it is our opinion that gifts governed by specific statutes may be accepted in accordance with the requirements of the particular statute. In the absence of a specific statute, only the Governor's consent is necessary for the acceptance of a gift of any kind to the State.

J. Joseph Curran, Jr.
Attorney General

Cecilia Januszkiewicz
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

BUSINESS AND PROFESSIONS

Preparation of Design Plan for Significant Movement of Non-Loadbearing Walls is Practice of Architecture

December 10, 1990

The Honorable Dana Lee Dembrow
Maryland House of Delegates

You have requested our opinion on whether the preparation of design plans for the movement of interior partitions that are not part of the building's structure ("non-loadbearing walls") constitutes the practice of architecture under the Maryland Architects Act.

For the reasons stated below, we conclude that the preparation of design plans involving any significant movement of non-loadbearing walls constitutes the practice of architecture. Accordingly, such plans must be prepared by either a licensed architect or a person acting within the scope of a statutory exception to the licensing requirement.

I

Background

You have inquired whether the preparation of certain design plans by individuals engaged in the occupation of "interior design" constitutes the unauthorized practice of architecture. Your inquiry specifically encompasses the preparation of plans for the movement of non-loadbearing interior walls in non-residential buildings intended for public use and assembly (for example, government buildings, offices, and stores or other commercial establishments).

In Maryland, "interior design" is not a statutorily recognized and defined profession.[1] As a result the title "interior designer" may be used by individuals with widely divergent training and experience.

Some practitioners of "interior design" have degrees in interior design from accredited institutions of higher learning. These individuals often belong to professional organizations and many have passed an examination administered by the National Council For Interior Design Qualification. California State University Real Estate and Land Use Institute, *A Study to Determine the Need to License Interior Designers* 8-9 (1990) ("California Study").

Other individuals, also operating under the rubric of "interior designer," have no formal education or training in the field of interior design. They belong to no professional organizations and have taken no competency examination, and their practical experience is limited to advising clients with respect to the purchase of items like furniture, draperies, carpet and accent pieces. California Study at 12.

Thus, under present Maryland law, the use of the title "interior designer" by an individual constitutes no verification of expertise, or even minimal competency, with respect to interior design skills. An individual who acts as an "interior designer" within the State of Maryland is subject to exactly the same restrictions on the practice of architecture as those imposed on any other person.[2]

---

[1] The following states have enacted some form of licensing for interior designers: Alabama (Ala. Code, §34-15A), California (Cal. Bus. & Prof. Code §5538), Connecticut (Conn. Gen. Stat. Ann. §20-377), Florida (Fla. Stat. Ann. §481.201 et seq.), Louisiana (La. Rev. Stat. Ann. §37:44), New Mexico (N.M. Stat. Ann. §61-24C), New York (N.Y. Educ. Law §161), Virginia (Va. Code Ann. §54.1-400 et seq.), and the District of Columbia (D.C. Code Ann. §2-3401 et seq.). Although these states differ in the permitted scope of design activity by interior designers, all have established an examination system, and all have established education or experience requirements or both.

In the 1990 Session of the Maryland General Assembly, Senate Bill 660 would have regulated the use of the title "certified interior designers" as well as certain aspects of the practice of certified interior designers. The bill failed.

[2] This opinion concerns only the issue of whether certain design services constitute the practice of architecture. The actual implementation of the design plans may, depending upon the nature of the work and applicable statutes and ordinances, require the services of certain licensed persons such as electricians or plumbers.

II

Regulation of Architecture

The practice of architecture in Maryland is governed by Title 3 of the Business Occupations and Professions Article ("BOP" Article), the Maryland Architects Act. BOP §3-101(g) defines the term "practice architecture" as follows:

> (g)(1) "Practice architecture" means to provide any service or creative work:
>
> (i) in regard to an addition to, alteration of, or construction of a building or an integral part of a building; and
>
> (ii) that requires education, training, and experience in architecture.
>
> (2) "Practice architecture" includes:
>
> (i) architectural design and preparation of related documents;
>
> (ii) consultation;
>
> (iii) coordination of services that civil, electrical, mechanical, or structural engineers or any other consultants provide;
>
> (iv) evaluation;
>
> (v) investigation; and
>
> (vi) planning.

BOP §3-302(a) provides that "[e]xcept as otherwise provided in this title, an individual shall be licensed by the [State] Board [of Architects] before the individual may practice architecture in the State." A person who practices architecture without a license is guilty of a misdemeanor. BOP §§3-601 and 3-605.

Thus, the statute establishes the general prohibition on the practice of architecture by an individual who is not licensed by the State Board of Architects. The only exceptions to the general requirement of licensure by the Board are found at BOP §3-103, which exempts from licensure design services with respect to certain types of residential construction and certain services provided by engineers, landscape architects, real estate brokers, and construction contractors.[3] Interior designers are not exempt.

Non-residential design services by interior designers do not fall within any of the statutory exceptions to licensure. Therefore, we next consider whether the specific services in question — preparing design plans for the movement of non-loadbearing interior walls within a building intended for public use — constitute the practice of architecture, and, hence, may be performed only by a licensed architect.

The cases draw a distinction between cosmetic and structural changes. On the one hand, preparing design plans for "cosmetic changes in the internal appearance of an existing structure" is not the practice of architecture. *Perry v. Dudley*, 145 Ga. App. 728, 244 S.E. 2nd 580, 581 (1978). *See also Marshall-Schule Associates v.*

---

[3] BOP §3-103 provides as follows:

> (a) This title does not require a person to employ a licensed architect in connection with any alteration, construction, design, or repair of a building or other structure that:
>
> (1) is for personal use; and
>
> (2) is not intended for any use, including assembly, employment or occupancy, by the public.
>
> (b) This title does not limit the right of:
>
> (1) an individual to perform architectural services that are incidental to practicing engineering and are not in conflict with the basic definition of practicing architecture, if the individual is licensed or otherwise authorized under Title 14 of this article to practice engineering;
>
> (2) an individual to perform architectural services that are incidental to practicing landscape architecture and are not in conflict with the basic definition of practicing architecture, if the individual is licensed or otherwise authorized under Title 9 of this article to practice landscape architecture;
>
> (3) a real estate broker, associate real estate broker, or real estate salesperson to appraise property or to choose sites; or
>
> (4) a construction contractor to administer construction contracts.

Goldman, 523 N.Y.S.2d 16, 17-18 (N.Y. City Civ. Ct. 1987). On the other hand, preparing design plans to effect structural changes to a building is the practice of architecture. *Snodgrass v. Immler*, 232 Md. 416, 421, 194 A.2d 103 (1963). *See also Geer v. Bennett*, 237 So. 2d 311, 316 (Fla. 1970).

The movement of non-loadbearing interior walls does not fit neatly into either the category of "cosmetic" or "structural" change to a building. Nonetheless, we conclude that, at least where the movement is significant, the General Assembly intended an architect to draw the plans.

The Architects Act does not specifically address the issue of movement of non-loadbearing interior walls. Nor does Maryland case law.[4] The statute does require the services of an architect, however, for the "alteration of ... an integral part of a building ...," when services in connection with the alteration require "education, training, and experience in architecture." BOP §3-101(g)(1).

Although design plans for the movement of non-loadbearing walls would not ordinarily affect the fundamental structural integrity of a building, they might well affect aspects of public safety and welfare. Indeed, even the initial determination of whether a wall is, in fact, non-loadbearing may impact upon public safety. The placement of interior walls within a structure such as an office building may have a considerable impact on fire safety, by making access to fire exits and escapes harder. Other public welfare concerns — for instance, access by persons with disabilities — might also be affected. All of these matters are within the expertise of architects; absent State regulation of the practice of interior design, we cannot conclude that an interior designer has comparable expertise. *See* Part I above.

---

[4] In *Gerry Potter's Store Fixtures, Inc. v. Cohen*, 46 Md. App. 131, 416 A.2d 283 (1980), the Court of Special Appeals found that Potter, a contractor retained to remodel and convert a clothing store into a yogurt shop, did not engage in the practice of architecture. The court found that Potter had prepared, free of charge, and incidental to his work as a contractor, "certain lay-out drawings." The decision identifies specifically only the placement of fixtures, color scheme, and type of materials as the subject of Potter's drawings. 46 Md. App. at 134.

One out-of-state trial court decision holds that the "re-arrangement of doors and closets" is the practice of architecture. *See Marshall-Schule Associates v. Goldman*, 523 N.Y.S.2d at 18.

Our view of the statute is guided by the statement of legislative intent set forth in BOP §3-102: "The purposes of this title are to safeguard life, health, public safety, and property and to promote the public welfare by regulating persons who practice architecture in the State." In view of these purposes, we conclude that where design plans call for the significant movement of non-loadbearing walls and therefore could have a potential impact on public safety or welfare, the preparation of these design plans constitute the practice of architecture.[5] They must be prepared by a licensed architect or a person acting within the scope of one of the statutory exceptions to the licensing requirement.

J. Joseph Curran, Jr.
Attorney General

Joel Jacobson
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[5] We refer to "*significant* movement" because we do not see how the underlying public welfare concerns of the statute are implicated by minor shifts in partitions that could not affect safety or other related issues. Those who review or approve plans ought to be able to determine whether the movement is so insignificant as to fall outside the general requirement for an architect's approval.

CHILD ABUSE

ATTORNEY-CLIENT PRIVILEGE — CONSTITUTIONAL LAW — SIXTH AMENDMENT — DUTY OF HEALTH PRACTITIONERS TO REPORT CHILD ABUSE OR NEGLECT EVEN AFTER ATTORNEY REFERRAL

February 8, 1990

The Honorable Sandra A. O'Connor
State's Attorney for Baltimore County

You have requested our opinion on an issue concerning the reporting of child abuse or neglect by mental health providers. Specifically, your question is whether the attorney-client privilege permits mental health providers to refrain from reporting suspected child abuse or neglect if the person providng the information was referred by an attorney.

For the reasons stated below, we conclude that a mental health provider must report instances of suspected child abuse or neglect, even if the person relating the information was referred to the provider by an attorney, unless the mental health provider is participating in the preparation of a defense to a criminal proceeding that has already been initiated.

I

Background

You have forwarded a copy of a memorandum from Dr. Fred S. Berlin, Director of the Johns Hopkins Sexual Disorders Clinic, to all patients and prospective patients of that clinic, dated July 1, 1989, in which Dr. Berlin summarizes the requirements of Maryland law about the reporting of suspected child abuse. The purpose of the memorandum was to inform patients that if they "tell any health care provider, *including us*, about any instance of sexual behavior involving a child who was under your care, custody, or supervision, whether such behavior was recent or in the more distant past, we will be required to report." (Emphasis in original.)

However, Dr. Berlin also included the following passage in this memorandum:

> Because giving us any such information could result in criminal prosecution, and because we are not in a position to give you legal advice, we recommend that you first consult an attorney before deciding whether or not you wish to disclose in full or in part any such information to us .... If you are referred to us by an attorney for evaluation, according to Maryland's highest court (State v. Pratt) any information you give us does *not* have to be reported.

(Emphasis in original.) The last sentence of this portion of Dr. Berlin's memorandum gives rise to your question.

II

Applicable Statutes

The reporting of suspected child abuse or neglect is governed by §§5-704 and 5-705 of the Family Law Article ("FL" Article). FL §5-704 requires reporting by members of certain specified professions, including each health practitioner: "Notwithstanding any other provision of law, including any law on privileged communications, each health practitioner, police officer, or educator or human service worker, acting in a professional capacity, who has reason to believe that a child has been subjected to" abuse or neglect is required to notify the appropriate authorities.[1] FL §5-704(c) specifies the contents of the required report.

FL §5-705 addresses the duty of all other persons: "Except as provided in paragraphs (2) and (3) of this subsection, notwithstanding any other provision of law, including a law on privileged communications, a person other than a health practitioner, police officer, or educator or human service worker who has reason to believe the child has been subjected to abuse or neglect" is required to notify the appropriate authorities. One of the specified exceptions is that a person covered by FL §5-705 is not required to provide notice "if the

---

[1] A "health practitioner" is "any person who is authorized to practice healing under the Health Occupations Article." FL §5-701(h). The definitions of "abuse" and "neglect" are set out in FL §5-701(b) and (n), respectively.

notice would disclose matter communicated in confidence by a client to the client's attorney or other information relating to the representation of the client ... or ... in violation of any constitutional right to assistance of counsel." FL §5-705(a)(2)(ii) and (iii).

Psychiatrists and other mental health providers are "health practitioners" and therefore are subject to the reporting requirements in FL §5-704. Prior to July 1, 1989, health practitioners who specialized in the psychiatric treatment of pedophilia were not required to report under certain circumstances. However, this exception to the reporting obligation of FL §5-704 was repealed by Chapter 730 (House Bill 1210) of the Laws of Maryland 1989.[2]

In our view, the statutory language could not be clearer. Health practitioners, including mental health providers, have an unqualified duty to report, "[n]otwithstanding any other provision of law, including *any* law on privileged communications ...." (Emphasis added.) Except to the extent that the Constitution limits its discretion, the General Assembly is free to abrogate the attorney-client or any other common law or statutory privilege.[3] FL §5-704 — especially construed in a

---

[2] The exception appeared as former FL §5-704(b):

> A health practitioner who specializes in the psychiatric treatment of pedophilia is not required to report sexual abuse under subsection (a)(1)(i) of this section if:
>
> (1) The health practitioner's reason to believe that a child has been subjected to sexual abuse is based exclusively on a report made to the health practitioner by an individual stating the individual sexually abused the child;
>
> (2) The health practitioner is providing psychiatric treatment to the individual for the purpose of curing the individual's pedophilia; and
>
> (3) The sexual abuse occurred prior to the time that the individual began the psychiatric treatment with the health practitioner.

The term "pedophilia" was defined in former FL §5-701(o).

[3] The common law attorney-client privilege is now embodied in §9-108 of the Courts Article: "A person may not be compelled to testify in violation of the attorney-client privilege." By statute, the General Assembly has created a privilege for communications between a patient and the patient's psychiatrist, psychologist, or licensed certified social worker. §§9-109 and 9-121 of the Courts Article.

light of the repeal of the "pedophilia" exception — reflects a legislative decision that, important as the policies underlying the privilege may be, nevertheless health practitioners and the other specified groups *must* report suspected child abuse or neglect.[4]

III

Constitutional Considerations

"Standing alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Cluchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985). *See generally* Larkin, *Federal Testimonial Privileges* §2.01, at 2-1 n.3 (1989) (citing cases).[5]

Yet it is also true, as the court in *Cluchette* observed, that "[i]n some situations ... governmental interference with the confidential relationship between a defendant and his counsel may implicate Sixth Amendment rights." 770 F.2d at 1471. The case mentioned by Dr. Berlin, *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979), makes this point. The Court of Appeals wrote that although the attorney-client privilege has "never [been] given an explicit constitutional underpinning, the privilege is, nevertheless, closely tied to the federal, as well as this State's constitutional guarantees of the effective assistance of counsel and could, if limited too severely, make these basic guarantees virtually meaningless." 284 Md. at 520.

However, "it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). *See also, e.g., Brewer v. Williams*, 430 U.S. 387, 398 (1977); *In re Groban's Petition*, 352 U.S. 330, 333 (1957). Hence, an "alleged governmental intrusion into the defendants' attorney-client relationships ... [that]

---

[4] By preserving the attorney-client privilege in FL §5-705, the General Assembly struck a different policy balance for those subject to the reporting requirements of that section.

[5] This portion of the opinion discusses constitutional issues regarding the attorney-client privilege only, because "[t]here is no constitutional right to the privilege of communication between patient and psychiatrist. It exists by legislative grant, and ordinarily the legislature may provide the conditions under which it is applicable." *Bremer v. State*, 18 Md. App. 291, 334, 307 A.2d 503 *cert. denied* 269 Md. 755 (1973) *cert. denied* 415 U.S. 930 (1974).

occurred long before any of the defendants were indicted ... thus [occurred] before their Sixth Amendment right to assistance of counsel had attached." *United States v. Goffa*, 513 F. Supp. 517, 522 (D. Del. 1981), *aff'd in part and rev'd in part on other grounds* 688 F.2d 919 (3d Cir. 1982). *See also, e.g., Tornay v. United States*, 840 F.2d 1424 (9th Cir. 1988).

State v. Pratt is entirely consistent with this limitation on the application of the Sixth Amendment.[6] In that case, the psychiatrist whose testimony was held to have breached the attorney-client privilege "had examined the accused at the request of her attorney after being retained by him to aid in preparing support for the [defendant's] insanity plea" — that is, after indictment. 284 Md. at 519. There is no suggestion in *State v. Pratt* of any constitutional right to maintain the secrecy of a consultation with a psychiatrist, even one instigated by an attorney, that occurs *prior to* the initiation of a criminal proceeding.

IV

Conclusion

In summary, it is our opinion that a mental health provider who learns of an instance of child abuse or neglect must report it, regardless of whether the person revealing the information was referred by an attorney. The only exception is if the attorney's referral occurs after the initiation of a criminal proceeding against a defendant, as part of the attorney's trial preparation.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[6] The right to counsel under Article 21 of the Maryland Declaration of Rights is indistinguishable from that under the Sixth Amendment. *State v. Tichnell*, 306 Md. 428, 509 A.2d 1179 (1986).

CHILD SUPPORT

CLERKS OF COURT — MONTGOMERY COUNTY'S CHILD SUPPORT ENFORCEMENT OFFICE IS A COMPONENT OF THE CIRCUIT COURT, FOR WHICH THE COUNTY HAS BUDGETARY RESPONSIBILITY

August 29, 1990

The Honorable Robert C. Murphy
Chief Judge of the Court of Appeals

You have requested our opinion concerning the status under State law of the Child Support Enforcement Division of the Office of the Clerk of the Circuit Court for Montgomery County. In particular, you ask whether State law contemplates that the budgetary responsibility for child support enforcement activities is to be that of the clerk.[1]

For the reasons stated below, we conclude as follows: The Child Support Enforcement Division in Montgomery County is a "local support enforcement office" as defined by State law. Specifically, it is a component of the Circuit Court for Montgomery County. Therefore, the Division is to be funded by Montgomery County, which would in turn receive federal revenues in reimbursement. Except for personnel in the clerk's office performing clerical functions, the Division should not be funded by the State through the clerk's budget.[2]

---

[1] This question is of immediate importance because the Chief Judge of the Court of Appeals is now responsible for submitting the budgets for the clerks. *See* note 3 below.

[2] Thus, we agree with the conclusion reached by Assistant Attorney General Julia M. Freit in an advice letter of April 9, 1990 to the Clerk of the Circuit Court for Montgomery County.

I

Federal Law

The federal government, through the Department of Health and Human Services ("HHS"), generally pays 66 percent of the operational costs of a state's child support enforcement program. 42 U.S.C. §655(a). In addition, "[i]n order to encourage and reward State child support enforcement programs which perform in a cost-effective and efficient manner to secure support for all children who have sought assistance in securing support, ... the Secretary [of HHS] shall ... pay to each State for each fiscal year ... an incentive payment ...." 42 U.S.C. §658(a).

Under this federal program, Title IV-D of the Social Security Act, a state must have its child support enforcement plan approved by the Secretary of HHS. 42 U.S.C. §652(a)(3). Among other requirements, a state plan must "be in effect in all political subdivisions of the State." 42 U.S.C. §654(1). The plan must also "provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the state to administer the plan." 42 U.S.C. §654(3). *See also* 45 C.F.R. §305.12(a).

Federal law also recognizes that the political subdivisions of a state might have program responsibilities, for it authorizes a state to "enter into written agreements for cooperative arrangements with local courts and law enforcement officials to assist the state IV-D agency in carrying out the child support enforcement program." *Jenkins v. Massinga*, 592 F. Supp. 480, 483 (D. Md. 1984). *See* 42 U.S.C. §654(7). Moreover, "if one or more political subdivisions of the state participate in the costs of carrying out activities under the state plan during any period, each such subdivision shall be entitled to receive an appropriate share (as determined by the state) of any such incentive payments made to the state for such period, taking into account the efficiency and effectiveness of the activities carried out under the state plan by such political subdivision." 42 U.S.C. §654(22). Federal law otherwise leaves to each state the responsibility for the exact placement of enforcement responsibilities within its own framework of state and local government, provided that the state ensures uniform administration of its plan. *See Jenkins v. Massinga*, 592 F. Supp. at 489.

II

Maryland Law

A. Organizational Structure For Child Support Enforcement

1. Legislative history

In the mid-1970s, child support collection efforts in Maryland were "disjointed and uncoordinated." Department of Human Resources ("DHR"), *Report to the House Appropriations Committee of the Maryland General Assembly on Domestic Collections in Maryland* at 2 (December 20, 1977) ("DHR Report"). In 16 of Maryland's 24 jurisdictions, the Division of Parole and Probation had responsibility for domestic collections. In eight jurisdictions — including Montgomery County — collection activities were carried out by "[l]ocal units" under "local operation ...." DHR Report at 5.

The DHR Report urged the enactment of legislation transferring collection responsibilities from the Division of Parole and Probation to DHR. Although the proposed transfer "will not eliminate all fragmentation in the existing system," the report said, "[i]t will, however, in sixteen Maryland jurisdictions locate in a single administrative structure the [support collection] functions ...." DHR Report at 3. The report continued: "In the other eight jurisdictions this administrative organization of the system will not be achievable. However, DHR can continue to work cooperatively with local agencies by contract in these jurisdictions and will be able by regulation to promulgate the standards for the operation of system elements of those local agencies." *Id.* The report specifically described the budgetary implications of a county's maintaining a local agency: "[U]nder the proposed legislation a local government may have Domestic Collections services provided by a local agency *if the nonfederal share of operating the services consists of local, not State, funds.*" DHR Report at 7 (emphasis added).

In Chapter 885 of the Laws of Maryland 1978, the General Assembly enacted the legislation described in the DHR Report. This law created a Bureau of Support Enforcement in DHR's Social Services Administration, with responsibility to "implement or coordinate" child support enforcement efforts throughout the State. Former Article 88A, §59(a) and (b).

The statute authorized the continuation of locally-based programs, so long as no State funds were involved:

> When the responsibility for collection and/or support enforcement is exercised by a local agency or circuit court:
>
> (A) The funds necessary to finance collection and/or support enforcement shall be derived from local and, to the extent available, federal resources.
>
> . . .
>
> (C) The Bureau shall pay to subdivisions exercising support enforcement responsibilities the maximum collection incentives to which the subdivision may be entitled pursuant to federal law.

Former Article 88A, §59(b)(5)(iii). The Bureau was made responsible for support enforcement statewide "except in those subdivisions where an agency of or the circuit court for the subdivision has responsibility for support enforcement." Former Article 88A, §59(b)(5).

If "[a]ny subdivision or circuit court having responsibility for collection and/or support enforcement" sought to give up that responsibility, it could do so by requesting "that [the] responsibility be transferred to the Bureau of Support Enforcement. Such requests must be made to the Department of Human Resources no later than September 1 of the year preceding the fiscal year in which the responsibility is to be assumed by the Bureau." Former Article 88A, §59(b)(5)(i).

2. Current law

The 1984 recodification of these provisions into the Family Law Article did not change their substance. DHR's Child Support Enforcement Administration ("CSEA") is now the single child support administrative entity required by federal law. *See* §§10-106 and 10-108 of the Family Law Article ("FL" Article). It develops Maryland's plan for complying with the requirements of Title IV-D and in many counties is responsible for carrying it out.

Some counties, however, continue to conduct support enforcement activities under the State plan through a "local support enforcement office." Under FL §10-108(b), CSEA has responsibility for support enforcement for obligations under certain court orders "[e]xcept in a county that has a local support enforcement office."

A county is not required to maintain a local office. Under FL §10-117, "[a] county or circuit court with a local support enforcement office may request that the responsibility for support enforcement be transferred to [CSEA]." Such a request is to be made to DHR "by September 1 of the year preceding the fiscal year for which responsibility will be transferred," and "[a]ny personnel of the local support enforcement office involved in a transfer ... shall become classified employees of [the] State ...."

The statute contains the following definition of "local support enforcement office":

> "Local support enforcement office" means 1 of the following that is responsible for support enforcement:
>
> (1) a county agency; or
>
> (2) a component of the circuit court for a county.

FL §10-101(e). According to the Revisor's Note, FL §10-101(e) "is new language added to avoid needless repetition of phrases such as 'subdivision or circuit court having responsibility for collection and/or support enforcement'."

Neither this provision nor any language in the predecessor statute envisions a clerk of the circuit court as *separately* responsible for local child support enforcement activities. Insofar as personnel in a clerk's office help conduct a support enforcement program housed within the circuit court, the clerk's office may be viewed as a "component of the circuit court." *Cf.* 72 *Opinions of the Attorney General* 334, 339 n.5 (1987). Nevertheless, the statute simply does not provide that a clerk's office may be a separate instrumentality for the conduct of a local program. As we explain in Part IIB below, the difference is important because of the different source of funding of the two entities.

B. Budgetary Responsibility

If a "local support enforcement office" is "a county agency," FL §10-101(e)(1), the county would budget for the office as for any other county agency. If the "local support enforcement office" is "a component of the circuit court" for that county, FL §10-101(e)(2), budgetary responsibility would likewise fall on the county. *See* Article 24, §8-101(5). *See also* 58 *Opinions of the Attorney General* 201

(1973). As both the language and legislative history of the child support enforcement statute make clear, *no* State funds are to be provided for a local office. Instead, a local support enforcement office "shall be funded from local and federal resources." FL §10-116(a)(1).

The office of a clerk of the circuit court is "funded through the State budget." Article IV, §10(b) of the Constitution.[3] Because a local support enforcement office is to be locally funded, State funds appropriated to a clerk's office may not be used to fund a local program.

To be sure, if personnel in a clerk's office are needed to handle the purely clerical consequences of a local support enforcement office's program, we see no reason why those personnel and related costs may not be borne by the clerk's budget. But the local program costs - that is, the cost of activities like conducting settlement negotiations, collecting payments, and enforcing court orders - must be paid by the county, through its budgetary responsibility for its own agencies or for the circuit court.

III

Status of Montgomery County Program

As noted in Part IIA above, Montgomery County had a local support enforcement program when the reorganization of the State program occurred in 1978. We understand that the County Attorney's Office, the State's Attorney's Office, and the Family Support Unit within the Office of the Clerk of the Circuit Court all had cooperative reimbursement agreements with the State from the mid-1970's. Memorandum to Harriet A. Herrman, Director of the Montgomery County Department of Social Services, from Bill Clarke at 2 (Sep. 30,

---

[3] Under Chapter 515 (Senate Bill 841) of the Laws of Maryland 1990, the Chief Judge of the Court of Appeals is to submit the budget of the clerk of each circuit court as part of the Judicial Branch's annual budget submission. Although this legislation is generally contingent upon ratification of a constitutional amendment that would eliminate the "visitorial power" of the circuit court over the clerks and instead make clerks subject to rules adopted by the Court of Appeals, the Chief Judge in any event is to prepare the clerks' budgets for fiscal year 1992.

1980).[4] Prior to July 1, 1981, the Family Services Unit within the Clerk's Office consisted of several employees who prepared dockets, controlled child support files, and otherwise performed clerical functions. Deposition of Frederick M. Russillo, former Program Administrator of the Family Services Division, at 40, *Paul v. Smith*, Civil Action No. H-83-3879 (D. Md.).[5]

In 1981, the Montgomery County program was consolidated, and the consolidated program then entered a series of cooperative reimbursement agreements with DHR. The cover sheet for each of the program's application for reimbursement stated that it was filed on behalf of the "Montgomery County Circuit Court."[6] The narrative that was part of the consolidated program's first application for reimbursement stated as follows:

> With the withdrawal of the Office of the State's Attorney for Montgomery County from the IV-D Program, the Office of the Clerk of the Circuit Court will, with the support and cooperation of the State's Attorney for Montgomery County, continue attorney support services within the courts [*sic*] Family Services Division. To serve this end, a "Legal Services Unit" will be formed consisting of a duly appointed and program-assigned State's Attorney and support staff. This unit will perform

[4] The memorandum generally described such agreements as follows: "Many localities had or were developing Cooperative Reimbursement Agreements (hereafter referred to CRA's) with local law enforcement offices and/or local collection agencies. These CRA's allowed additional money to be paid to the service provider to perform the required actions, whether legal functions or collection functions. These monies were paid on a 25/75 split with ... every local dollar [matched] with three (3) federal dollars." Clark Memorandum at 1.

[5] This deposition was taken in connection with a 1983 suit filed by a former employee of the Family Services Division against the late Howard M. Smith, longtime Clerk of the Circuit Court for Montgomery County; Judge David L. Cahoon, then Administrative Judge of the Circuit Court; and Montgomery County. The case was settled in 1985 before trial.

[6] These documents were signed by Howard Smith as Program Director. At the time, Mr. Smith was both Clerk of the Circuit Court and Court Administrator. *See* Order of the Circuit Court for Montgomery County (November 30, 1978) (delegating "the execution of the functions of Court Administrator to the Clerk of the Court ....").

> all primary and secondary duties required in the preparation and presentment of the Family Services Division caseload before the court. It will also provide review, counsel and guidance to the division as a whole, as required.

Application for Fiscal Year 1982 at 3-4.

Correspondingly, the Administrative Judge for the Circuit Court for Montgomery County included the program in his budget submissions to the county:

> The Family Services Division of the Circuit Court, bolstered with matching federal funding under Title IV-D of the Social Security Act of 1975, has begun an ambitious program of child support enforcement services. Through the amalgamation of prosecutorial and intake services formerly offered by the Office of the State's Attorney, the program now provides intake, account maintenance, location, prosecution and enforcement functions for all court ordered child support obligations. The benefits of this program accrue to the county as well to its citizens through the payment of incentive monies to the former based upon the recapture of expended social services tax dollars from obligated payors ....

Budget Narrative in Circuit Court Budget Submission for Fiscal Year 1983.

Finally, Montgomery County itself, in its defense in *Paul v. Smith*, asserted that the plaintiff, a hearing officer with the program, was an employee of the Circuit Court. Memorandum of Law in Support of Motion for Summary Judgment at 1, 2, and 4.

In sum, we have no doubt that the Montgomery County program, from its consolidation in 1981, was a component of the Circuit Court for Montgomery County. Nor are we aware of any evidence that Montgomery County exercised its prerogative under FL §10-117 to request that its local support enforcement office be transferred to the State. Indeed, the continued series of reimbursement agreements suggests no significant change in the program since its 1981 consolidation.[7]

Therefore, Montgomery County's child support enforcement program is subject to the provisions of law governing the budget of the Circuit Court. Except for personnel in the clerk's office who would perform clerical functions in support of the program no matter where it was housed organizationally, the budget of the Clerk of the Circuit Court for Montgomery County should not be charged with the costs of the program.

IV

Conclusion

In summary, it is our opinion that when a county has chosen to conduct a local child support enforcement program, as Montgomery County has, the personnel carrying out that program are the budgetary responsibility of the county.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[7] The Montgomery County Attorney's Office has expressed its view that the most recent agreements between the Clerk of the Circuit Court for Montgomery County and CSEA reflect "cooperative agreements" under FL §10-111(a) not involving the county. This provision authorizes CSEA to "make a cooperative agreement with a public or private agency, a circuit court, or a law enforcement official ...." The agreements, however, are between CSEA and "Montgomery County, a body corporate and politic, acting through the Clerk of the Court ...." Thus, the agreements are best understood as continued renewals of the original agreement between CSEA and the entity that Montgomery County intended to be its local support enforcement office, under which CSEA passes through the proportionate share of federal funds that it receives.

CLERKS OF COURT

DEPUTY CLERKS — MARRIAGES — MARRIAGES PERFORMED BY EMPLOYEE AFTER EXPIRATION OF APPOINTMENT AS DEPUTY CLERK ARE NONETHELESS VALID

September 25, 1990

The Honorable Merritt Pumphrey, Clerk
Circuit Court for Howard County

You have requested our opinion concerning the validity of marriages performed by an employee of your office. Specifically, you ask if marriages performed since 1986 by an employee who was, prior to 1986, a deputy clerk designated to perform marriages are valid even if the employee was not reappointed and resworn after the 1986 election.

For the reasons given below, we conclude that the marriages performed by the employee are entirely valid. The couples married by this employee need take no further action whatever.

I

Authority of Designated Deputy Clerks to Perform Marriages

Section 2-406 of the Family Law Article ("FL" Article) provides:

> A marriage ceremony may be performed in this State by:
>
> (1) any official of a religious order or body authorized by the rules and customs of that order or body to perform a marriage ceremony;
>
> (2) any clerk; or

> (3) any deputy clerk designated by the county administrative judge of the circuit court for the county.[1]

A deputy clerk is a person appointed by the clerk of a circuit court pursuant to Article IV, §26 of the Maryland Constitution and confirmed by the judges of that court.[2] A deputy clerk, once appointed and confirmed, is required to take the oath of office prescribed by §2-104(b) of the Courts Article. The oath of office is a prerequisite to qualifying for the office of deputy clerk. *See* Article I, §10 of the Constitution.

A deputy clerk's term of office is concurrent with that of the elected clerk, other than in Washington County; a deputy clerk is subject to reappointment by the clerk, in the exercise of the clerk's discretion and subject to confirmation of the judges, and must be resworn at the beginning of the clerk's new term of office. *See* 43 *Opinions of the Attorney General* 119 (1958). *See also O'Leary v. Shipley*, 313 Md. 189, 191 n. 1, 545 A.2d 17 (1988).

When the clerk elects not to reappoint and reswear an individual to a new four-year term as a deputy clerk, that person, if he or she continues in the clerk's employment, becomes an "employee" of the clerk and no longer qualifies as a "deputy clerk." Since the county administrative judge has no authority to designate someone other than a deputy clerk to perform marriages, a designation properly made when an individual was a deputy clerk is no longer effective after the individual ceases to be a deputy clerk, whether by reason of resignation, retirement, failure to be reappointed to a new term, or any other termination of the status of deputy clerk.

Therefore, an employee of the clerk's office is not authorized to perform marriages under FL §2-406 unless, at the time the marriage

---

[1] FL §2-201(c) defines "clerk" as "a clerk of the circuit court of a county." The allowance of a civil ceremony performed by the elected clerk of a circuit court or any designated deputy clerk was added to the Code by Chapter 406 of the Laws of Maryland 1963.

[2] Under Chapter 62 (Senate Bill 842) of the Laws of Maryland 1990, contingent on ratification by the voters in November 1990, Article IV, §26 is amended to provide that deputy clerks and other employees of the clerk's office shall be appointed and removed according to procedures set by law.

is performed, the person is a duly qualified deputy clerk who has been designated by the county administrative judge to perform marriages.[3]

II

Validity of Marriages Performed by Non-Deputized Employee of Clerk

Although, as stated in Part I above, an employee of the clerk's office who is not a duly appointed and sworn deputy clerk is not authorized under Maryland law to perform marriages, any marriage performed by the employee under apparent authority to do so is nonetheless valid. This conclusion is firmly rooted in both Maryland case law and sound public policy favoring the validity of marriage.

In *Knapp v. Knapp*, 149 Md. 263, 131 A. 329 (1925), the Court of Appeals held that a marriage performed by one who reasonably appeared to be a minister was valid despite complete absence of authority in fact. While this case was decided at a time when Maryland law required a religious ceremony and before the law expressly authorized a civil ceremony performed by a clerk or designated deputy clerk, the rationale of the case is unquestionably applicable to a marriage performed by a person who reasonably appears to be a designated deputy clerk.

In upholding the marriage performed by the supposed minister, the Court relied on the law of public officers and stated as follows:

> The law has long recognized that because of this inability of the public to go behind apparent authority, dealings of supposed officers, who are in fact not qualified, must be given effect nevertheless. "Third persons who have occasion to deal with a public officer and to rely upon his acts, finding a person in the apparent possession of the office and

[3] In a May 13, 1988 letter of advice to the Honorable Suzanne Mensh, Clerk of the Circuit Court for Baltimore County, concerning whether the general duties of the clerk or deputy clerk of the court could be performed by assistant clerks, Assistant Attorney General Julia Freit advised that assistant clerks could perform those duties not specifically restricted to the clerk or deputy clerk. Inasmuch as that letter did not address the performance of a specifically restricted duty, like performing marriages, by one unauthorized to do so, it is not relevant to the present inquiry.

> ostensibly exercising its functions lawfully and with the acquiescence of the public, can neither be expected to know, nor to investigate, in every instance, his title to the office or his eligibility to election to it. As to them, he must be held to be what he appears to be, the lawful occupant of the office. This rule is demanded by public policy as the only one affording protection to the public." ... And the reason for that rule applies with even more force to a case of marriage before an unauthorized minister.

149 Md. at 268 (citations omitted). Because the marriage by a supposed minister in *Knapp* was upheld by the Court on the basis of the law of apparent authority of supposed public officers, it necessarily follows that the validity of a marriage by a supposed public officer (a deputy clerk) is also upheld by the same decision. *See* Strahorn, *Void and Voidable Marriages in Maryland and Their Amendment*, 2 Md. L. Rev. 211, 221 (1938) ("[T]he case of *Knapp v. Knapp* decided that, even if the celebrant lacked appropriate authority, if the parties acted on the belief that he had it the marriage is valid.").

The case of *Knapp v. Knapp* has never been overruled or modified. In fact, *Knapp* simply affirmed a longstanding principle upholding marriages entered into upon the reasonable belief of the parties that the person officiating over the ceremony had been authorized to do so. *See Farley v. Farley*, 94 Ala. 501, 10 So. 646 (1891); *Haggin v. Haggin*, 35 Neb. 375, 53 N.W. 209 (1892); *Holder v. State*, 35 Tex. Crim. 19, 29 S.W. 793 (1895). *See also* Uniform Marriage and Divorce Act, 9A U.L.A. §206(d) at 166-67.

Additionally, Maryland cases have held that failure to comply with certain other statutory requirements concerning marriage does not invalidate the marriage. For example, in *Feehley v. Feehley*, 129 Md. 565, 99 A. 663 (1916), the Court of Appeals rejected a contention that failure to secure a marriage license as required by law rendered a marriage void. Furthermore, in 1974, the Court of Special Appeals had occasion to address the effect of a marriage performed with a license procured by fraud. *Picarella v. Picarella*, 20 Md. App. 499, 361 A.2d 826 (1974). Despite the fraud, the court applied the reasoning of the *Feehley* decision to find the marriage valid. Both the *Feehley* and *Picarella* decisions rested upon the theory that "'[i]n contracts of marriage there is an interest involved above and beyond that of the immediate parties. Public policy requires that marriage should not be lightly set aside.'" 20 Md. App. at 504, (quoting *Oswald v. Oswald*, 146 Md. 313, 126 A. 81 (1924)).

The *Picarella* court, citing *Feehley*, noted that the Maryland Code nowhere provides that a marriage contracted in violation of its licensing provisions is invalid:

> "In view of the important considerations of morality and legitimacy involved, it is manifestly a sound and just rule of construction the statutes providing for marriage licenses are not held to have the effect nullfying, for non-compliance with their terms, a marriage valid at common law, unless such an intention is plainly disclosed. ... [±] statutory provision for license to marry should not be regarded as mandatory, and vital to the validity of a marriage, in the absence of a clear indication of a legislative purpose that it should be so construed."

20 Md. App. at 512-13 (quoting *Feehley*, 129 Md. at 568-69).

This same reasoning must apply when construing the statutory provision governing who may perform marriages in Maryland. If the General Assembly had intended that marriages performed in violation of FL §2-406 would be invalid, it could have expressly so provided. In fact, when the General Assembly did intend such a consequence, that intent was expressly stated. For example, FL §2-202 governing marriages within certain degrees of relationship clearly states, "[a]ny marriage performed in this State that is prohibited by this section is void."[4] By contrast, the law does not provide that a marriage is invalid if performed by someone who does not satisfy the requirements of §2-406(a).

III

Conclusion

In summary, it is our opinion that an employee of the clerk's office is not authorized by Maryland law to perform marriages unless,

---

[4] In *Fensterwald v. Burk*, 129 Md. 131, 98 A. 358 (1916), the Court of Appeals held that a marriage between an uncle and niece, despite being in violation of the statute, was valid because the marriage was valid in Rhode Island where it had been performed.

at the time of the marriage, that individual is a duly appointed and sworn deputy clerk who has been designated by the county administrative judge to perform marriages. Nevertheless, marriages performed by an employee of the clerk's office who reasonably appears to be a deputy clerk with authority to perform marriages are valid.

J. Joseph Curran, Jr.
Attorney General

Julia M. Freit
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

COLLEGES AND UNIVERSITIES

COMMUNITY COLLEGES — COUNTIES — COUNTY, RATHER THAN COMMUNITY COLLEGE BOARD, HAS POWER TO BORROW MONEY FOR ACQUISITION OF LAND AND BUILDINGS

October 25, 1990

Clyde H. Sorrell, Esquire
County Attorney for Montgomery County

You have asked whether the Board of Trustees of Montgomery Community College may itself borrow money to finance the acquisition of land and buildings for the College.

For the reasons stated below, we conclude that the power to borrow money for this purpose is granted to the Montgomery County Council, not the Board of Trustees.

I

Background

Your inquiry arises out of a proposed acquisition by Montgomery Community College of land and a building in Montgomery County for the use of the college. The proposed purchase would include the use of county funds. To finance the acquisition, the college's board of trustees intends to borrow money and give the lender a mortgage on the property to be acquired. The board is willing to include in the loan agreement terms and conditions acceptable to the county government.

The board believes that it possesses the power to borrow the funds under its statutory authority, discussed in Part II below, to purchase or otherwise acquire property, and as part of the board's "inherent authority to take action necessary and proper to carry out its powers and duties." Letter from Hamid R. Setyedin, Chairman of the Board of Trustees, to Montgomery County Executive Sidney Kramer (April 17, 1990).

Your office expressed concern to the board and the county executive about the board's asserted authority to obtain financing in its name. In light of your concern, both the county executive and the board concur in your request for our opinion as to "whether the Board's inherent authority to take action necessary and proper to carry out its powers and duties, including the acquisition of real property, can reasonably be construed to permit the Board to borrow money on terms and conditions acceptable to the County."

II

Statutory Provisions

Maryland's community colleges are the subject of Title 16 of the Education Article ("ED" Article). The Board of Trustees of Montgomery Community College was established pursuant to ED §16-201, which creates a board of community college trustees in each county that has one or more community colleges. While the composition and selection of the college's board of trustees are the subject of a statutory section specific to Montgomery County, ED §16-510, the powers of the board are derived from ED §16-203, which applies to all but one of Maryland's community college boards.[1] Among the powers conferred by ED §16-203 on each board are the following:

> (e) Each board of trustees may purchase, lease, condemn, or otherwise acquire any property it considers necessary for the operation of the community college.
>
> (f)(1) Each board of trustees may sell, lease, or otherwise dispose of community college assets or property.
>
> (2) The president of the community college and the chairman of the board of trustees may execute a conveyance or other legal document under an appropriate resolution of the board.

---

[1] In Chapter 220 of the Laws of Maryland 1990, the General Assembly created the New Community College of Baltimore, which is governed pursuant to the provisions of a new Subtitle 6 of ED Title 16.

By statute, a college's budget must be prepared in accordance with county fiscal procedures and approved by the county governing body. ED §16-401(d) and (e). Most counties, including Montgomery, are required to contribute at least 28 percent of the college's current expenses. ED §16-403(d). Community colleges also receive aid from the State according to statutory formulas. *See* ED §§16-403 through 16-405. A community college also may participate in the capital construction program administered by the State Board for Community Colleges. ED §16-104(f)(3).

The subtitle concerning the fiscal affairs of community colleges sets forth the powers of county government in relation to the community colleges. Among the powers of each county is the power to borrow money, set out in ED §16-402(d):

> Each county governing body may borrow money to purchase land and construct capital improvements for a community college. Money may be borrowed on terms and conditions the county governing body considers proper, subject to any requirements of local law applicable to the creation of public debt.[2]

There is no reference in the code to borrowing by the board, as distinct from the county.

III

Authority to Borrow Money

Like other State agencies, "[p]ublic institutions of higher education are creatures of the State and can exercise only those powers granted to them by legislation, either expressly or by necessary implication." *University of Medicine and Dentistry v. American Association of University Professors*, 223 N.J. Super. 323, 538 A.2d 840, 844 (1988). *See Huffman v. State Roads Commission*, 152 Md. 566, 584, 137 A. 358 (1927) (powers of State agencies, boards and commissions). *Cf. Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 158, 252 A.2d 242 (1969) (powers of political subdivisions); *Bowie Inn v. City*

---

[2] In a separate section applicable only to Montgomery County, the General Assembly has also granted the Montgomery County Council the right to approve in advance the site of any real property sought to be acquired by the board. ED §16-511.

of Bowie, 274 Md. 230, 247, 335 A.2d 679 (1979) (powers of municipal corporations).

The Court of Appeals, describing the status and powers of modern boards and agencies, observed that "while such agencies are governmental, they have no powers but such as are expressly delegated to them by the organic or statutory law of the government of which they are a part, or such as are by implication essential to the full and adequate exercise of such express powers." *Huffman*, 152 Md. at 584. In interpreting an agency's enabling statute to determine whether an asserted power has been granted, we are to look at both the language of the statute and "the context within which statutory language appears." *Morris v. Prince George's County*, 319 Md. 597, 604, 573 A.2d 1346 (1990).

A. Board's Power

We begin with the language of the statute granting powers to the board of trustees. ED §16-203 does not expressly grant a community college board the power to borrow money. Nor is such power necessarily implicit in the power to "purchase ... or otherwise acquire any property ...."

This issue was addressed in *Rushe v. Hyattsville*, 116 Md. 122, 81 A. 278 (1911). In that case, residents of the town of Hyattsville sought to enjoin as *ultra vires* the enforcement of ordinances permitting the town's borrowing of money and incurring of indebtedness to acquire a certain piece of land and construct a building upon it. The town charter did not authorize borrowing except in certain emergencies, but it did authorize the town to purchase, hold, and dispose of real property and to erect "suitable buildings." 116 Md. at 128-29. Based on these provisions, the trial court "*implied* the power in the [town] to pass the ordinances" and denied the injunction. 116 Md. at 129 (emphasis in original).

In reversing that decision, the Court of Appeals restated the principle "that municipal corporations have only such powers as are granted to them by the constitution or statutes, either expressly, or by fair and reasonable construction." 116 Md. at 126. The Court held that the power to borrow money and issue notes "cannot be implied from the *mere* authority to purchase property and erect public buildings." 116 Md. at 129 (emphasis in original). The Court found it "well settled that any fair and reasonable doubt as to the existence of the power attempted to be exercised must be resolved against the [municipal] corporation, and in such case the power must be denied." 116 Md. at 126.

We find *Rushe* persuasive authority for the proposition that the board's power to acquire real property does not imply any power to borrow money for land acquisition and construction. Moreover, if there were any doubt about whether the General Assembly intended the power to borrow funds for real property acquisitions to reside in the board, that doubt is resolved by the separate statutory provision that places responsibility and authority for such borrowings in the county government and subject to the debt restrictions of local law.

B. County's Powers

ED §§16-401 and 16-402, part of the community college title of the Education Article, describe the powers and responsibilities of a county governing body in relation to a college and its board. ED §16-402(a) and (b) authorize a county governing body to appropriate money by prescribed categories to pay the cost of establishing and operating a community college. ED §16-402(c) prohibits a college from spending more in any category than the amount appropriated by the county for that category. Under ED §16-401, a college's capital and operating budgets must be prepared and considered in accordance with county fiscal procedures and must be approved by the county governing body, which is expressly authorized to reduce those budgets.

Borrowing money to acquire and improve land is expressly addressed by the statute. ED §16-402(d) authorizes a county governing body to borrow such funds "on terms and conditions the county governing body considers proper, subject to any requirements of local law applicable to the creation of public debt." A similar delegation to each county has always been part of the community college statutory scheme.

Chapter 134 of the Laws of Maryland 1961 enacted the predecessor of the subtitle on community colleges now codified as ED Title 16.[3] The original provision, like the present one, authorized the

---

[3] In Chapter 134, the General Assembly established the board of education of each county having a community college as the "board of trustees and governmental corporation" of the community college. In Chapter 454 of the Laws of Maryland 1968, the General Assembly authorized boards of education to divest themselves of responsibility for community colleges and to request that the Governor appoint a separate board of trustees for
(continued...)

boards of trustees of the colleges to "purchase, lease, condemn, or in any other manner acquire real and personal property deemed necessary by the board of trustees for the operation of the community college." Former Article 77, §300(d). At the same time, the General Assembly reserved to each county government the power "to borrow funds for the purchase of land and the construction of capital improvements for said purposes upon such terms and conditions as they deem right and proper, subject to the general requirements of local laws applicable to the creation of public debt." Former Article 77, §303.

These provisions, which have remained substantively unchanged since their enactment in 1961, show that the General Assembly considered at the outset the issue of where authority and responsibility for capital borrowing would reside and decided that it should be committed to the governing body of each county. While the statute does not by its terms forbid borrowing by a college board, as distinct from a county, we see nothing in the structure or content of the statute to suggest that this particular power and responsibility was to be shared by those authorities.

We believe that these provisions evince a legislative design to create a process of debt accountability and control by the county. That process would be undermined by the recognition of an implied power of a college board to borrow capital improvement monies without restriction.[4]

---

[3](...continued)
community colleges. Under the current statute, the community colleges of each county and Baltimore City are governed by an independent community college board of trustees appointed for that county. ED §§16-201, 16-501 through 16-512, and 16-604.

[4] While your letter indicates that the board intends to engage in the transaction on terms and conditions acceptable to the county, you suggest that the transaction, if effected in the name of the county, might not comply with all local laws concerning the creation of public debt. Indeed, it seems to us that the issue you pose as to the authority of the board, as distinct from the county, to borrow funds is one that would only arise as a practical matter in a situation where the borrowing could not be accomplished for the college by the county according to statutory requirements.

IV

Conclusion

In summary, it is our opinion that the Board of Trustees of Montgomery Community College does not possess authority to borrow funds for the acquisition of real estate and improvements. Such borrowing must be accomplished by the Montgomery County Council.

J. Joseph Curran, Jr.
Attorney General

Gerard J. Gaeng
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

In Chapter 282 (House Bill 51) of the Laws of Maryland 1992, codified at §16-401.1 of the Education Article, the General Assembly authorized the boards of trustees of several community colleges, including Montgomery College, to borrow money for certain purposes.

CONDOMINIUMS

"COMMON OWNERSHIP COMMUNITIES" — LOCAL GOVERNMENT — ORDINANCE IMPOSING PER-UNIT FEES FOR COUNTY SERVICES ON CONDOMINIUMS, COOPERATIVES, AND HOMEOWNERS' ASSOCIATIONS NOT PREEMPTED BY STATE LAW

June 20, 1990

Clyde H. Sorrell, Esquire
County Attorney

Marc P. Hansen, Esquire
Senior Assistant County Attorney

Richard H. Melnick, Esquire
Assistant County Attorney

You have requested our opinion concerning the authority of Montgomery County to impose certain fees on common ownership communities. The fees, which would be authorized by legislation currently under consideration, would be used to fund various county services to these communities, in particular a dispute resolution service. Specifically, your question is whether a fee assessed by the county on a per-unit basis is preempted by provisions of State law prohibiting local jurisdictions from imposing "a burden or restriction" on a common ownership community that is not imposed on other "property of similar character."

Although the matter is not free from doubt, for the reasons stated below, we conclude that the proposed per-unit charge is not preempted by State law.[1]

---

[1] We have not been asked, and therefore do not address, any other legal question that might arise about the proposed legislation.

I

Proposed Montgomery County Ordinance

Bill No. 44-89, "Common Ownership Communities; Dispute Resolution," is currently pending before the Montgomery County Council. The bill applies to all "common ownership communities," defined to include condominiums, cooperatives, and homeowners associations. Section 10B-2(b).[2]

The bill proposes to create a new Commission on Common Ownership Communities, an oversight and policymaking body intended to examine and make recommendations concerning conditions in common ownership communities. §§10B-1 and 10B-6. All such communities are to register annually with the Commission. §10B-7(a)(1). The bill would also create an Office of Common Ownership Communities, which would function under the supervision of the Commission. Among the duties of the Office is to "operate a dispute resolution process to furnish mediation and administrative hearings." §10B-5(i).

The bill's dispute resolution procedures, in brief, vest in the Commission the power to "hear any dispute between or among parties arising under any association document." §10B-9(a).[3] Parties to a dispute would choose between mediation or an administrative hearing before an arbitration panel. §10B-11(a). The decision of the arbitration panel is to be binding on the parties, subject to judicial review procedures set out in the bill. §10B-13(e).

The bill authorizes the County Executive to establish fees to pay for the activities of the Commission and Office. Specifically, the County Executive "may establish reasonable fees in amounts sufficient to fund the provision of dispute resolution and technical assistance by the Commission and the Office" through the following methods:

---

[2] Citations are to the chapter of the Montgomery County Code that would be added by Bill No. 44-89.

[3] The term "party" includes "an owner," "a governing body," and "an occupant of a dwelling unit in a common ownership community." §10B-8(b)(7). A party may file a dispute with the Commission only after "a good faith attempt to exhaust all procedures or remedies provided in the association documents." §10B-9(b).

(1) a per unit annual charge to common ownership communities to renew registration;

(2) fees for service, that do not exceed the actual cost of the service, for technical assistance and dispute resolution; and

(3) a per unit charge to developers when documents are recorded.

Section 10B-7(b). *See also* §10B-15(b).

II

State Anti-Discrimination Provisions

A. Statutory Language

The statutes regarding condominiums, cooperatives, and homeowners associations each contain parallel language regarding the imposition of differential "burdens and restrictions." The original provision was enacted in 1974 as part of the Maryland Condominium Act and now appears in §11-122(b) of the Real Property Article ("RP" Article): "Except as otherwise provided in this title, a county, city, or other jurisdiction may not enact any law, ordinance, or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subjected to a condominium regime. Any such law, ordinance, or regulation, is void."

In 1986, the General Assembly enacted a virtually identical provision in the Maryland Cooperative Housing Corporation Act: "Except as provided in this subtitle, a county, city, or other jurisdiction may not enact any law, ordinance, or regulation which would impose a burden or restriction on a cooperative housing corporation that is not imposed on all other property of similar character not a cooperative housing corporation. Any such law, ordinance, or regulation is preempted by the subject and material of this title and is void." §5-6B-19(a)(2) of the Corporations and Associations Article ("CA" Article).

Finally, the Maryland Homeowners Association Act, enacted in 1987, contains the following version of the same prohibition: "A local government may not enact any law, ordinance, or regulation which would ... [i]mpose a burden or restriction on property which is part of a development because it is part of a development." RP §11B-104(b)(1).

Thus, a local law is prohibited by these provisions if it imposes a "burden or restriction" on a common ownership community *and* the "burden or restriction" is discriminatory because it is not imposed on similar property. "The only criterion in [RP §11-122(b)] for identifying a law proscribed by it is the impact of that law, by way of a burden or restriction on a condominium, as compared to its impact, or lack thereof, on similar property." *Rockville Grosvenor, Inc. v. Montgomery County*, 289 Md. 74, 89, 422 A.2d 353 (1980). In other words, the General Assembly has reserved to itself the power to decide whether, in pursuit of some policy objective, the developers or owners of property in a condominium, cooperative, or homeowners association are to bear costs that other, similar situated property owners do not.

B. Burden

Under RP §§11-122(b) and 11B-104(b)(1) and CA §5-6B-19(a)(2), a county would impose a "burden" if it charged common ownership communities an annual fee for the privilege of maintaining that form of property ownership. Even a small fee per unit would not be insignificant when multiplied by the number of units and a number of years. Such a fee would be a "burden" in the common usage of the term. A "burden" is "[t]hat which is borne or carried; a load," *Webster's New International Dictionary* 357 (2d ed. 1953); "that which is carried; load," *Random House Dictionary of the English Language* 279 (2d ed. 1987); "[a] weight or impediment; something to be borne," Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2221 (1985).[4]

The pertinent cases do not suggest any construction of "burden" other than its usual one. In *Rockville Grosvenor*, the Court of Appeals held that a county ordinance which required those converting rental housing into condominiums to pay each displaced tenant up to $750 for relocation expenses was a "burden," within the meaning of the provision. 289 Md. at 95. In addition, *Nordheimer v. Montgomery*

[4] The obsolete variant "burthen" appears in Article 14 of the Maryland Declaration of Rights: "That no aid, charge, tax, burthen or fees ought to be rated or levied, under any pretense, without the consent of the Legislature." No case elaborates on the meaning of the term in this context.

County, 307 Md. 85, 512 A.2d 379 (1986), makes clear that a tax is a "burden" for purposes of RP §11-122(b). *See* 307 Md. at 100.[5]

We doubt, however, that the term "burden" extends to user fees, paid in exchange for government services of roughly proportional value. *Compare Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972) (no federal Commerce Clause violation where "charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed") *with American Trucking Associations, Inc., v. Scheiner*, 483 U.S. 266, 290 (Commerce Clause violation where flat taxes "do not even purport to approximate fairly the cost or value of the use of [state] roads").

In our view, one of the alternatives open to the County Executive under Bill No. 44-89 - "fees for service, that do not exceed the actual cost of the service, for technical assistance and dispute resolution," §10B-7(b)(2) - is a permissible user fee and therefore is not a "burden," within the meaning of the State preemptive provisions. This fee is "paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge ... and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses." *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1105 (1984) (distinguishing user fee from tax).

We cannot reach the same conclusion about the "per unit annual charge to common ownership communities to renew registration." Although we are told that the charge would likely be low (about $3.00 per unit), it would not be insignificant if a common ownership community had many units. More importantly, the charge would not be proportional to governmental services rendered. Communities that never used the dispute resolution service would nonetheless be required to pay the charge and would thereby be "burdened." *Cf. American Trucking Associations v. Scheiner*, 483 U.S. at 290; *Eastern Diversified Properties, Inc. v. Montgomery County*, 570 A.2d 850 (1990).

The third alternative fee source — "a per unit charge to developers when documents are recorded" - also is a "burden," in our view. The

---

[5] In *Nordheimer*, the Court of Appeals held that a Montgomery County condominium transfer tax authorized by a public local law was not in conflict with RP §11-122(b), because "[t]he provision has utterly no application to laws *enacted by the General Assembly* which impose unequal burdens." 307 Md. at 100 (emphasis added).

fee bears no relation to developers' use of the services of the Commission and Office.

C. Discrimination

Under the provisions in question, "burdens" are not impermissible unless they are discriminatory. "Because only those local laws which adversely affect condominiums differently than other similar property are voided by [RP §11-122(b)], there are conceivably many non-discriminatory local laws which could apply to condominiums." *Rockville Grosvenor*, 289 Md. at 92.

As the Court of Appeals pointed out in *Rockville Grosvenor*, if common ownership property presents a problem, but so too do other comparable forms of property, a local jurisdiction may not impose the cost of a solution on the particular common ownership property alone. Thus, Montgomery County could not make those converting apartments into condominiums pay tenant relocation costs when "[n]o relocation reimbursement is required if the owner of an apartment house or apartment complex refuses to renew leases of tenants who desire to continue to rent, because the owner plans to convert the facility to a cooperative apartment ... [or] plan[s] to raze a rental facility and convert to business or commercial use." 289 Md. at 95.

Here, by contrast, Bill No. 44-89 does not distinguish among types of community ownership properties. Condominiums, cooperatives, and homeowners association are treated alike. To be sure, the dispute resolution mechanism and associated fees will not apply to apartment complexes, which certainly have their share of disputes. But, in our view, the County Council is not precluded by State law from the legislative judgment that landlord-tenant disputes are so different in kind from disputes in a common ownership community that, for this purpose, rental facilities are not "property of similar character."

Nor is it determinative that some common ownership committees will actually use the dispute resolution service more than others. The service will be equally available to all, and the very prospect of recourse to the service might lead to the informal resolution of problems within communities. We note, by analogy to federal Commerce Clause cases, that a state tax borne largely by businesses outside that state is neither discriminatory nor unconstitutionally disproportionate merely because those businesses might not avail themselves of state services to the same extent as in-state businesses. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).[6]

III

Conclusion

In summary, it is our opinion that the per-unit fees contemplated by Montgomery County Council bill No. 44-89 are not preempted by RP §11-122(b) (condominiums) CA §5-6B-19(a)(2) (cooperatives), or RP §11B-104(b)(1) (homeowners associations).

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

This opinion was cited approvingly by the Court of Appeals in *Dumont Oaks Comm. Ass'n, Inc. v. Montgomery County*, 333 Md. 202, 210 (1993).

---

[6] A per unit charge (*i.e.*, the larger the community, the higher the fee), as distinct from a flat charge per community, would roughly approximate the likely use of the Commission's services. The number of disputes in a community will likely be directly proportional to the size of the community. Therefore, a per-unit charge is arguably a "proxy for value obtained from the State," or at least potential value. *American Trucking Associations v. Scheiner*, 483 U.S. at 2844.

CONSTITUTIONAL LAW

PERSONNEL — DRUG TESTING — AUTHORITY OF SECRETARY OF PERSONNEL

March 2, 1990

The Honorable Timothy F. Maloney
Maryland House of Delegates

You have requested our opinion on two issues related to House Bill 370, "Department of Personnel — Drug Testing." First, you ask whether the bill is constitutional. Second, you ask whether the Secretary of Personnel would have the authority to adopt a drug testing program if the bill were defeated.

For the reasons stated below, we conclude as follows: House Bill 370 is constitutional. Although it provides a useful clarification of the authority of the Secretary of Personnel, its defeat would not preclude the Secretary's adopting drug testing regulations under her current regulatory authority.

I

House Bill 370

House Bill 370, departmental legislation, would authorize the Secretary of Personnel "to administer a drug testing program for certain applicants and employees ...." The bill "generally relat[es] to a drug testing program for State applicants and employees."

House Bill 370 would add a new §18C to Article 64A of the Maryland Code, the Merit System Law. The bill would confirm the authority of the Secretary of Personnel to "establish and implement a drug screening program" for both applicants and employees "in sensitive positions or sensitive classifications." §18C(b)(1) and (c)(1). The Secretary would be required to adopt regulations that would, among other things, identify the employees or applicants to be subject to drug testing, "the circumstances under which drug testing may be performed," and the disciplinary action that may be taken as a result of a positive test result. §18C(d)(1), (2), and (4).

The bill specifies that if an employee is *not* "in a sensitive position or a sensitive classification," the employee "may be required to submit to a drug test only when an appointing authority has reasonable and specific grounds for believing that the employee is using drugs illegally." §18C(c)(2).[1] Conversely, although the bill does not say so expressly, employees who are in "sensitive positions or classifications" could be made subject to random drug testing, if the Secretary so determines in regulation.

The key terms "sensitive classification" and "sensitive position" describe jobs that the Secretary has determined meet any of the following criteria:

> (i) The employee has a substantially significant degree of responsibility for the safety of others and a potential that impaired performance of the employee could result in death of or injury to the employee or others;
>
> (ii) The employee is required to carry a firearm;
>
> (iii) The employee is directly involved in efforts to interdict the flow of narcotics into State institutions; or
>
> (iv) The employee is directly involved with narcotics law enforcement.

§18C(a)(5) and (6).

II

The 1989 Supreme Court Decisions

In early 1989, the Supreme Court upheld the constitutionality of certain government-ordered drug testing programs. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

---

[1] If an amendment proposed by the Department of Personnel is accepted, the words "and specific" would be deleted from this provision. Neither this change nor another, unrelated amendment to the applicant testing portion of the bill affects our conclusion. *See* note 4 below.

In *Skinner*, the Court upheld federal regulations authorizing railroads to test train crews involved in accidents or violations of safety rules. In *Von Raab*, the Court upheld urinalysis testing of Customs Service employees who sought promotion into jobs that involved either drug interdiction or the carrying of a firearm. The essence of the Court's reasoning was that, although the Fourth Amendment's prohibition against "unreasonable searches and seizures" applied to government-ordered drug testing, these testing requirements were reasonable as a matter of law.

Shortly after these decisions, we wrote an opinion to the Secretary of Personnel that summarized he cases and explained their import for any drug testing program that the Secretary might seek to adopt. 74 *Opinions of the Attorney General* 102 (1989). In essence, our opinion addressed the changes in the law from this office's earlier opinion on drug testing of State employees, 71 *Opinions of the Attorney General* 58 (1986).

We characterized the Supreme Court as having determined "that some categories of employees may be subject to drug testing without individualized suspicion." 74 *Opinions of the Attorney General* at 109. We acknowledged that the two Supreme Court decisions did not involve random testing programs. However, we pointed out, "we discern no constitutionally significant difference between categorical testing and random testing. The determinative point is that testing without individualized suspicion is constitutionally permissible under some circumstances. That the methodology of a testing program is random rather than categorical makes no difference, in our view." *Id.*

Continuing our interpretation of the Supreme Court decisions, we advised Secretary Ford that the following categories of State employees could be made subject to random or other forms of suspicionless drug testing:

> 1. Employees required to carry a firearm:
>
> 2. Employees, such as correction officers, who are directly involved in efforts to interdict the flow of narcotics into State institutions;
>
> 3. Any employee, whether or not the employee carries a firearm, who is involved with narcotics law enforcement; [or]

> 4. Any employee whose on-the-job behavior, if affected by substance abuse, could cause death or serious injury to other persons — for example, vehicle operators.

74 *Opinions of the Attorney General* at 109-10.

House Bill 370 embodies exactly these categories in its definition of "sensitive classification" and "sensitive position." The last of the categories identified in our opinion is somewhat reworded in §18C(a)(5)(i) and (6)(i), but the gist of it is the same.

Hence, unless the case law since the issuance of our opinion compels a different conclusion, we have in effect already expressed the view that House Bill 370 is constitutional.[2]

III

Subsequent Cases

A. Random Testing

In dictum in a recent decision, the Maryland Court of Appeals suggested that there might be a constitutionally significant difference between random drug testing and other forms of suspicionless mandatory testing. *City of Annapolis v. United Food and Commercial Workers, Local 400*, 317 Md. 544, 565 A.2d 672 (1989). In that case, the Court of Appeals upheld the constitutionality of a program under which uniformed police and firefighter personnel, as part of their regularly scheduled periodic physical examinations, were required to submit a urine sample to determine the presence of illegal drugs. Applying the balancing test derived from the Supreme Court's decisions, the Court of Appeals concluded that the program "is not facially at odds with the Fourth Amendment simply because it is not based on reasonable suspicion of illegal drug use by covered employees." 317 Md. at 566.[3]

---

[2] Assistant Attorney General James F. Truitt, Jr., counsel to the Department of Personnel, has also approved for legal sufficiency proposed regulations embodying the same criteria for random drug testing.

[3] The Court also rejected the argument that the program violated Article 26 of the Maryland Declaration of Rights. The Court pointed out that Article (continued...)

The Court of Appeals pointed out that it had "no occasion to consider whether random drug testing, not based on reasonable suspicion, unconstitutionally invades reasonable expectations of privacy." 317 Md. at 561. The Court observed, however, "that a purely random physical examination program for the purpose of drug testing would likely necessitate more stringent review. This is so because the privacy expectations in that posture would appear to be greater than, as here, where providing urine samples during routine physical examinations is accepted by employees as essential for continued employment in safety-sensitive professions." *Id.*

This dictum does not dissuade us from our view that random drug testing of employees in sensitive jobs is constitutional. The principles of *Skinner* and *Von Raab* apply equally to random testing. Indeed, the only decision of the Fourth Circuit on this issue stated flatly that "the Supreme Court upheld the constitutionality of random drug tests in *Skinner* ... and ... *Von Raab* ...." *Thompson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989) (upholding random testing of civilian employees at chemical weapons plant).

The same view of the significance of the Supreme Court cases have been taken by the D.C. Circuit. In *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), the unions argued "that random testing ... is 'vastly more intrusive than the limited drug testing' approved by the Supreme Court." 885 F.2d at 888-89 (quoting appellants' supplemental brief at 1). The circuit court rejected this argument:

> We find [the] analysis [in *Skinner*] fully applicable in the present case. While it is true that the regulations sustained in *Skinner* required testing only after a triggering event and in a medical environment, we do not find that either of these facts compels "a fundamentally different analysis from that pursued by the Supreme Court." ... While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence.

---

[3](...continued)
26 was *in pari materia* with the Fourth Amendment, "and while each provision is independent of the other, we find no basis for concluding that Article 26 is transgressed under the facts of this case." 317 Md. at 566 n.4.

885 F.2d at 891 (citation and footnote omitted). The court thus upheld the random testing of various employees in safety-sensitive positions. *See also National Federation of Federal Employees v. Cheney*, 884 F.2d 603, 608-09 (D.C. Cir. 1989) *cert. den.* 58 U.S.L.W. 3468 (Jan. 22, 1990); *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989), *cert. den.* 58 U.S.L.W. 3468 (Jan. 22, 1990); *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. den.* 110 S. Ct. 404 (1989).

IV

Sensitive Jobs

A. Safety-Related

The *Skinner* decision, involving train crews, stands for the proposition that employees may be subjected to suspicionless drug testing if their "duties [are] fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." 109 S. Ct. at 1419.

The cases applying *Skinner* reaffirm this view of the case. *See American Federation of Government Employees v. Skinner*, 885 F.2d at 890 (transportation safety jobs); *National Federation of Federal Employees v. Cheney*, 884 F.2d at 610 (pilots and aircraft mechanics); *Thompson v. Marsh*, 884 F.2d at 115 (chemical weapons jobs); *American Federation of Government Employees v. Cavazos*, 721 F. Supp. 1361, 1373 (D.D.C. 1989) (full-time government drivers). The point of the public safety rationale adopted by the Supreme Court, observed the D.C. Circuit, "was that a single slip-up ... may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs." *Harmon v. Thornburgh*, 878 F.2d at 491.

The first element of the definition of "sensitive" classifications and positions, §18C(a)(5)(i) and (a)(6)(i), properly reflects this rationale. This element of the definition of "sensitive" classifications and positions is therefore constitutional.

B. Firearms

In *Von Raab*, the Supreme Court upheld suspicionless drug testing for "positions that required the incumbent to carry a firearm ...." 109 S. Ct. at 1393.

The courts have generally rejected arguments that this aspect of *Von Raab* should be limited to employees who are frequently in situations that might require them actually to fire their weapons. "[I]t may be that most, if not all, of the GSA employees who carry firearms in the line of duty do not and will not use them .... But a misused firearm, like a misused locomotive, can be lethal.... [W]ith regard to the management of firearms it is better to be safe than sorry." *Hartness v. Bush*, 712 F. Supp. 986, 992 (D.D.C. 1989). *See also American Federal of Government Employees v. Cavazos*, 721 F. Supp. at 1372. *But see National Treasury Employees Union v. Watkins*, 722 F. Supp. at 770.

Thus, in our view, the standard in §18C(a)(5)(ii) and (a)(6)(ii) is constitutional.

C. Drug Interdiction

In *Von Raab*, the Supreme Court held that the government has a compelling interest in ensuring that "front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment ...." 109 S. Ct. at 1393. Although the particular "interdiction" personnel discussed by the Supreme Court were customs agents seeking to interdict the flow of narcotics at the nation's borders, we concluded in our prior opinion that the same reasoning applied to those responsible for interdicting the flow of drugs into State institutions.

Our understanding of *Von Raab* has been confirmed in subsequent cases. In *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989), the court upheld a program of across-the-board urinalysis testing of correctional officers having contact with prisoners:

> The presence of drugs in prison can lead to violence and the prospect of correctional officers selling illegal drugs to prisoners is an obvious security risk. A drug-induced episode carries with it the potential onslaught of violence by the impaired prisoner or escapee. Other prisoners, visitors, correctional officers, and public are all put at risk by the presence of drugs in a jail. Not only are prisoners

> under the influence of drugs a threat to safety, but prison employees who sell to prisoners are subject to blackmail.... Mandatory testing of correctional officers, therefore, "serves special governmental needs, beyond the normal need of law enforcement." *Von Raab*, 109 S. Ct. at 1390.

888 F.2d at 1197.

The court in *Taylor v. O'Grady* also made it clear that suspicionless drug testing of correctional officers could not extend beyond those who had contact with prisoners. "[E]mployees not in contact with prisoners are indistinguishable from other nonprison governmental employees who ... are not subject to suspicionless, warrantless searches. Since those officers with only administrative or clerical duties or otherwise lacking contact with the jail population do not threaten claimed dangers if impaired while on duty, and since the record does not show they are able to smuggle drugs to the prisoners, the department gains nothing by testing them." 888 F.2d at 1197. *See also American Federation of Government Employees v. Thornburgh*, 720 F. Supp. 154 (N.D. Cal. 1989) (mandatory, random testing of all employees of the Federal Bureau of Prisons regardless of job functions could not be justified).

Thus, the standard in §18C(a)(5)(iii) and (a)(6)(iii) is constitutional, because employees "directly involved in efforts to interdict the flow of narcotics into State institutions" are those who have contact with the population of a prison or other institution.

D. Narcotics Law Enforcement

We understood *Von Raab* to mean that an employee engaged in any aspect of law enforcement against illegal drug use could be subject to random testing. Although *Von Raab* did not address othe law enforcement personnel, the D.C. Circuit subsequently held that the performance of other kinds of law enforcement duties, unrelated to drugs, did not alone give rise to a sufficient governmental interest to permit suspicionless drug testing. *Harmon v. Thornburgh*, 878 F.2d at 490.

Because the standard in §18C(a)(5)(iv) and (a)(6)(iv) reflects this application of the Fourth Amendment, it is constitutional.

E. Summary

The Constitution allows random drug testing of persons who hold the types of jobs identified in our 1989 opinion and in House Bill 370.[4] Perhaps some particular future applications of these criteria will give rise to controversy, but that possibility in no way prevents us from concluding that House Bill 370 is constitutional on its face. *See National Treasury Employees Union v. Bush*, 891 F.2d 99 (5th Cir. 1989).

V

Existing Statutory Authority

If House Bill 370 were not enacted, the Secretary of Personnel would not have express authority — indeed, under House Bill 370, an express duty — to adopt a drug testing program by regulation.[5] Her authority to do so would depend on grants under current law.

In this office's 1986 opinion on drug testing, Attorney General Sachs concluded that "the Secretary of Personnel has statutory authority to establish, by regulation, a drug testing program for applicants and current employees alike, assuming that the Secretary finds a link between drug abuse and the requirements of particular job categories." 71 *Opinions of the Attorney General* at 61-62. *See* Article 64A, §§11, 16(a), 18(a), and 33(d)(1). *See also* 67 *Opinions of the Attorney General* 322, 323-24 (1982).

---

[4] For employees not in a "sensitive" classification or position, House Bill 370 provides for drug testing only if there are "reasonable ... grounds for believing that the employee is using drugs illegally." §18C(c)(2). The standard of reasonableness is constitutional; the more stringent "probable cause" test is not required. *Von Raab*, 489 U.S. at 667; *National Treasury Employees Union v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989).

[5] In its statement of support for House Bill 370, the Department of Personnel pointed out that "there is no specific section of the Merit System Law which directly addresses the issue of drug testing." Statement to House Appropriations Committee at 1 (Feb. 22, 1990). The Department's position is that "the functional responsibilities assigned to the Department [should] have a clear statutory basis." *Id.*

No change in the law since 1986 causes us to alter this conclusion, and the Department has so construed its statute.[6]

VI

Conclusion

In summary, it is our opinion that: (1) House Bill 370 is constitutional. (2) If House Bill 370 were not enacted, the Secretary of Personnel has authority under current law to adopt by regulation a drug testing program.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[6] *See* COMAR 06.01.09 (current drug testing regulations). The Department's view of its existing authority is also set forth in its statement to the Appropriations Committee.

CONSTITUTIONAL LAW — FIRST AMENDMENT — ESTABLISHMENT CLAUSE — OPENING OF PRIVATELY FUNDED KOSHER KITCHEN IN LEASED SPACE AT PUBLIC UNIVERSITY IS PERMISSIBLE

April 4, 1990

Dr. James A. (Dolph) Norton
Interim Chancellor
University of Maryland System

You have requested our opinion on whether the opening of a kosher kitchen on the campus of the Towson State University would violate the Establishment Clause of the First Amendment to the United States Constitution.

For the reasons stated below, we conclude that the Establishment Clause does not preclude the opening and operation of a privately funded kosher kitchen at a public university. The planned kosher kitchen at Towson State University will conform to certain limitations required by the Establishment Clause and therefore may be opened.

I

Proposal for a Kosher Kitchen at Towson State

In the spring of 1989, a group of students and representatives from the Jewish community met with officials of Towson State University to discuss the feasibility of constructing a dining facility that would prepare and serve kosher meals. The facility would be located in Newell Dining Hall, a part of one of the University's residence buildings. The space in question is leased from the University by Service America Corporation, pursuant to a contract under which Service America provides food services to the University.

As envisioned, the kosher kitchen would prepare kosher meals for Towson State students and their guests who desire these special meals. In accordance with the precepts of Orthodox Judaism, only kosher food would be permitted in the space. Any student, however, would be welcome to take meals at the kosher kitchen.

The cost of renovating the space to accommodate the new facility is estimated to be about $40,000. In addition, new equipment would be needed. Both the funds and the equipment would be donated by private citizens; no public funds would be used.

II

Establishment Clause Analysis

A. *Introduction*

To an orthodox Jew, observing the laws of Kashruth has "deep religious significance .... The dietary laws are an important, integral part of the covenant between the Jewish people and the God of Israel." *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975). *See also* §14-901(c) of the Commercial Law Article (definition of "kosher"). Hence, the creation of a kosher kitchen at a public university raises questions under the Establishment Clause of the First Amendment, which prohibits governmental action "respecting an establishment of religion."

Yet it is well-settled "that the government may ... accommodate religious practices ... without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987). *See also Walz v. Tax Commission*, 397 U.S. 664, 673 (1970). In our view, the proposed kosher kitchen permissibly "facilitate[s] the opportunities of individuals to practice their own religion" without crossing the line of impermissible governmental aid to religion. *Marsh v. Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting). *See Sossin Systems, Inc. v. City of Miami Beach*, 262 So. 2d 28, 29-30 (Fla. App. 1972) (upholding ordinance prohibiting false representation that food is kosher).

B. *Establishment Clause Criteria*

In its most recent foray into the application of the Establishment Clause, the Supreme Court reaffirmed the constitutional test originally set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As the Supreme Court summarized: "Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *County of*

Allegheny v. American Civil Liberties Union, 492 U.S. 573, 591 (1989).[1]

1. Purpose

In order to attract diverse groups of students to its campus, the University has an interest in facilitating private contractual arrangements to meet special dietary needs. To further this wholly secular purpose, the University will simply allow a vendor of food services to contract with any student who desires kosher food and thereby to accommodate those students who observe Jewish dietary laws. That the motive of the students in seeking this particular type of food is a religious one does not change the secular purpose or imply University endorsement of the students' religious beliefs. *See Widmar v. Vincent*, 454 U.S. 263, 271-72 (1981); *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

2. Effect

The effect of the University's action will be neither to advance nor inhibit religion. Rather, the University is simply allowing its contractor to use the contractor's leased space to meet customer demand for a particular type of food, just as it would try to accommodate other specialized demands. The University does not impermissibly aid religion merely by allowing its students to pursue their religious beliefs "as a result of [their] genuinely independent and private choices ...." *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 488 (1986).

We might reach a different conclusion if University resources were used to defray the costs of installing the kosher kitchen or to subsidize the higher costs of providing kosher food. But neither is the case.[2]

---

[1] For examples of the application of these criteria in the opinions of this office, *see, e.g.*, 74 *Opinions of the Attorney General* 71 (1989); 73 *Opinions of the Attorney General* 68; 69 *Opinions of the Attorney General* 100 (1984); 65 *Opinions of the Attorney General* 186 (1980); and 59 *Opinions of the Attorney General* 209 (1974).

[2] We would have the same concern if fees paid by students who did *not* contract for food at the kosher kitchen were, by the University's direction, used to subsidize the operation of the kosher kitchen.

3. Entanglement

"In challenges to government action under the establishment clause, the action is unconstitutional if it creates excessive administrative entanglement between church and state." Tribe, *American Constitutional Law* §14-11, at 1226 (2d ed. 1988). There would be a risk of excessive entanglement of this kind if the University were involved in matters pertaining to the religious character of the kosher kitchen - that is, to the aspects of the operation intended to assure that the food served meets the standards of Kashruth. However, it is our understanding that all such matters would be resolved by the private parties involved. The University would not become involved in those details. Hence, we see no risk of the excessive entanglement prohibited by the Establishment Clause.

III

Conclusion

In summary, it is our opinion that the Establishment Clause of the First Amendment does not forbid the opening of a kosher kitchen in leased facilities at Towson State University, with no use of public funds for the installation or operation of the kosher facility and no University involvement in the details of the facility's operation.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

CONSTITUTIONAL LAW — BUDGETARY ADMINISTRATION — BUDGET AMENDMENT — APPROPRIATIONS — HOME RULE POWERS — AUTHORITY OF GENERAL ASSEMBLY TO ALLOCATE INCOME TAX REVENUES — AUTHORITY OF GENERAL ASSEMBLY TO CONDITION DISTRIBUTION OF FUNDS TO HOME RULE SUBDIVISIONS

May 4, 1990

The Honorable William Donald Schaefer
Governor

You have asked us to address in detail the constitutionality and legal sufficiency of House Bill 134, which provides for the distribution of specified amounts of income tax funds to Baltimore City and Allegany, Garrett, and Somerset Counties.

For the reasons stated below, we conclude as follows: Although House Bill 134 is not itself unconstitutional, the bill must be construed as simply an authorization that cannot be given effect without an appropriation of the funds specified in the bill. In our review, we have also considered whether a requirement that the subdivisions maintain at least their current property tax rates as a condition of receiving the distributions violates the home rule powers of two of the subdivisions. We conclude that it does not.[1]

I

Appropriations Issue

A. *Description of House Bill 134*

House Bill 134 amends §2-608 of the Tax-General Article ("TG" Article). TG §2-608 is part of a subtitle on the distribution of individual income tax revenue. Subsection (a) of §2-608 provides that after various distributions, including a distribution to municipal

[1] This opinion was sent to the Governor on May 1, 1990 as a bill review letter. Because of the importance and complexity of the issues addressed, we are reissuing it in this revised format.

corporations and special tax districts pursuant to TG §2-607, the Comptroller is to distribute to the counties the remainder of the county income tax revenue (commonly called the "piggyback" tax) for each county. In addition to this distribution, the Comptroller is required in fiscal year 1990 to pay certain specified sums to 16 counties and Baltimore City. TG §2-608(c). These sums are to be paid on June 1.[2] *See* TG §2-610.

The bill adds a new subsection (d) to TG §2-608, providing that certain specified sums are to be paid to three counties and Baltimore City, to be used as additional resources for education and combatting drug abuse.[3] Although the bill provides that the payments are to be made in fiscal year 1991, neither the bill nor existing law provides

---

[2] Section 2 of Chapter 423 of 1988, as amended by Section 2 of Chapters 8 and 9 of the Laws of Maryland 1989, provides that this provision will be abrogated as of July 1, 1990.

TG 2-608(c) was amended by the Targeted Tax Relief Act of 1989, which became law as of midnight, March 21, 1989. Supplemental Budget No. 3 of the Budget Bill for fiscal year 1990 took account of the legislation through a reduction in the estimated revenue.

[3] The full text of TG §2-608(d) is as follows:

> (1) For fiscal year 1991, in addition to the distribution required under subsection (a) of this section, the Comptroller shall pay the following amounts to selected counties:
>
> | | |
> |---|---|
> | Allegany | $ 500,000 |
> | Baltimore City | 10,678,000 |
> | Garrett | 509,000 |
> | Somerset | 767,000 |
>
> (2) The amounts shall be paid to the selected counties only if the property tax rate levied for fiscal year 1991 is at least equal to the property tax rate levied for fiscal year 1990.
>
> (3) The amounts shall be utilized to increase the amount of funds appropriated in the prior fiscal year by the selected counties for education or for limiting drug abuse.
>
> (4) By September 1, 1990 each selected county shall provide the Department of Fiscal Services with a report as to the use of the funds provided in this subsection.

when this payment is to be made.[4] As a condition on the receipt of these payments, the City and the three counties must at least maintain their current property tax rates.

Because TG §2-608(a) refers to the distribution of the remaining piggyback tax revenues to each county, the payments to the City and the 16 counties under TG §2-608(c) are from proceeds of the State income tax. The same is true of the new TG §2-608(d). In this regard, subsection (d) is like previous amendments to §2-608 and its predecessor, which provided for the payment of certain specified sums to particular counties and Baltimore City. *See* Chapter 13, Laws of Maryland 1987 and Chapter 423, Laws of Maryland 1988.[5] Moreover, the new subsection (d) is similar to a distribution of State income tax proceeds to the State's municipal corporations and special tax districts for fiscal year 1990. *See* TG §2-608.1. Although these various distributions are made from State income tax revenues, the legislative intent is that these distributions are to be made before the remaining revenue is deposited in the General Fund of the State Treasury. TG §2-609.

B. Allocation of Revenues — Constitutional Principles

House Bill 134 presents an extraordinarily significant and difficult constitutional question regarding the ability of the General Assembly to allocate State revenues outside the budget: May the General Assembly, by the passage of a bill that is not an appropriation bill, divert State general tax revenues to one or more of the political subdivisions?

Maryland is now a model of fiscal integrity among the states. That was not always the case. Indeed, although there are many reasons for Maryland's fiscal preeminence, not the least of which is the fiscal prudence of the Executive and Legislative Branches, the single most consistently acknowledged factor — the heart and foundation of the State's fiscal integrity — is the strong executive budget system that was

---

[4] Because the bill requires the receiving subdivisions to submit a report by September 1 to the Department of Fiscal Services on the use of the funds, arguably this provision implies that the distribution is to be made by that date. However, it can also be interpreted to mean that the subdivisions must submit plans by then for the use of the funds as a condition of receiving them.

[5] This office approved these bills for constitutionality and legal sufficiency by form letter.

put into place by a 1916 amendment of the Constitution known as the Budget Amendment.

"Maryland had no orderly system of planned public expenditures in the years before the Budget Amendment." *Kelly v. Marylanders For Sports Sanity*, 310 Md. 437, 453, 530 A.2d 245 (1987). As the Court of Appeals in another case described the situation:

> Appropriations for various purposes were made piece-meal by the General Assembly, each project receiving independent consideration without relation to other claims upon the public purse. In earlier times, when the range and scope of state activities were limited, this [planless] procedure was not seriously objectionable, for it was nevertheless not impossible for members of the legislature to have a fairly clear grasp of the state's fiscal operations. Eventually, however, with the growth in the size and complexity of governmental programs and machinery, embarrassing deficits occurred.

McKeldin v. Steedman, 203 Md. 89, 96, 98 A.2d 561 (1953).

In 1916, the Goodnow Commission studied the fiscal problems of the State, found that the excess of expenditures over receipts was "ample proof that the methods of making appropriations now in force are defective," and proposed an executive budget system designed to bring about a fundamental "reform in State finance which is demanded by the people ...." Report of the Commission on Economy and Efficiency on a Budget System (Goodnow Commission), 1916 S. Jour. 129, 130-31.

"The heart of the scheme," wrote the Court of Appeals, "is 'to impose upon the Governor the sole responsibility of presenting to the legislature a complete and comprehensive statement of the needs and resources of the State ....'" If the Legislature wanted "'to make provision for any purpose not included in the Governor's plan ...," it could do so, "'but on the condition that it provide for the revenue which the accomplishment of its purpose necessitates.'" 203 Md. at 97 (quoting Goodnow Commission Report).

Thus, the Constitution requires that "[e]very appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill." Article III, §52(3). Furthermore, the budget, as prepared and proposed by the Governor, is to contain "a complete plan of proposed expenditures and estimated revenues." §52(4). "The Budget and the Budget Bill as submitted by the Governor to the General Assembly shall have a figure for the total of all proposed appropriations and a figure for the total of all estimated revenues available to pay the appropriations, and the figure for total proposed appropriations shall not exceed the figures for total estimated revenues ...." §52(5a). With certain exceptions not material here, the General Assembly may not increase the appropriations proposed by the Governor nor add to the Budget Bill items of appropriation not proposed by the Governor. §52(6). Finally, the Budget Bill as passed by the General Assembly must be balanced, *i.e.*, the figure for the total proposed appropriations may not exceed the total estimated revenues. §52(5a). If the General Assembly desires to make other appropriations, it must do so in accordance with §52(8), which requires that it levy a tax to pay for the supplementary appropriation. *Maryland Action for Foster Children v. State*, 279 Md. 133, 142, 367 A.2d 491 (1977).

Thus, "[t]he constitutional objective, as revealed by these provisions, is two-fold: first, to prevent the possible disturbance of the balanced budget which the plan contemplated, and, second, to allow legislative additions to the executive budget if, and only if, the legislature is willing to assume the burden and responsibility of sponsoring the necessary taxes to finance its proposals for additional expenditures." *McKeldin v. Steedman*, 203 Md. at 98.

Given the well-established language, background, and intent of the Budget Amendment of the Constitution, if the question presented by House Bill 134 were entirely one of first impression, we would not hesitate to conclude that the diversion of State tax dollars from the general revenues of the State would so seriously undermine the Executive Budget system as to be clearly unconstitutional; for such diversions would preempt the Governor's ability to develop the complete and balanced plan of proposed expenditures and estimated revenues required by §52. However, we do not write upon an entirely clean slate.

In 1921, only five years after the adoption of the Budget Amendment, Attorney General Armstrong advised the Secretary of the Board of Motion Picture Censors:

> In my judgment, the Budget Amendment applies only to appropriations made *out of the Treasury* and was not intended to prevent the Legislature from designating the manner of use of monies received by various agents of the State prior to the time when

> these monies find their way into the State Treasury. In the case presented by you, the fees earned by your Board are paid directly to you, and while Section 3 [of the Budget Bill] places a lien upon these fees to the extent of your Budget appropriation out of the Treasury, and thereby compels you to return to the Treasury out of your fees the full amount of your appropriation, your excess earnings remain in the hands of the Board, and if the General Assembly sanctions their use with the consent of the Governor, I do not believe that it has exceeded its constitutional authority or violated the limitations of the Budget Amendment, because its action does not constitute an appropriation of monies out of the Treasury of the State.

6 *Opinions of the Attorney General* 345, 346 (1921) (emphasis in original). *See also* 6 *Opinions of the Attorney General* 263, 265-66 (1921) (similar conclusion regarding University of Maryland's use of funds from sources other than the Treasury).

Of even greater cause for concern is the decision of the Court of Appeals in *Baltimore v. O'Conor*, 147 Md. 639, 128 A. 759 (1925). In that case, the Court struck down a statute that would have authorized the diversion of surplus funds specifically required by Article XV, §1 of the Constitution to be deposited in the State Treasury. The Court did so because, in its words, "[i]f the General Assembly can, by the simple expedient of directing that certain State revenue be placed in special accounts in the treasury, secure the right to appropriate it without reference to the requirements of the Budget Amendment, then the General Assembly has the power to nullify the amendment." 147 Md. at 646-47.

However, while striking down the law at issue, the Court, over the strong objections of then Attorney General Robinson, distinguished and *approved* an act that would have "divert[ed] to certain local uses money ... part of which would no doubt have eventually reached the treasury." 147 Md. at 647. The money referred to by the Court was derived from fines for motor vehicle offenses committed in a particular county. The statute directed certain State officials to credit those funds to the county, which was to use them to support the county police force.

It is not easy to discern the rationale underlying this passage (which, although dicta, was stated unequivocally in response to a position that had been briefed fully, and which has not subsequently been called into question by the Court). Under the broadest of readings, the General Assembly would be empowered to direct the disposition, without regard to the appropriations process, of all State revenues prior to their deposit in the State Treasury, except where the Constitution itself expressly requires that a State official remit funds to the Treasury. This view would accord with that of Attorney General Armstrong.

However, the same Court of Appeals described the Budget Amendment as "providing an intelligent and definite method of estimating and appropriating the income of the State," so as to remedy the prior situation in which "appropriations were more or less uncorrelated and deficits in the State Treasury were not unusual." 147 Md. at 644. As we discussed above, the Court of Appeals has since repeatedly reaffirmed the central role of the Budget Amendment in our constitutional scheme. Given the enormous growth in both State resources, State programs, and State expenditures since 1925, we cannot accept that the Court would today authorize a system of State resource allocation completely outside of, and necessarily destructive of, the Budget amendment. *See* 68 *Opinions of the Attorney General* at 91-92.[6]

Accordingly, we read *O'Conor* more narrowly, as we think that the Court of Appeals would in 1990 and beyond. This narrow reading does not ignore *O'Conor's* endorsement of legislative power to categorize certain funds as local even though they might be held by a State official, but it does preserve the basic structure and intent of the Budget Amendment. That is, we read *O'Conor* to suggest the following: The General Assembly may determine by statute that a category of funds derived from the residents of a political subdivision or from events occurring within a subdivision are not to enter the ordinary flow of State revenues but instead are to be remitted directly to that subdivision for its general purposes or for some specific purpose identified in the statute.

That is what the General Assembly has done, in TG §2-608(a), with the county or "piggyback" income tax and with the portion of the income tax identified in TG §2-607. In these provisions, the General Assembly has instructed the Comptroller to remit a portion of the tax revenues generated in each local jurisdiction to that jurisdiction — where, of course, the funds are subject to local budget procedures.

---

[6] Indeed, it is not clear that even the *O'Conor* Court would reach the same result about general tax revenues, which were not at issue in the case.

The categories of funds described in these provisions are neither estimated as State funds in the Budget Bill nor appropriated for other purposes in the Budget Bill or by a supplementary appropriations bill. In effect, by statute these portions of income tax revenues never lose their local status, just as in *Baltimore v. O'Conor* the fines originating in one county were authorized to be kept at their source.

House Bill 134 is significantly different, however. It does not identify an overall category of revenues derived from particular jurisdictions that are marked off, year after year, for the use of those jurisdictions. Instead, it allocates specific dollar amounts of Statewide income tax revenues that have already been estimated and appropriated in the Budget Bill, attaches conditions for their disbursement, and limits the disbursement to a single fiscal year. Indeed, because House Bill 134 seeks to require the disbursement of revenues already appropriated, we think that the Court of Appeals would be that much less likely to approve it under the dicta in *O'Conor* or otherwise.[7] Unlike TG §§2-607 and 2-608(a), House Bill 134 in our view cannot be construed as a permissible demarcation of a category of local funds, to be returned to the source jurisdiction outside the ordinary process of appropriations.

Hence, although the matter is not entirely free from doubt, we think that House Bill 134 can be given its intended effect only though a lawful appropriation.

C. Appropriation Methods

Article III, §52 of the Constitution prescribes the permissible methods of appropriation. In a regular session, those methods are limited to appropriations by the Budget Bill or a supplementary appropriation bill.[8]

---

[7] To be sure, although House Bill 134 relies on the same source of revenues as were estimated in the budget and the Budget Bill, House Bill 134 does not result in a violation of the balanced budget requirement. Article III, §52(5a) merely requires that the "Budget and the Budget Bill as submitted by the Governor" and as enacted are to be balanced. The budget and Budget Bill for fiscal year 1991 satisfied this requirement.

[8] Although an appropriation act during a regular session must be either a Budget Bill or supplementary appropriations bill, in a special session the Budget Amendment allows the General Assembly to enact emergency appropriations. Article III, §52(14). Thus, in *Panitz v. Comptroller*, 247

(continued...)

The Department of Budget and Fiscal Planning has advised that Senate Bill 310, the Budget Bill for fiscal year 1991, does not contain an appropriation pursuant to which the Comptroller could make the disbursements required by House Bill 134. Nor is House Bill 134 a supplementary appropriation bill.

Article III, §52(8)(b) requires that "[e]ach Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a *tax, direct or indirect, to be levied and collected as shall be directed in said bill.*" An example of a levy of such a tax is the standard clause used in bills that create a State debt, *i.e.*, "[a]n annual tax is imposed on all assessable property in the State in rate and amount sufficient to pay the principal and interest..." House Bill 134 does not levy a tax but rather distributes existing tax revenues that have been appropriated for other purposes by the Budget Bill.[9]

Thus, the Maryland Constitution does not permit House Bill 134 to be given effect without further action. A possible vehicle for such action is the Budget Bill to be considered at the 1991 Session of the General Assembly. Traditionally, a portion of the annual Budget Bill includes deficiency appropriations, to deal with actual expenditures in excess of budgeted estimates. Although it is impossible to foresee the revenue situation at that time, if, when the Governor submits the Budget Bill for fiscal year 1992, funds are available to accommodate the expenditures contemplated by House Bill 134, the Governor in his discretion would be free to include such a deficiency appropriation. If

---

[8](...continued)
Md. 501, 503, 232 A.2d 891 (1967), the Court of Appeals stated that funds which had not been validly appropriated by a supplementary appropriations bill in a regular session could be appropriated by an appropriation act in a special session. *See also* 52 *Opinions of the Attorney General* 176, 180 (1967). This was, in fact, done by Chapter 1 of the Laws of Maryland, Special Session, June 22, 1967.

[9] The Budget and Taxation Committee was advised by letter dated March 27, 1990 from Dennis Parkinson, Deputy Secretary of Budget and Fiscal Planning, that no provision had been made in the 1991 budget for the expenditures required under House Bill 134 and that in order to accommodate House Bill 134, appropriations in the Budget Bill would need to be reduced.

that were possible, the funds could reach the four jurisdictions upon enactment of the Budget Bill, probably in April 1991.[10]

II

Home Rule Issue

We have also considered the question of whether House Bill 134 (assuming it were implemented through the appropriations process described above) would impermissibly intrude on the home rule powers of Baltimore City and Allegany County by mandating that State funds be paid to these subdivisions "only if the property tax rate levied for fiscal year 1991 is at least equal to the property tax rate levied for fiscal year 1990." TG §2-608(d)(2). In our view, House Bill 134 is a public general law that would not violate the home rule provisions in Articles XI-A or XI-F of the Constitution.

The legislative powers of the State and its political subdivisions are significantly different. The General Assembly inherently possesses full power to legislate on every subject, except as limited by the Maryland Constitution with regard to State and local matters and the federal constitution with respect to national matters. The subdivisions have only such legislative authority as has been given them by the State, either in the Constitution or by statute. Consequently, except to the extent that it is restrained by the home rule powers that the Constitution gives some subdivisions, the Legislature may regulate subdivisions in virtually any manner it sees fit. 62 *Opinions of the Attorney General* 275, 278-79 (1977).

The City of Baltimore enjoys a form of constitutional home rule known as "charter government." *See* Article XI-A of the Constitution.

---

[10] We have considered whether House Bill 134 might be viewed as a mandatory funding law under Article III, §52(11) and (12) of the Constitution. We think not, given that the bill intends to require outlays in fiscal year 1991 alone, while under §52(11) and (12) a level of mandatory funding could only be required for fiscal year 1992 at the earliest.

We note that the statutory budget amendment process in §7-209 of the State Finance and Procurement Article might provide a means by which the goals of House Bill 134 could be pursued. We recognize that the constraints of §7-209 limit the availability of this remedy. Additionally, we are advised by the Department of Budget and Fiscal Planning that limited resources might well, as a practical matter, restrict the ability to resort to this remedy.

Allegany County has adopted "code home rule." *See* Article XI-F. Garrett and Somerset Counties do not have home rule powers.

Under Article XI-A, §4, the General Assembly may not enact a "public local law" on any subject covered by the express powers granted by the Legislature to Baltimore City in its charter. And Article XI-F, §4 prevents the General Assembly from enacting a "public local law which is special or local in its terms or effect within a code county," such as Allegany County.[11]

As this office previously has observed, the distinction between public general laws and public local laws is extremely significant for home rule purposes, and often difficult to determine:

> [T]here is no categorical standard for distinguishing between public general and public local laws. Nevertheless, public local laws traditionally are confined in their operation to certain prescribed or defined territorial limits, and their subject matter is one of purely local concern.... Thus, ... "[the] classification of a particular statute as general or local is traditionally based on substance and not form," *Cole v. Secretary of State*, 249 Md. 425, 433 (1968); "[and] ... the fact that the statute takes the form of an amendment to the general law [traditionally has not made] it a public general law rather than a public local law if its subject matter is exclusively local." *Id.*
>
> . . .
>
> In the Charter Home Rule Amendment [the] limitation [on the General Assembly's authority] took the form of a constitutional prohibition of the enactment of a public local law by the General Assembly on any subject covered by the Express

---

[11] In the Code Home Rule Amendment, the local law prohibition is somewhat blurred. Article XI-F, §1 says that "laws which apply to more than one county" are not local laws, while §4 authorizes the General Assembly to "enact ... public local laws applicable to code counties only by general enactment which in term as effect apply alike to all code counties [in a given class of code counties]." This office noted this apparent inconsistency previously, and resolved it by concluding that §4 applies only to laws affecting the incorporation, organization, or government of code counties. *See* 62 *Opinions of the Attorney General* at 304-06.

> Powers Act. However, since a law which applies to two more more of the geographical subdivisions of the State is not a local law for charter home rule purposes, and since "the General Assembly ... may enact a law on any matter of 'state concern' applicable to just one charter county or the city [of Baltimore]," this restraint has not been as significant as it might have been.

62 *Opinions of the Attorney General* at 300-01 (citations omitted).

Applying these standards, we conclude that House Bill 134 is not a public local law, but a public general law on a subject of State concern: the distribution of State tax revenues. Although the decision to set a particular property tax rate is a home rule power of Baltimore City and Allegany County, the "tax effort" contingency in House Bill 134 is an integral component of a measure that distributes income tax dollars collected from citizens in all of the State's subdivisions. *See Board of Public Works v. Baltimore County*, 288 Md. 678, 682, 421 A.2d 588 (1980).

In addition, the "tax effort" provision affects not just Baltimore City or Allegany County, but four subdivisions in all. Under both charter home rule and code home rule, laws affecting more than one county, by definition, are not public local laws. *See* Article XI-A, §4 and Article XI-F, §1.[12]

Finally, just as Congress can attach conditions on the receipt of federal funds that, in effect, direct the states or restrain them in the exercise of their sovereign powers if they choose to accept the money, the General Assembly can take similar action with respect to the counties and Baltimore City. One recent example affecting Maryland was a condition on the receipt of certain oil overcharge funds, under which the State had to agree that the funds would be "used as a supplement to, and not a substitute for, otherwise available funding for the program." 71 *Opinions of the Attorney General* 226, 230 (1986). *See also, e.g., South Dakota v. Dole*, 483 U.S. 203 (1987); *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1947).

---

[12] As long as the bill genuinely affects more than one county, it makes no constitutional difference that it does not apply to more than one charter or one code home rule subdivision. *See* Bill Review Letter on House Bill 1647 (May 16, 1984).

III

Conclusion

As the discussion in Part I above made painfully evident, House Bill 134 touches upon constitutional issues that are both exceptionally complex and relatively novel. Although prior decisions of the Court of Appeals and prior opinions of this office are of some assistance, in truth they leave many questions unanswered. We can well understand how the Legislature, seeking to meet the critical needs of Baltimore and the other jurisdictions that are to be aided by this bill, chose a funding method that reasonable people could view as constitutionally self-executing. But after exacting analysis, and with due regard for the fiscal prudence that has been the philosophical anchor of the Budget Amendment and that has given the State of Maryland its national reputation for sound governmental management, we must conclude that another step — an act of appropriation — is required before House Bill 134 can be given effect.

J. Joseph Curran, Jr.
Attorney General

Judson P. Garrett, Jr.
Deputy Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

CREDIT REGULATION

VEHICLE SALES — MECHANICAL REPAIR CONTRACTS — COST OF MECHANICAL REPAIR CONTRACT MAY BE FINANCED IF ANY MANUFACTURER'S WARRANTY APPLIES TO VEHICLE

February 16, 1990

The Honorable Catherine I. Riley
Chairman, Senate Finance Committee

You have asked our opinion concerning the scope of Chapter 830 (House Bill 1159) of the Laws of Maryland 1989, which became effective July 1, 1989. Specifically, you ask for clarification of the amendment that allows for the financing of the costs of a mechanical repair contract only when the vehicle "is covered by an original manufacturer's warranty."

For the reasons stated below, it is our opinion that Chapter 830 permits the financing of the cost of a mechanical repair contract for a vehicle if any manufacturer's warranty still applies to the vehicle.

I

Background

In 1988, this office issued an opinion discussing permissible charges when the purchase price of a vehicle is financed under the Retail Installment Sales Act ("RISA"). 73 *Opinions of the Attorney General* 117 (1988). We concluded that certain fees and charges may not be financed under RISA.[1]

In the aftermath of our opinion, House Bill 1159 was introduced in the 1989 Session of the General Assembly. The bill's preamble stated that it was intended to clarify any ambiguities "as to whether

---

[1] The applicability of RISA to these fees and charges is the subject of currently pending litigation. *Maryland New Car & Truck Dealers Ass'n, Inc., v. State*, Case No. 10-522/7272 (Cir. Ct. for Harford County).

mechanical repair contracts sold in connection with the sale of a motor vehicle may be financed along with the sale of motor vehicles ...."

As enacted by the House, the bill provided that the cost of a mechanical repair contract could be included in the financing for the purchase of a motor vehicle, "provided that the cost of mechanical repair contract is separately itemized in the financing agreement."[2] The Senate Finance Committee than added the amendment in question: "For purposes of this section, a mechanical repair contract may be sold only for a vehicle which is covered by an original manufacturer's warranty." §§12-609(b)(3) and 12-1012(a) of the Commercial Law Article ("CL" Article).

The amendment has apparently caused some confusion, at least in the banking industry. The Maryland Bankers Association, in a letter to you dated August 23, 1989, stated that the prohibition against financing a mechanical repair contract for a vehicle that is not covered by an original manufacturer's warranty has created significant difficulties for banks that buy motor vehicle sales contracts. Specifically, the Association noted: "The bank has no knowledge whether a used vehicle is still under an original manufacturer's warranty.... Different makes and models of motor vehicles have different original manufacturer's warranties. Moreover, warranties for different parts of a vehicle may be offered for different lengths of time ...." The Association further commented that, because of the uncertainties of the original warranty coverage for used vehicles,

---

[2] A mechanical repair contract is defined in § 15-311.1(a) of the Transportation Article as follows:

> (1) For the purposes of this section, the term "mechanical repair contract" means any agreement or contract between a licensed vehicle dealer and a customer by which the dealer agrees to perform over a fixed period of time, for a specific duration and for a specific identifiable price, services relating to the maintenance or repair of a motor vehicle; provided that the purchase of the contract is optional to the purchaser.
>
> (2) The term "mechanical repair contract" includes, but is not limited to, extended warranties and extended service contracts.

"many banks are refusing to finance the sale of used vehicles if the contracts of sale include extended warranty coverage."[3]

Such confusion is understandable, given the diversity of original warranties offered by manufacturers. The terms of each manufacturer's warranty vary as to both the duration of the warranty for various component parts and the application of the warranty to subsequent purchasers.[4] Typically, an original manufacturer's warranty consists of (1) a basic warranty, covering most component parts of the vehicle; (2) a powertrain warranty, spanning a period of time exceeding the basic warranty period;[5] and (3) an emission control system warranty, also running for a period of time longer than the basic warranty period.[6]

---

[3] A violation of CL §12-609 may result in the holder forfeiting any finance, delinquency, or collection charge and, if the violation was committed knowingly, constitutes a misdemeanor. CL §§12-630(d) and 12-636(a). A violation of Subtitle 10 of Title 12 also subjects the credit grantor to various civil and criminal penalties. CL §§12-1017 and 12-1018.

[4] For example, the warranty on the 1989 and 1990 Ford models (6 year/60,000 miles) remains in effect regardless of the number of owners, while the second or subsequent owners of 1987 and 1988 models (6 year/60,000 miles) can obtain warranties only by filing an application with the manufacturer and paying a $100 fee. The 1989 Chrysler warranty provides a 7 year/70,000 mile warranty for the powertrain, and allows the powertrain warranty to be transferred to a second buyer for a fee of $100, but that warranty may not be transferred to a third or subsequent purchaser. In contrast, the 1990 warranty for a Toyota is fully transferable to subsequent vehicle owners.

[5] A powertrain warranty generally covers the engine, transmission, transaxel, differential, and driveshaft assembly. The extent of the coverage varies from one manufacturer to another.

[6] Under federal law, an emission control performance warranty for light duty vehicles extends for a period of at least 2 years or 24,000 miles and the emissions equipment warranty extends for a period of 5 years or 50,000 miles. 42 U.S.C. §§7521(d) and 7541; 40 C.F.R. §85.2103.

II

Analysis

We begin with the words of the amendment in question, "because what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal." *Kaczorowski v. City of Balto.*, 309 Md. 505, 513, 525 A.2d 628 (1987). Indeed, "[s]ometimes the language in question will be so clearly consistent with apparent purpose (and not productive of any absurd result) that further research will be unnecessary." 309 Md. at 515.

The phrase used in the amendment to Chapter 830 is "*an* original manufacturer's warranty." The indefinite article "an" generally means "any." *See, e.g., United States v. Hudson*, 65 F. 68, 71 (W.D. Ark. 1894); *Kaufman v. Superior Court*, 115 Cal. 152, 46 P. 904, 905 (1896); *First Amer. Nat'l Bank v. Olsen*, 751 S.W.2d 417, 421 (Tenn. 1987). "[A] term introduced by 'a' or 'an' applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonably understood." 2A *Sutherland Statutory Construction* §47.34 at 249 (4th ed. 1984).

We have no basis on which to conclude that any meaning other than the ordinary one was intended by the phrase "covered by an original manufacturer's warranty" in Chapter 830. Presumably the General Assembly knew that every new vehicle has multiple warranties, one of which - for emission control equipment - is specified by federal law.[7] *See, e.g., Board of Educ. v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185 (1982) (General Assembly presumed to have knowledge of prior law). Hence, we conclude that any of the warranties mentioned above could constitute "an original manufacturer's warranty" under Chapter 830 if the owner or owners complied with the terms of the warranty.[8]

Your letter suggests that, as a result of the amendment, Chapter 830 was limited in its scope to "newer vehicles." We agree with you that Chapter 830 does not apply, as your letter put it, "to any car

---

[7] *See* note 6 above.

[8] Your letter indicates that the Senate Finance Committee "intended that original manufacturer's warranties include all those that are issued by the original manufacturer, whether they apply to the entirety of the vehicle, or parts of it."

which has sufficient age as to have totally expired all warranty coverage." But, because of the length of powertrain and emission control warranties, vehicles several years old will be covered by Chapter 830.[9] If the statute's reach is to be limited to vehicles "newer" than that, an amendment (perhaps linking coverage to specified age or mileage) will be necessary.

III

Conclusion

In summary, it is our opinion that if any of the original warranties provided by a manufacturer are applicable to a vehicle, the cost of a mechanical repair contract for that vehicle may be financed.

J. Joseph Curran, Jr.
Attorney General

Edward R. K. Hargadon
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editors Note:

In the case referred to in note 1, the circuit court held that the fees and charges at issue could lawfully be financed under RISA.

---

[9] Conceivably, for example, a twice-resold vehicle with 49,000 miles on it would still be "covered by an original manufacturer's warranty" on its powertrain and emissions control system.

CRIMINAL LAW

DRUG OFFENSES — KNOWLEDGE IS ELEMENT OF OFFENSE OF UNLAWFULLY MANUFACTURING, DISTRIBUTING, OR DISPENSING DRUGS

April 12, 1990

Robert S. Finkelstein, Esquire
District Counsel
Immigration and Naturalization Service

You have requested our opinion on whether knowledge or intent is an element of the offense of unlawfully manufacturing, distributing, or dispensing a controlled dangerous substance, under Article 27, §286(a)(1) of the Maryland Code.

For the reasons stated below, we conclude that knowledge is an element of that offense.

I

Background

An alien is subject to deportation for certain crimes, including those involving drug-trafficking. *See* 8 U.S.C. §1251(a)(11). As we understand the situation, if the conviction is for a state offense, the conviction provides a basis for deportation only if the offense includes all of the elements of the comparable federal offense.

Under federal law, it is an offense for any person "*knowingly or intentionally* ... to manufacture, distribute, or dispense ... a controlled substance ...." 21 U.S.C. §841(a) (emphasis added). The comparable Maryland statute, Article 27, §286(a)(1), part of the Maryland Controlled Dangerous Substances Act, makes it unlawful "for any person ... [t]o manufacture, distribute, or dispense ... a controlled dangerous substance."[1]

Section 286(a)(1) was modeled after §401(a) of the Uniform Controlled Dangerous Substances Act. Chapter 403, Laws of Maryland 1970. *See Davis v. State*, No. 83 (Sept. Term 1989), at 5 (March 9, 1990). The language of the Uniform Act is as follows: "Except as authorized by this Act ..., it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance." 9 U.L.A. Part II, at 91 (1988).

Thus, neither the Maryland statute nor its model contains an explicit knowledge or intent requirement. You ask whether, in our opinion, the Maryland courts would hold that knowledge or intent is nevertheless an element of this offense.

II

Analysis

A. Scienter in Possession Offenses

In *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1988), the Court of Appeals considered whether knowledge was an element of two offenses under another provision in the Maryland Controlled Dangerous Substance Act. In that case, the defendant was charged with violating §287(a), which prohibits drug possession, and of §287(d), possession

---

[1] The full text of this provision is as follows:

> Except as authorized by this subheading, it is unlawful for any person:
> (1) To manufacture, distribute, or dispense, or to possess a controlled dangerous substance in sufficient quantity to reasonably indicate under all circumstances an intent to manufacture, distribute, or dispense, a controlled dangerous substance.

The terms "manufacture," "distribute," and "dispense" are defined in Article 27, §277(p)(l), and (k), respectively. *See also* §277(i) (definition of "deliver"). The drugs that are "controlled dangerous substances" are delineated in §§278 and 279.

of paraphernalia. The trial court ruled that knowledge was not an element of these possession offenses.[2]

The Court of Appeals reversed. The Court pointed out that the statute did not "contain language indicating whether *scienter* is an element of the §287 offenses." 313 Md. at 645. Although the General Assembly has the power to create strict liability offenses, these offenses "are generally regulatory in nature" and "commonly involve light fines or penalties." 313 Md. at 644. By contrast, the possession offenses with which Dawkins was charged were not "mere 'public welfare' or 'regulatory' offense[s]"; rather, they were serious offenses punishable by up to four years in prison or a $25,000 fine or both. 313 Md. at 651.

The Court elaborated as follows about the seriousness of the possession offenses:

> [P]ossession of controlled dangerous substances, both in 1970 and today, does not fall within the category of a mere "public welfare" or "regulatory" offense....
>
> Today, the prohibition against possessing a controlled dangerous substance, such as heroin, cocaine, etc., is regarded as a most serious offense, particularly in light of the association between illegal drugs and other crime.... The penalty for the possession offenses reflects the seriousness of the crime.... The purpose of proposing a penalty upon possession of narcotics is to punish and deter immoral behavior having serious consequences, rather than merely to regulate conduct.

313 Md. at 651.[3]

---

[2] Section 287(a) makes it unlawful for any person "to possess or administer to another any controlled dangerous substance ...." Section 287(d) makes it unlawful for any person "to possess or distribute controlled paraphernalia ... under circumstances which reasonably indicate the intention to use such controlled paraphernalia for purposes of illegally" administering, manufacturing, distributing or dispensing the drug.

[3] Contrasting the prior possession statute with §287, the Court observed that the latter was enacted in 1970, a time of reform in penal codes (continued...)

The Court then surveyed decisions in other states with comparably worded statutes and found that, "even though the statutes are silent as to a *scienter* requirement, most of these jurisdictions have, by judicial decision, determined that knowledge is an element of the crime of possession." 313 Md. at 646-47.[4] The Court so held about §287.

B. Scienter in Distribution Offenses

The Court of Appeals' description of the seriousness of drug possession is all the more applicable to the offense of illegally manufacturing, distributing, or dispensing drugs. It is far from a mere regulatory offense. The measure of its seriousness is the severity with which it is punished. The General Assembly has enacted an elaborate and stringent series of penalties, in which the length of the term of imprisonment varies with the kind of drug involved in the offense and the criminal record of the defendant. §286(b) through (f). For instance, a person who is convicted of manufacturing, distributing or dispensing certain narcotics, including heroin and cocaine, is subject to imprisonment for up to 20 years or a $25,000 fine or both. §286(b)(1).

Courts in other states with provisions virtually identical to §286(a)(1) have held that *scienter* is an element of the offense. Washington law, for example, declares it "unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." Wash. Rev. Code §69.50.401(a). In *State v. Boyer*, 91 Wash. 2d 342, 588 P.2d 1151 (1979), the Washington Supreme Court considered the question of "whether guilty knowledge, an understanding of the identity of the product being delivered, is a part of the crime." 588 P.2d at 1152. The court held that it was:

> The language of the statute ... provides no guidance on the issue before us. However, without the mental element of knowledge, even a postal carrier would be guilty of the crime were he

---

[3](...continued) "express[ing] the contemporary view that disfavors strict liability offenses." 313 Md. at 650.

[4] In part, the Court of Appeals, like courts in other states, relied on language in the definition of "possession" for the inference that the General Assembly had intended to require knowledge as an element of the offense. 313 Md. at 648-49. *See* Article 27, §277(s).

> innocently to deliver a package which in fact contained a forbidden narcotic. Such a result is not intended by the legislature. Accordingly, absent express legislative language to the contrary, we find in the context of this statute, its history and language, that guilty knowledge is intrinsic to the definition of the crime itself.

Id. *See also* *Thomas v. State*, 522 P.2d 528 (Alaska 1974); *State v. Osmundson*, 241 N.W.2d 892 (Iowa 1976); *Applegate v. State*, 301 So. 2d 853 (Miss. 1974); *State v. Dunn*, 246 S.E.2d 245 (W.Va. 1978); *But see Aumiller v. State*, 720 P.2d 347 (Okla. Crim. App. 1986).

We think it highly likely, in light of *Dawkins*, that the Court of Appeals would likewise conclude that *scienter* is an element of the offense under §286(a)(1).[5]

IV

Conclusion

In summary, it is our opinion that knowledge is an element of the offense of unlawfully manufacturing, distributing, or dispensing a controlled dangerous substance under Article 27, §286(a)(1) of the Maryland Code.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[5] "Of course," as the Court wrote in *Dawkins*, "such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom." 313 Md. at 651.

CRIMINAL LAW — CONSTITUTIONAL LAW — FREEDOM OF SPEECH — MARYLAND'S FLAG PROTECTION LAW IS CONSTITUTIONAL

November 14, 1990

The Honorable Samuel I. Rosenberg
The Honorable Timothy Maloney
Maryland House of Delegates

In light of the United States Supreme Court's decision in *United States v. Eichman*, 110 S.Ct. 2404 (1990), invalidating as applied the federal Flag Protection Act, you have requested our opinion on the constitutionality of the 1990 revision of Maryland's Flag Law, Article 27, §83 of the Maryland Code. That criminal statute now provides as follows:

> A person may not intentionally mutilate, deface, burn, trample upon, or otherwise use a flag:
>
> (1) In a manner intended to incite or produce an imminent breach of the peace; and
>
> (2) Under circumstances likely to incite or produce an imminent breach of the peace.

For the reasons stated below, it is our opinion that, unlike the federal act, the Maryland law is a "breach of the peace" statute. As such, it seeks to regulate nonspeech activities and is justified by a sufficiently important governmental interest unrelated to the suppression of free expression. Moreover, even if Article 27, §83 were aimed at expression, it would pass muster under the First Amendment because it expressly proscribes only unlawful conduct not protected by the Constitution — flag destruction intended to incite imminent lawless action and likely to produce that action.

I

Analysis and Impact of *Eichman*

In *United States v. Eichman*, the second Supreme Court flag burning decision in less than a year, the Court reaffirmed that "expressive" flag destruction was subject to full First Amendment protection. 110 S.Ct. at 2407. A statute prohibiting such expression was required to pass "the most exacting scrutiny," 110 S.Ct. at 2409, and must be justified by a compelling governmental interest unrelated to the content of the expression. 110 S.Ct. at 2408.[1]

In concluding that the federal Flag Protection Act of 1989 could not be applied to expressive flag burning, the Court rejected the contention that the constitutionality of the statute had to be gauged under "the deferential standard" of *United States v. O'Brien*, 391 U.S. 367 (1968), governing regulation of conduct containing speech and non-speech elements where the governmental interest underlying the law was unrelated to the suppression of free expression. *See* 110 S.Ct. at 2407. The Court found that the governmental interest behind the Flag Protection Act — preserving the flag as a symbol of our nation and its ideals — was a justification rooted in the content of the regulated speech and, thus, was related to suppression of expression. 110 S.Ct. at 2407 and 2409. Nonetheless, it is apparent from a reading of *Eichman* and prior flag cases that the Court was not immunizing from government control flag destruction that amounted to breach of peace.

Eichman did not involve a claim that the Flag Protection Act was unconstitutional on its face.[2] Rather, the Court found the law unconstitutional "as applied" to expressive conduct that merited the "full protection of the First Amendment." 110 S.Ct. at 2407. Moreover, the restriction on expressive conduct imposed by the law was insufficiently justified. 110 S.Ct. at 2409.

Prior Supreme Court flag cases, relied on in *Eichman*, have strongly suggested that a flag destruction statute could be constitutionally applied to facts amounting to a breach of peace and could be justified by the government's interest in preventing such misconduct.

---

[1] *Eichman* was preceded by five flag desecration or misuse cases, in none of which the government prevailed or a conviction was upheld. *See Texas v. Johnson*, 109 S.Ct. 2533 (1989); *Cahn v. Long Island Vietnam Moratorium Committee*, 418 U.S. 906 (1974); *Spence v. State of Washington*, 418 U.S. 405 (1974); *Smith v. Goguen*, 415 U.S. 566 (1974); *Street v. New York*, 394 U.S. 576 (1969).

[2] The defendants charged under the federal law originally challenged the law both as applied and on its face. The latter claim was not adjudicated. *See United States v. Eichman*, 731 F. Supp. 1123, 1130 n.9 (D.D.C. 1990); *United States v. Haggerty*, 731 F. Supp. 415, 422 n.8 (W.D. Wash. 1990).

For example, in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), the Court, in refusing to permit a prosecution for flag burning under a Texas statute, noted that "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag." 109 S.Ct. at 2541.[3] *See also Spence v. Washington*, 418 U.S. 405 (1974) (asserted state interest in preventing breach of peace rejected in flag misuse case because of lack of factual evidence).[4]

Finally, a recent, well-reasoned decision of the United States Court of Appeals for the Eighth Circuit upheld a federal flag burning conviction on the ground that the law could be constitutionally applied to facts amounting to a breach of the peace. *United States v. Cary*, 897 F.2d 917 (8th Cir. 1990). In this case, the court emphasized that the defendant's flag burning actions occurred "in a context of violence" and involved the government's "important and substantial interest in protecting against further breaches of the peace." 897 F.2d at 926. This interest, the court wrote, was unrelated to the suppression of expression. 897 F.2d at 924. Thus, the constitutional question was resolved under the more lenient standard of *O'Brien* rather than "the exacting scrutiny" of *Johnson* (and *Eichman*).[5]

---

[3] The majority in *Johnson* also noted that:

> We ... conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." 109 S.Ct. at 2542.

[4] Justice Brennan, who wrote the *Eichman* and *Johnson* opinions, also emphasized in his dissent from the denial of certiorari in *Kime v. United States*, 459 U.S. 949 (1982), that the flag mutilation statute whose constitutionality the Court declined to address there was "neither an arson statute nor a breach-of-the-peace statute." 459 U.S. at 954.

[5] The court noted that "[b]ecause the government's interest is unrelated to expression, we need not apply the incitement to imminent lawless action test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)." 897 F.2d at 925 n. 20.

II

Analysis of the 1990 Maryland Law

Chapters 420 and 422 of the Laws of Maryland 1990, the revision of Article 27, §83, were enacted by the General Assembly with an eye toward fashioning legislation that would pass constitutional muster as a breach of the peace statute.[6] Legislative committees were unquestionably aware of the lower court decisions that led to *United States v. Eichman*. *See* letter of advice to Delegate David B. Shapiro on House Bill 503 (March 28, 1990) and letter of advice to Delegate Daniel M. Long on House Bill 503/Senate Bill 374 (March 5, 1990). In addition, House Judiciary Committee amendments to the legislation expressly incorporated the "incitement to imminent lawless action" test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), as a substantive element of the flag destruction offense.[7]

Because the 1990 flag law was carefully crafted to punish only imminent breaches of the peace, we believe that it passes constitutional muster on two different theories. Examined under the more lenient standard of *O'Brien* and *Cary*, it seeks to regulate not expression but a particular type of conduct, breach of the peace, and is justified by the State's undoubted interest is preventing such violent or threatening behavior. Alternatively, even if the statute were viewed as aimed at speech or expression, it only proscribes conduct that *Brandenburg*

---

[6] In four separate advice letters, this office stated that a flag desecration statute that only punished breach of the peace would survive a constitutional challenge. Letter of advice to Delegate Samuel I. Rosenberg (August 11, 1989); letter of advice to Governor William Donald Schaefer (January 10, 1990); letter of advice to Delegate Daniel M. Long on House Bill 503/Senate Bill 374 (March 5, 1990); and letter of advice to Delegate David B. Shapiro on House Bill 503 (March 28, 1990).

[7] Before the bill's passage in the House, this office noted in its March 28, 1990 letter of advice to Delegate David B. Shapiro that: "The proposed amendments to House Bill 503 convert the bill into breach-of-the-peace legislation and the language of the amendments was drafted with an eye on the Supreme Court's decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (The First Amendment does not prohibit a state from banning the advocacy of the use of force or of law violation 'where such advocacy is directed to inciting or promoting imminent lawless action and is likely to incite or produce such action.') Under this constitutional standard, which is incorporated into House Bill 503 as proposed for amendment, a person could be constitutionally convicted for burning or destroying a flag if the State meets its burden of showing these elements of 'imminent lawless action.'"

holds to be outside the protection of the First Amendment — that is, imminent lawless action.

III

Conclusion

In summary, the constitutionality of the 1990 flag law is not controlled by *Eichman*, but rather by other authorities that support the constitutionality of the measure. In our opinion, Article 27, §83 does not violate the First Amendment.

J. Joseph Curran, Jr.
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

CRIMINAL LAW — STATUTES — FLAG LAW — USE OF MARYLAND FLAG IN "MARYLAND WITH PRIDE" PROGRAM LOGO DOES NOT VIOLATE FLAG DESECRATION LAW

December 11, 1990

The Honorable C. Bernard Fowler
Senate of Maryland

You have requested our opinion concerning the applicability of Maryland's flag desecration law to the logo that businesses may use if they join the "Maryland With Pride" program. In your letter to this office, you stated that you had received a complaint from a constituent who was offended that a company was using the "Maryland With Pride" logo, with its adaptation of the Maryland flag, to promote the company.

For the reasons stated below, we conclude that the "Maryland With Pride" program's logo does not violate the flag desecration law.

I

The "Maryland With Pride" Program

The "Maryland With Pride" program is a promotional campaign, introduced in 1987 by Governor Schaefer, designed to identify the diverse products that are grown, processed, manufactured, or handcrafted in Maryland. These range from microchips to apples, from home paint to wine. Businesses that offer a service are also invited to join the program.

The "Maryland With Pride" logo contains a stylized version of the Maryland flag, in the form of a pennant with the word "Maryland" above and the words "With Pride" below. Displayed on labels, packaging, and advertisements, the logo seeks to create consumer awareness and to symbolize the pride Marylanders have in the goods and services they produce.

The promotion is a cooperative program of the Departments of Agriculture and Economic and Employment Development. Businesses pay no fee for signing on with the program. Each business is responsible, however, for any costs that result from adapting the logo to labels, packaging, and the like. The program has suggested that the logo may be displayed on products, packaging, shipping materials, outgoing mail, catalogues, brochures, stationery, letterhead, and advertising.

In return for the businesses' use of the logo, the "Maryland With Pride" program provides several marketing efforts designed to promote the businesses. The program showcases "Maryland With Pride" businesses in a permanent display at the Baltimore/Washington International Airport, and two traveling displays promote member businesses at trade shows, conventions, and public events. In addition, listings of the various industry catalogues are available to "Maryland With Pride" members, to encourage business-to-business opportunities.

II

Commercial Misuse of the Flag

Article 27, §82 of the Maryland Code provides as follows:

> No person shall, in any manner, for exhibition or display:
>
> . . .
>
> (c) Expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or use for any purpose, any substance, being an article of merchandise, receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

A violation of §82 is a misdemeanor, punishable by a fine of up to $500. Article 27, §85.

Prior to 1990, the definition of "flag" for purposes of this prohibition included any "copy, picture or representation ... purporting to be" the Maryland flag "or a representation thereof." Former Article 27, §81. However, in Chapters 420 and 422 of the Laws of Maryland

1990, the General Assembly deleted this language. This legislation was not focused on commercial misuse of likenesses of the flag; rather, the legislation was intended to prevent breaches of the peace caused by the destruction of the flag itself. *See* 75 *Opinions of the Attorney General* 147 (1990).[1] Nevertheless, the practical effect of the amendment to the definition of "flag" is to render §82 unenforceable as to misuse of likenesses of the flag. We recommend that the General Assembly consider a restoration of the old definition, limited to §82.

In any event, in order to answer your question fully, this opinion will analyze the applicability of §82 to the "Maryland With Pride" logo as if the provision still applied (or, after amendment, will again apply) to likenesses of the flag.

Numerous prior opinions of the Attorney General have interpreted §82. *See, e.g.*, 31 *Opinions of the Attorney General* 205 (1946); 24 *Opinions of the Attorney General* 666 (1939); 23 *Opinions of the Attorney General* 507 (1938); 22 *Opinions of the Attorney General* 525 (1937); 21 *Opinions of the Attorney General* 578 (1936); 10 *Opinions of the Attorney General* 180 (1925); 9 *Opinions of the Attorney General* 280 (1924); 7 *Opinions of the Attorney General* 489 (1922). These opinions distinguish between private commercial exploitation of the State emblem, intended to enhance the value of a product, which is prohibited; and noncommercial use of the State emblem on stationery or on items like books, which is not.

III

Inapplicability of Flag Law to "Maryland With Pride" Program

We begin with the premise that Article 27, §82(c) does not apply to the State's own use of the flag on articles of merchandise or otherwise. In *Unnamed Physician v. Commission on Medical Discipline of Maryland*, 285 Md. 1, 12, 400 A.2d 396 (1979), the Court of Appeals held that "the word 'person' in a statute does not include the State, its agencies or subdivisions unless an intention to include these entities is made manifest by the Legislature."

---

[1] 75 *Opinions of the Attorney General* 147 reviewed the legislative history of the 1990 amendment to the flag law. We are not aware of any discussion of the effect of the amendment on §82, which was not itself amended.

We have no reason to believe that the General Assembly meant to limit the State's ability to market its own merchandise with the State flag. Such a construction of Article 27, §82(c) would deprive the State of a power to the detriment of its sovereignty — precisely the kind of situation in which the rule of construction is most vigorously applied. *See United States v. Coumantaros*, 165 F. Supp. 695, 700 (D. Md. 1958); *Mayor and City Council v. Baltimore Gas & Elec. Co.*, 232 Md. 123, 136, 192 A.2d 87 (1963). *Cf.* 67 *Opinions of the Attorney General* 380, 386-87 (1982).[2] Moreover, this reasoning applies as forcefully to the "Maryland With Pride" program, albeit the logo is used by private companies.

The "Maryland With Pride" program is a cooperative endeavor of the Departments of Agriculture and Economic and Employment Development. The Department of Agriculture's Office of Marketing and Agricultural Development carries out many activities to assist the agricultural community in marketing and product promotion. The marketing services section provides programs and services to help all segments of the economy, from producer to consumer, through the marketing system. Programs include market improvement projects to enhance quality and presentation of agricultural commodities to the consumer, international marketing, and market news.

In the Department of Economic and Employment Development, the Division of Business Development has the general responsibility of advancing the economic welfare of the people through programs and activities to develop in a proper manner the State's natural resources and economic opportunities. Article 83A, §2-101. The Division coordinates activities with those of the Division of Tourism and Promotion. Article 83A, §2-103(c). The latter division attempts to promote Maryland businesses and job opportunities, advertise the State, and disseminate information about the State. *See* Article 83A, §4-103.

The "Maryland With Pride" program was developed to further these objectives. Moreover, use of the program's logo is controlled by

---

[2] In this opinion, the Attorney General concluded that a governmental entity is a "person" under the State trademark registration statute, because application of the term "would result solely in enhancement of the entity's proprietary activities." 67 *Opinions of the Attorney General* at 387. This conclusion is not at odds with the rule that "[a] governmental entity will be excluded from the general term 'person' if the contrary reading would result in impairment of the entity's sovereignty ...." 67 *Opinions of the Attorney General* at 386.

the State. Businesses must complete a registration form to become a member of the "Maryland With Pride" program. In effect, the program is licensing its logo to participating businesses, much as a trademark is licensed by the trademark owner. *See generally* 3 Callman, *The Law of Unfair Competition Trademarks and Monopolies* §19.48, at 417 (4th ed. 1983).

In short, the program is reasonably calculated to promote and further the public purposes of the Departments of Agriculture and the Economic and Employment Development. The promotional campaign is designed to identify products that are grown, processed, manufactured, or handcrafted in Maryland and thereby to promote Maryland. This program is a far cry from the private commercial exploitation of the Maryland flag prohibited in Article 27, §82(c).

III

Conclusion

In summary, it is our opinion that Article 27, §82(c) does not apply to the use of the flag in the State's "Maryland With Pride" program.

J. Joseph Curran, Jr.
Attorney General

Alexander Wright, Jr.
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

DRUG ENFORCEMENT ACT

LICENSES — SANCTION PROVISIONS OF THE ACT ARE NOT APPLICABLE TO SOLE PROPRIETORSHIPS

October 11, 1990

Peter C. Cobb, Esquire
Executive Assistant to the
Governor for Public Safety

You have requested our opinion concerning the scope of Chapter 410 (House Bill 515) of the Laws of Maryland 1990, the Drug Enforcement Act of 1990.[1] Specifically, you have asked whether the license sanction provisions of Chapter 410, which require notification when a holder of a State license is convicted of a controlled dangerous substances offense and authorize licensing agencies to take disciplinary action against licensees on the basis of such convictions, apply to the owners of sole proprietorships for which a business entity license is required, as well as to individuals licensed in their individual professional, occupational, or employment capacity.[2]

For the reasons that follow, we conclude that the license sanction provisions were not intended to apply to sole proprietorships.

I

Scope of License Sanction Provisions in Chapter 410

In a recent case, *Morris v. Prince George's County*, 319 Md. 597, 573 A.2d 1346 (1990), the Court of Appeals reiterated its recent approach to statutory construction, emphasizing a realistic effort to discern the General Assembly's underlying objective:

---

[1] Chapter 410 will become effective on January 1, 1991.

[2] For the sake of clarity, holders of business entity licenses will be referred to in this opinion as "sole proprietors"; individuals licensed as individuals will be referred to as "natural persons." *Cf.* note 5 below.

> Obviously, "'what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal.'" ... And sometimes it may not be necessary to go further than the scrutiny of statutory language, for the language itself may be sufficiently expressive of the legislative purpose or goal.
>
> But our endeavor is always to seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment.... In the conduct of that enterprise, we are not limited to study of the statutory language.... The "meaning of the plainest language" is controlled by the context in which it appears.... Thus, we always are free to look at the context within which statutory language appears.... Even when the words of a statute carry a definite meaning, we are not "precluded from consulting legislative history as part of the process of determining the legislative purpose or goal" of the law.

319 Md. at 603-04 (citations omitted). In considering Chapter 410, we conclude that both the language of the statute and its legislative history indicate an intent to exclude sole proprietorships from the coverage of the license sanction provisions.

As enacted, Chapter 410 defines "license" as follows:

> (1) "License" means a license, permit, certification,
registration, or other legal authorization:
>
> (i) Issued to or granted to an individual by a licensing authority; and
>
> (ii) Required for engaging in employment or an occupation or profession.
>
> (2) "License" includes a commercial driver's license issued under Title 16, Subtitle 8 of the Transportation Article.

(3) Except as provided in paragraph (2) of this subsection, "license" does not include:

(i) A license to drive a motor vehicle issued by the Motor Vehicle Administration under Title 16 of the Transportation Article; or

(ii) The registration of an agent, issuer agent, or investment advisor representative under the Maryland Securities Act (Title 11 of the Corporations and Associations Article) and regulations adopted under that act.

Article 41, §1-403(c).

The dictionary definitions of the term "individual" indicate that it typically refers to natural persons and not to business entities. *Webster's Third New International Dictionary* (1986), for instance, states that the term "individual" refers to a "single human being as contrasted with a social group or institution." And *Black's Law Dictionary* (5th ed. 1979) states that the term "denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association ...."

Black's Law Dictionary goes on to point out that the term "individual" "may, in proper cases, include artificial persons," and, indeed, the term has on occasion been read by courts in other jurisdictions to include corporations and other business entities. *See, e.g., Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986); *Nelson v. U.S. Fire Insurance Co.*, 66 Cal. Rptr. 115, 118 (Cal. App. 1968). For purposes of legislative drafting in Maryland, however, the term is not given such a broad reading: "If [a statutory] reference is intended to apply only to human beings, use 'individual'." *Maryland Style Manual for Statutory Law* 90 (1985). Thus, use of the term "individual" in Article 41, §1-403(c) supports the conclusion that only natural persons were to be included. *See Shermco Industries v. Secretary of the Air Force*, 452 F. Supp. 306, 314 (N.D. Tex. 1978), *rev'd on other grounds* 613 F.2d 1314 (5th Cir. 1980) (term "individual" in federal Privacy Act does not apply to "proprietorship"). *See also St. Michael's Convalescent v. State of Colo.*, 643 F.2d 1369 (9th Cir. 1981); *Northern Rent-A-Car, Inc. v. Conway*, 464 A.2d 750 (Vt. 1983).

The remaining language of the statutory definition also supports the conclusion that the license sanctions were intended to apply only to natural persons and not to sole proprietor. Businesses, including sole proprietorships, are not generally thought of as "engaging in employment or an occupation or profession." Even if the owning of a business of a certain type is viewed as "an occupation or employment" of the sole proprietor, a business permit does not authorize the sole proprietor to engage in that employment or occupation. Instead, it authorizes a specific business to operate. Additional businesses, even if owned by the same sole proprietor, require additional permits. *See, e.g.*, §5-504(c) of the Business and Occupations Article ("BOP" Article).

In addition, if the sole proprietor wishes to actually practice a regulated occupation or profession that is to be the object of the business, he or she must be licensed as an individual for that occupation or profession as well; the holding of a business permit alone does not suffice. *See, e.g.*, BOP §§13-307 and 13-402. Thus, a business permit, when issued to a sole proprietor, does not fall within Chapter 410's definition of "license."

This conclusion is supported by the legislative history of the provision. When House Bill 515 was introduced, the bill defined "license" as follows:

> (1) A license, permit, certification, or charter issued by a State licensing authority; or
>
> (2) A license registered with the Department of Assessments and Taxation as a foreign corporation doing business in Maryland.

See Laws of Maryland 1990 at 1670-71.

This definition clearly included all business permits, including those for sole proprietorships. However, the bill treated "individual" licensees and "business licensees" differently. An "individual" applying for a license or renewal was subject to the license sanction provisions. A "business licensee," on the other hand, would have been required merely to establish and maintain a drug and alcohol-free workplace.[3]

The House Judiciary Committee adopted amendments that eliminated the drug and alcohol-free workplace provisions applicable to business licensees and changed the definition of "license" so that it covered a long list of specific licenses. The Senate Judicial Proceedings Committee, however, while leaving out the drug and alcohol-free workplace provisions, returned to a definition of "license" based on the one in the original bill (except that it omitted a reference to charters).

The final version, arrived at in conference committee, also is based on the original definition but was amended to apply only if issued to "an individual" to engage in "employment, an occupation, or [a] profession." The addition of this limitation strongly suggests an intent to cut back on the scope of the definition in comparison to the earlier definition, which had included licenses issued to business entities. "All parts of a statute must have been intended to have meaning ... and must be so interpreted." *Baltimore City v. United Five and Ten Cent Stores, Inc.*, 250 Md. 361, 368, 243 A.2d 521 (1968).[4]

---

[3] "Business licensee" was defined as "a corporation, partnership, association, or entity other than an individual which receives a license, permit, certification, or charter from a State licensing authority." "State licensing authority," in turn, was defined as "an agency of the State of Maryland which issues licenses to individuals."

Because this latter definition made the "business licensee" definition meaningless, the Administration proposed an amendment to remove reference to individuals in the licensing authority definition. This amendment was adopted by the House and became part of Chapter 410.

[4] In addition, the history of the "securities" exemption, Article 41, §1-403(c)(3)(ii), reflects the legislative intent to limit the license sanction provisions to individuals, as distinct from business entities in any form. Testimony from a representative of the securities industry suggested the impracticability of applying sanctions to the thousands of individuals and business entities, many located out of state, licensed by the Securities Commissioner. The General Assembly, recognizing the validity of this concern, added the exemption in §1-403(c)(3)(ii). But the exemption is worded in terms of individuals only — "agent, issuer agent, or investment advisor representative." Surely the General Assembly was not trying to solve only half of the problem. Its choice of wording in this exemption implies a legislative recognition that business entities like broker-dealers and investment advisors were already outside the scope of the act and did not require an express exemption.

II

Conclusion

In summary, it is our opinion that the license sanction provisions of Chapter 410 apply only to individuals licensed to engage in employment or an occupation or profession. They do not apply to sole proprietors who hold business entity licenses.[5]

J. Joseph Curran, Jr.
Attorney General

Kathryn M. Rowe
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[5] This conclusion should not be taken to suggest that we discern any general distinction between the legal rights and obligations of an individual and those of the individual's sole proprietorship. In most contexts, there will be no such distinction. Our conclusion is limited to our understanding of the legislative objective underlying Chapter 410.

DRUG TESTING

LABORATORIES — PHYSICIAN NEED NOT ORDER TESTS CONDUCTED FOR JOB-RELATED REASONS — PHYSICIAN OR OTHER QUALIFIED PROFESSIONAL MUST SCREEN POSITIVE TEST RESULTS

September 10, 1990

Ms. Joann M. Levy
Governor's Office of Justice Assistance

You have requested our opinion concerning the requirements of §17-214.1 of the Health-General Article ("HG" Article), dealing with job-related drug and alcohol testing. Specifically, you have asked the following questions:

1. Who is authorized to order a drug test under the statute?

2. How are the results communicated to the employer and by whom? Who is authorized to review the results and speak with employees or employee-applicants if a test is confirmed positive? Is a medical review officer required?

For the reasons stated below, we conclude as follows:

1. Although a laboratory generally may analyze a specimen only upon order of a physician, this requirement does not apply to drug tests conducted for job-related reasons. An employer may contract directly with a laboratory for such testing.

2. A laboratory must ensure that positive results are screened before the laboratory reports them to the employer, so that information which may not be reported has been deleted. The screening must be done by a physician or other professional qualified to assess whether positive test results reflect permissible use of over-the-counter or prescription drugs. Maryland law does not require that the screening be done by a "medical review officer," which is a term in the guidelines of the federal drug testing program referring to a physician specially trained in substance abuse disorders who evaluates positive test results in light of an employee's medical background.

I

HG §17-214.1

HG §17-214.1, enacted in 1988 and amended in both 1989 and 1990, sets out procedures to ensure fair and accurate drug and alcohol testing procedures when an employer chooses to adopt a testing program.[1] The statute neither mandates nor prohibits testing; rather, it prescribes procedures when "[a]n employer ... requires any person to be tested for job-related reasons ...." HG §17-214.1(b).[2]

Under HG §17-214.1(b)(1), an employer must have the specimen tested by a laboratory that holds a permit from the Laboratories Administration of the Department of Health and Mental Hygiene ("DHMH") or, if the laboratory is located outside the State, is "certified or otherwise approved" under HG §17-214.1(e). This latter subsection provides that DHMH is to adopt regulations governing the certification of laboratories that conduct job-related drug and alcohol testing. The regulations require laboratory compliance with certain standards and guidelines for accreditation for proficiency testing and for compliance with federal cutoff levels for positive testing; they also include procedures for annual recertification and inspection. *See* COMAR 10.10.01.[3] An employer who requires an employee to be tested must also inform the employee of the name and address of the laboratory that will perform the test, if the employee so requests. HG §17-214.1(b)(2).

---

[1] Throughout this opinion, we use the phrase "drug testing" to refer to testing for "controlled dangerous substances," as defined in Article 27, §277 of the Maryland Code. *See* HG §17-214.1(a)(3).

[2] HG §17-214.1(g) states that the statute is applicable to job-related drug and alcohol testing of "any person, including pre-employment applicants, employees, and contractors." For ease of reference, we shall speak simply of "employees" in this opinion.

Uncodified Section 2 of Chapter 727 of the Laws of Maryland 1988, which enacted HG §17-214.1, states that "this act may not be construed to alter or expand the existing authority under law of an employer to test for the incidence of the use of drugs or alcohol of an employee, contractor, or applicant for employment."

[3] Certain amendments to these regulations have been proposed. 17:5 Md. Reg. 668 (March 9, 1990); 17:16 Md. Reg. 1998 (Aug. 10, 1990).

If the employee has been tested positive for the use or abuse of any drug or alcohol, the employer must, after confirmation of the test results, supply the employee with: (1) a copy of the test result; (2) a copy of the employer's written policy on drug or alcohol abuse; (3) if applicable, written notice of the employer's intent to take any disciplinary action; and (4) a statement or copy of the provisions of HG §17-214.1(d), which permits an employee to request independent testing of the same sample for verification of the test result.[4] The notification must be delivered in person or by certified mail and within 30 days from the date the test was performed. HG §17-214.1(e).

HG §17-214.1(f) exempts drug and alcohol testing "of a person under arrest or held by a law enforcement or correctional agency"; "[a]lcohol testing procedures conducted by a law enforcement or correctional agency on breath testing equipment certified by the State Toxicologist"; and drug testing "by a laboratory facility of a law enforcement or correctional agency that maintains laboratory testing standards comparable to the standards in this section."

Finally, HG §17-214.1(h)(1) requires that certain information be kept confidential:

> Except as [required by certain federal laws on commercial motor vehicles], in the course of obtaining information for, or as a result of, conducting job-related alcohol or controlled dangerous substance testing for an employer under this section, a laboratory, a physician, including a physician retained by the employer, or any other person may not reveal to the employer information regarding:
>
> (i) The use of a nonprescription drug, excluding alcohol, that is not prohibited under the laws of the State; or

---

[4] The employee tested must pay the cost of the independent test. HG §17-214.1(d)(2).

> (ii) The use of a medically prescribed drug, unless the person being tested is unable to establish that the drug was medically prescribed under the laws of the State.

II

Authority to Order Test

Under federal law, a laboratory that wants to participate in the Medicare and Medicaid programs, or that performs tests on specimens shipped across state lines, "must perform tests only at the written or electronic request of an authorized person." 55 Fed. Reg. 9538, 9594 (March 14, 1990), *to be codified at* 42 C.F.R. §493.1101(b). Under Medicare, only a physician is an "authorized person." 55 Fed. Reg. at 9541 and 9577. *See* 42 U.S.C. §1861(r). Otherwise, an "authorized person" is to be defined by reference to state law. 55 Fed. Reg. at 9541.

Under Maryland law, as a general matter only a physician, or someone acting under the authority of a physician, may order a laboratory test. The pertinent regulation of the Laboratories Administration provides as follows:

> A medical laboratory may not perform a laboratory examination without obtaining signed authorization by a physician, court of law, or other person authorized to order laboratory examinations under various sections of the Annotated Code of Maryland.

COMAR 10.10.01.06B(8).

This rule properly reflects the interaction of several statutory provisions. HG §17-205(a) requires that a person obtain a permit from DHMH before the person may "[o]perate a medical laboratory in this State" or "[r]epresent or service in this State any medical laboratory that is outside this State."[5] HG §17-201(b)(1) defines a "medical laboratory" as "any laboratory that makes examinations in connection with the *diagnosis* and control of human diseases or the assessment of human health, nutritional, or medical conditions." (Emphasis added.)

---

[5] Exceptions to the permit requirements exist for physician office laboratories that meet certain specified requirements not applicable here.

HG §17-208(b), relating to issuance and contents of a permit, provides that a laboratory must apply for certain "classes of services that the medical laboratory may offer" and implies that the permit authorizes only those classes of services set forth in the permit. One such class of service or specialty is the testing for drugs or alcohol. *See* COMAR 10.10.01.03N(7).

Under the Maryland Medical Practice Act, the practice of medicine includes, in relevant part, the following:

> *Diagnosing*, healing, treating, preventing, prescribing for, or removing any physical, mental or emotional ailment or supposed ailment of an individual
>
> 1. By physical, mental, or emotional or other process that is exercised or invoked by the practitioner, the patient, or both; or
>
> 2. By appliance, test, drug, operation, or treatment.

§14-101(j)(2)(i) of the Health Occupations Article ("HO" Article) (emphasis added).

Substance abuse is a recognized pathology. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 163-64 (3d ed. 1980). Thus, ordinarily, the diagnosis of drug or alcohol abuse — and, therefore, the use of a medical laboratory as part of a diagnostic procedure — constitutes the practice of medicine and may be undertaken only by a licensed physician (or by someone to whom those duties are properly delegated by a licensed physician under HO §14-304).[6]

---

[6] We are not here addressing the role of a licensed certified social worker, discussed in detail in 73 *Opinions of the Attorney General* 208 (1988).

Moreover, the general conclusion that only a physician may order a medical laboratories test, including drug or alcohol tests, is buttressed by HG §17-202.1, dealing with the release of laboratory examination results. Under that section, if an individual requests in writing a copy of the results of a laboratory examination performed upon that individual, the laboratory must send a copy. But the statute also requires the laboratory to "notify the individual's physician before sending the results to the individual." HG §17-202.1(c).

All of these general provisions, however, are framed with reference to laboratory testing as an outgrowth of the therapeutic relationship between physician and patient. None appears to contemplate the quite different circumstances of a workplace drug testing program, under which testing is for "job-related reasons." HG §17-214.1(b).[7] And the one statute directly addressing workplace testing, HG §17-214.1, does *not* require that tests be ordered by a physician.

In our view, the pertinent statute omits such a requirement because it would make little sense, given the realities of job-related testing. For example, assuming no impediment from a collective bargaining agreement, a private sector employer is free to adopt a random testing program for its employees. Surely no public policy objective would be served by having a physician engage in the ministerial act of signing testing requisitions for those employees selected at random to be tested. *See generally Morris v. Prince George's County*, 319 Md. 597, 603-04, 573 A.2d 1346 (1990) (statutes are to be construed to achieve "the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed ...").

In short, we think that a laboratory may perform drug testing for job-related reasons at the request of an employer or its authorized agent.

---

[7] We are not suggesting that assistance to the employee with a substance abuse problem ought not to be a part of a drug-free workplace program. Our point is simply that an employer adopts a testing program primarily in furtherance of its business interests.

III

Reporting of Results

Your other questions concern legal requirements that apply to the reporting of test results — first by laboratory to the employer, then by the employer to the employee.

The only requirement that we can identify under State law is that a physician or other appropriate health care professional, whether employed by the laboratory or the employer, review the results before they are reported to the employer.[8] This requirement necessarily follows, in our view, from the confidentiality requirements of HG §17-214.1(h). Raw test results may not be reported to an employer; they must first be screened to assure that the employer does not learn of the employee's use of a "nonprescription drug, excluding alcohol, that is not prohibited under the laws of the State" or of a "medically prescribed drug, unless the person being tested is unable to establish that the drug was medically prescribed under the laws of the State." HG §17-214.1(h)(1)(i) and (ii). The point of these provisions, we take it, is that an employer should not learn of a positive test if the test is positive not because of illegal drug use, but rather because of components in an over-the-counter or prescription drug properly used by the employee.

A laboratory cannot comply with this requirement unless it ensures that someone qualified to assess test results against information about an employee's particular medical situation is available to screen positive test results. However, the statute does not specify who is qualified to carry out this screening role, and this matter is largely one of judgment about the comparative qualifications of various health care professionals. Certainly a physician would be qualified to do so; we cannot say, however, that only a physician may do so. Ultimately, the statute imposes responsibility on the laboratory to accomplish the screening properly without specifying exactly how it is to be done.

In particular, HG §17-214.1 does not require a "medical review officer" in the chain of reporting. This term is used in certain guidelines for federal workplace drug testing programs issued by the National Institute on Drug Abuse. 53 Fed. Reg. 11970 (April 11,

---

[8] Laboratories subject to federal regulation are required to send a report promptly "to the authorized person ... that initially requested the test." 55 Fed. Reg. at 9594, *to be codified at* 42 C.F.R. §493.1101(d).

1988). A "medical review officer" is a "licensed physician responsible for receiving laboratory results generated by an agency's drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information." 53 Fed. Reg. at 11980. This specially trained physician, who may be an agency or contract employee, is to "examine alternate medical explanations for any positive test result" by, for example, "conducting a medical interview with the individual ...." 53 Fed. Reg. at 11985.

These guidelines apply only to federal agencies. 53 Fed. Reg. at 11979.[9] The guidelines do not prescribe generally applicable standards, although they are an authoritative and important resource.[10] Maryland law does not impose a comparable "medical review officer" requirement. The issue whether only a physician is qualified to distinguish permissible from prohibited use of drugs is certainly debatable as a policy matter. When the federal Department of Transportation adopted its drug testing program, for instance, it rejected suggestions that nonphysicians be permitted to interpret positive test results, concluding that "it is important ... that a person with substantial medical training be in a position to make the critical medical judgment about whether an individual's drug use is legitimate." 54 Fed. Reg. 49854, 49860 (Dec. 1, 1989).[11] *See also* COMAR 06.01.09.03D(2) and 06.01.09.04C(2) (under State Department of Personnel drug testing program, test results are reported to State Medical Director.) Whatever the policy merits of a requirement that a physician review positive test results, however, Maryland law has not mandated it.

---

[9] The portion of the guidelines dealing with laboratory procedures applies to any laboratory seeking to perform drug testing for a federal agency.

[10] Chapter 602 (House Bill 800) of the Laws of Maryland 1990 requires that laboratories comply with the cutoff levels for positive test results contained in the federal guidelines. This new provision is HG §17-214(e)(2)(iv).

[11] Employers subject to the federal Department of Transportation regulations must comply with its requirement that a medical review officer, "a licensed physician with knowledge of substance abuse disorders," review all results prior to their transmission to the employer. 54 Fed. Reg. at 49875, *to be codified at* 49 C.F.R. §40.33(a)(1) and (b)(1).

IV

Conclusion

In summary, it is our opinion that a laboratory may conduct a drug test for job-related reasons upon request of an employer; an order of a physician is not required. However, a physician or other qualified health care professional must screen positive test results before they are reported to the employer.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Geoffrey J. C. Boyd
Assistant Attorney General

EDUCATION

LOCAL GOVERNMENT — SCHOOL BOARDS — AUDITS — COUNTY MAY AUDIT SCHOOL BOARD'S FINANCIAL TRANSACTIONS AND ACCOUNTS, BUT NOT ITS MANAGEMENT PRACTICES

February 23, 1990

Mr. John L. Armacost
Ms. Julia W. Gouge
Mr. J. Jeffrey Griffith
County Commissioners of
Carroll County

You have requested our opinion regarding the scope of the authority of the County Commissioners of Carroll County to audit the records of the Board of Education of Carroll County. Specifically, you ask whether §5-108(d) of the Education Article ("ED" Article) limits the county's audit to a review of the board's financial transactions and accounts, or whether it permits an audit that would assess the board's management practices.

For the reasons given below, we conclude that ED §5-108 limits the county to an audit of the board's financial transactions and accounts.

I

Background

A. *The County's Proposal*

As we understand the circumstances, the County Commissioners have issued a Request for Proposals ("RFP") to perform an audit of the Board of Education. The RFP states that the audit "will include evaluation of the past three years individual financial audits as well as various management and administrative practices." The RFP names, among the items to be reviewed, the board's purchasing practices, surplus/excess property policy, hiring practices, professional development policies, and other administrative practices as deemed appropriate.

The county takes the position that it is authorized to conduct such an audit by ED §5-108(d), which provides:

> In addition to the audit required by this section, the county commissioners or county council may conduct an audit using auditors employed by the county.

The board, while acknowledging the county's right to conduct an audit, contends that the county's authority is limited to an audit of "financial transactions and accounts," which the board itself must undertake annually. ED §5-108(a).[1] The county's proposed management audit, the board contends, would infringe upon the board's statutory authority to control educational matters in the county.

B. Types of Audits

To fully understand the parties' positions, one must consider the differences between a financial audit and a management audit, commonly referred to as a "performance audit."

---

[1] ED §5-108 provides in full as follows:

> (a) Each county board shall provide for an annual audit of its financial transactions and accounts.
>
> (b)(1) The audit shall be made by a certified public accountant or a partnership of certified public accountants who are:
>
> (i) Enrolled for practice by the State Board of Public Accountancy; and
>
> (ii) Approved by the State Superintendent.
>
> (2) The audit shall be made in accordance with the standards and regulations adopted by the State Board.
>
> (c)(1) The results of the audit are a matter of public record.
>
> (2) The results shall be reported within 3 months after the close of the fiscal year for the county board to the State Superintendent and the county fiscal authority on the form and in the manner required by the State Board.
>
> (d) In addition to the audit required by this section, the county commissioners or county council may conduct an audit using auditors employed by the county.

A "financial audit" generally refers to a review of an entity's financial statements, or segments of them, for two purposes: to determine whether the statements fairly present the audited entity's financial position in accordance with generally accepted accounting principles; and to determine whether the entity has complied with legal requirements governing those transactions and events that may have a material effect on the financial statements. *See* United States General Accounting Office, *Government Auditing Standards*, ch. 2 (1988 revision). The resulting auditor's report expresses an opinion on the entity's financial presentation but not on its underlying managerial success.

A "performance audit," on the other hand, generally refers to an assessment of an entity's or program's practices to determine whether the entity or program is operating economically and efficiently, whether it is achieving its objectives, and whether corrective actions for improving its performance are appropriate. *Id.* Thus, a performance audit is significantly more invasive than a financial audit.

II

History of Audit Provisions

The term "audit" is not defined in the Education Article. Nor does it have an unvarying meaning generally. *See In re Brown's Estate*, 408 Pa. 214, 183 A.2d 307, 316 (1962). The legislative history of ED §5-108(d) leads us to conclude, however, that the General Assembly intended to authorize an audit of financial transactions and accounts only.

Prior to the 1978 revision of the Education Article, ED §5-108 appeared as former Article 77, §118 of the Maryland Code. Subsections (a) and (b) of Article 77, §118 were substantially similar to subsections (a) through (c) of the current ED §5-108. They required that a county board of education provide for an annual audit of "its financial transactions and [its] accounts" by a certified public accountant, following the standards and regulations adopted by the State Board of Education, and that the results be made public and be submitted in a report to the State Superintendent and the county fiscal authority. Subsection (c) of §118 stated:

> In addition to the audit authorized in this section, the county commissioners or county council

> are authorized to conduct *such* an audit using auditors employed by the county.

(Emphasis added.)

By its use of the modifier "such," the General Assembly evidently intended to limit the county commissioners or council to the type of audit required in the preceding provisions of §118 — that is, to an audit of a board of education's "financial transactions and accounts." "Generally the word 'such' refers only to something which has been said before .... 'It naturally, by grammatical usage, refers to the last precedent antecedent.'" *Board of Supervisors v. Weiss*, 217 Md. 133, 138, 141 A.2d 734 (1958) (quoting *In re Wallace's Estate*, 98 Cal. App. 2d 285, 219 P.2d 910 (1950)). *See also Black's Law Dictionary* 1284 (5th ed. 1979). In this case, the antecedent is the audit of "financial transactions and accounts" referred to in the preceding paragraphs of §118.

The term "such" disappeared in the recodification of this provision to what is now ED §5-108(d). The revisor's notes to the recodification of ED §5-108 state that "[t]he only changes are in style." Chapter 22, Laws of Maryland 1978. A revisor's changes in style are not intended to produce substantive changes in the law or its purpose. *See, e.g., Board of Educ. of Garrett County v. Lendo*, 295 Md. 55, 62, 453 A.2d 1185 (1982); *State v. Loscomb*, 291 Md. 424, 430, 435 A.2d 764 (1981); *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 155, 321 A.2d 748 (1974).[2] While the revisor's notes are not law, they are entitled to considerable weight in ascertaining legislative intent in Maryland. *Office and Professional Employees Intern'l v. MTA*, 295 Md. 88, 101, 453 A.2d 1191 (1982).

Therefore, we conclude that the General Assembly intended no substantive change when it adopted ED §5-108(d) without the word "such." The county audit authorized by subsection (d) is limited in scope to the audit of financial transactions and accounts required by the preceding subsections of ED §5-108, just as the audit authorized by former Article 77, §118(c) was limited.

---

[2] "Recodification of statutes is presumed to be for the purpose of clarity rather than change of meaning. Thus, even a change in the phraseology of a statute by codification will not ordinarily modify the law unless the change is so material that the intention of the General Assembly to modify the law appears unmistakably from the language of the Code." *In re Special Investigation No. 236*, 295 Md. 573, 576-7, 458 A.2d 75 (1983).

Moreover, the legislative history of former Article 77, §118 suggests that the General Assembly has consistently decided against authorizing broad audits by county officials of boards of education. This provision, §118, was enacted in 1969 as one of several changes to implement the recommendations of a School Law Revision Commission appointed in 1966. Chapter 405, Laws of Maryland 1969.[3]

The commission expressly recognized the traditional separation of education from other functions of local government in Maryland and made several recommendations to improve the working relationships between local boards of education and local government agencies. Among them, the commission recommended "[t]hat a more comprehensive annual audit be made of the financial transactions and accounts of the local boards of education by certified public accountants approved by the State Superintendent of Schools," and that "the State Board of Education should prescribe standards for such audits." Report of the School Law Revision Commission at 25-26 (Dec. 1, 1967) ("Report"). It was the commission's intent to prevent the need for State and federal auditors to make audits at the local level regarding expenditure of State and federal funds. Report at 38. Judging from these comments, the commission intended to improve the *quality* of local level audits, not to change the traditional relationship between county boards and county fiscal authorities.

In addition to language requiring the local board to provide an annual audit of its financial transactions and accounts, the commission's proposed statute included the following language: "Additional audits may be made at the request of the local fiscal authorities upon approval by the State Auditor." Report at 67. The General Assembly adopted the commission's proposed statute essentially unchanged, with the exception of the final phrase regarding audits by local fiscal authorities. Instead of the potentially broad scope of "[a]dditional audits," the General Assembly chose instead to use the limiting phrase "such an

[3] Prior to 1969, each board of education was required to conduct an audit of "its business and financial transactions and of the accounts of its treasury"; in certain specifically enumerated counties, the county commissioners were authorized to "audit the books and accounts" of the boards and school superintendents. Former Article 77, §69.

audit," discussed above. It thereby limited the counties to the same type of financial audits as the boards themselves were to conduct.[4]

Finally, the General Assembly's choice of language — whether in former Article 77, §118 or in current ED §5-108(d) — stands in marked contrast to that used in another context, where the General Assembly has unmistakably authorized a broad performance audit. The Division of Audits, within the State Department of Fiscal Services, is directed to conduct an audit of each unit of State government at least once every two years. §2-1215 of the State Government Article ("SG" Article). The General Assembly has defined the scope of the audit to include both fiscal and compliance parts and performance parts, thus recognizing a distinction between the two. As to the performance part, the Division of Audits is authorized to conduct "(1) a review of the efficiency and economy with which resources are used; and (2) a review to determine whether desired program results are achieved effectively." SG §2-1216(b).[5]

As we have explained, the term "audit" in ED §5-108(d) is limited to an audit of "financial transactions and accounts." The General Assembly did not intend to empower the counties to conduct a performance audit of boards of education, as it surely intended by the much more expansive language used in describing the Legislative Auditor's power to conduct a performance audit of units of State government. *See* 63 *Opinions of the Attorney General* 453 (1978).

Our reading of ED §5-108(d) does not make a practical nullity out of this grant of authority to the counties. A financial audit necessarily is selective: An auditor examines a sample of pertinent transactions, not all of them. Therefore, a second financial audit, which would be undertaken at the commissioners' discretion and would examine a

---

[4] The resulting provision extended the authority to audit the books and accounts of boards of education to all counties, rather than just certain enumerated counties. The General Assembly also rejected the commission's proposal to subject the counties to a requirement to obtain approval from the State Auditor before auditing boards of education.

[5] By contrast, the annual audits that counties and other political subdivisions are required to submit to the Legislative Auditor are of their "books, accounts, records and reports" for the purpose of examining the "accuracy and legality" of their methods and of suggesting "methods of bookkeeping, changes in the uniform system of financial reporting and changes in the reports ...." Article 19, §40.

different sample or be conducted in greater depth, can be an important safeguard; it is not an exercise in useless duplication.

III

Allocation of Powers Between County and Board

Other provisions of law governing the allocation of power and duties between county boards of education and county governments also support our conclusion that the county's audit authority is limited to a review of the board's financial records and accounts. ED §5-108(d) should be construed in harmony with these provisions.[6]

A county, through its commissioners, may exercise only those powers that have been expressly or impliedly granted by law. Article VII, §1 of the Maryland Constitution; *Harbor Island Marina, Inc. v. Board of County Comm'rs of Calvert County*, 286 Md. 303, 309, 407 A.2d 738 (1979).

The county's authority to audit the board derives solely from ED §5-108(d). Boards of education are not subject to the budget and fiscal policies and purchasing laws of the counties in which they are located. *Cf.* Article 24, §8-101. Moreover, the State has preempted the area of educational budgeting, so that local school boards are not subject to county budgetary requirements, substantive or procedural, that are not authorized by State law. 68 *Opinions of the Attorney General* 236 (1983). *See Board of Educ. of Montgomery County v. Montgomery County*, 237 Md. 191, 197, 205 A.2d 202 (1964); *Montgomery County v. Yost*, 223 Md. 150, 162 A.2d 462 (1960) (inconsistencies between county budgetary requirements and public general law must be resolved in favor of the latter).

A county's authority to control expenditures of the local board of education is limited by statute. Each local board is charged with the duty of preparing an annual school budget, subject to the rules and regulations of the State Board of Education, which it submits to the county officials. ED §§5-101 and 5-102. A county is mandated to contribute a minimum amount to the current expenses of the school

---

[6] We note that the County Commissioners of Carroll County are "nonvoting ex officio members" of the Carroll County Board. ED §3-301(a)(2). This opinion does not address what entitlement the commissioners may have, in their capacity as board members, to examine records of the board.

board by levying a sufficient annual tax. ED §§5-103, 5-104, and 5-202(b)(3). A county is also required to levy sufficient funds to meet the minimum salaries required by ED §§6-301 and 6-302 for teachers and other professional and clerical personnel. *See Board of Educ. v. Montgomery County*, 237 Md. at 200. A county may provide funds in excess of the minimum amount required by law. ED §5-103(c). A county may also reduce the amounts requested by the board of education that are in excess of the minimum amount required by ED §5-202, but in so doing must identify in writing the categories of the budget that have been reduced and the reasons for the reduction. ED §5-103(d). *See generally* 64 *Opinions of the Attorney General* 51, 52-53 (1979).

County boards of education, on the other hand, are granted broad authority to control all educational matters that affect the counties. ED §4-101. A board's powers and duties include, among other things, the power to: appoint and set the salaries of all principals, teachers, and other certificated and non-certificated school personnel, ED §4-103; determine the educational policies of the county school system and adopt rules and regulations for the conduct and management of the county public schools, ED §4-107; establish public schools and determine their geographical attendance area, ED §4-108; establish curriculum guides and courses of study for the schools under its jurisdiction, ED §4-110; and acquire and dispose of real property and rent, repair, improve, and build school buildings, ED §4-114. A county may not impose any requirement on a board that would interfere or conflict with the board's express statutory powers. *See* 68 *Opinions of the Attorney General* at 240 (county may not constrain a board's discretion to spend funds in accordance with State law).

The Request for Proposal in question here appears to cover areas in which action would exceed the county's powers or conflict with the board's express powers. For example, the RFP indicates that the auditors are expected to review the "purchasing practices by the Board of Education, [and the] feasibility/desirability of combining purchasing departments between Board of Education and the County," even though the board is not subject to the county's purchasing policies or laws. The RFP also requires review of the board's hiring practices, including internal promotional policies, general hiring criteria, and experience requirements for administrative positions, even though the board possesses the power to appoint all school personnel and set their salaries. *See* ED §§4-103, 6-301, and 6-302.

IV

Conclusion

In summary, it is our opinion that the County Commissioners' authority to audit the Board of Education of Carroll County under ED §5-108(d) is limited to an audit of the board's financial transactions and accounts. An audit of the kind sought by the county may be conducted only if the General Assembly amends the statute to authorize it.

J. Joseph Curran, Jr.
Attorney General

Caroline E. Emerson
Assistant Attorney General

Jack Schwartz
Chief Counsel,
Opinions & Advice

EDUCATION — HANDICAPPED CHILDREN — EXPULSION AND SUSPENSION PROCEDURES FOR HANDICAPPED CHILDREN IN PRIVATE SCHOOLS

July 18, 1990

The Honorable Samuel I. Rosenberg
Maryland House of Delegates

You have requested our opinion on the applicability of rules of the State Board of Education governing the expulsion and suspension of handicapped children. Specifically, your questions are as follows:

1. "Do the rules governing expulsion and suspension procedures apply to all private schools or only to those that receive public funds?"

2. "Is the availability of a corresponding public program of consequence?"

3. "Does *Honig v. Doe*, 108 S.Ct. 592 (1988), control this issue in Maryland and, if so, to what extent?"

For the reasons stated below, we conclude as follows:

1. All State-approved private schools that offer special education and related services must follow procedures that protect a handicapped student against unwarranted disruption of the educational plan developed for that student. In the case of a student in a State-approved private school who is placed by a local board of education, the procedures are those specified in the federal Education for the Handicapped Act and the State regulation that implements it, COMAR 13A.08.01.07F. In the case of a student in a State-approved private school who is not placed by a local board of education, the procedures are those developed by the school itself, following the basic principles underlying the federal and State procedures but not bound to the details of them. If a private school does not have State approval, it is not subject to any regulatory requirements concerning the expulsion or suspension of handicapped students.

2. The existence of a corresponding public program is relevant, as indicated in response to your first question, to the details of the procedures. That is, if a local board of education has offered an appropriate placement in a public program but the student's parents opt for a State-approved private school instead, the school need not follow the specific procedures in COMAR 13A.08.01.07F. Instead, as a condition of State approval, the school must articulate and adhere to its own procedures governing when and how that handicapped student can be expelled or suspended.

3. Although *Honig v. Doe* is an important federal precedent in this area and influences our analysis, it alone does not resolve the questions that you have posed, for we must also take account of State approval requirements.

I

Background

State law specifically requires that "[t]he State and each county ... make free educational programs available to each handicapped child ...." §8-402(a) of the Education Article ("ED" Article).[1] When a school-age child is identified as requiring special education services in order to learn, he or she may be referred by the local board of education to an appropriate public school placement. *See* ED §8-401(a). If no placement is available in a public program, the child "shall be placed in an appropriate nonpublic educational program that offers [special educational] services." ED §8-409(a). The State and county pay the cost of such a private placement if the State Department of Education has approved the program. ED §8-409(c)(1)(i).[2]

---

[1] The term "handicapped child" is defined in ED §8-401(a).

[2] The Department must also approve the placement, the cost, and the amount of payment. ED §8-409(c)(1)(ii), (iii), and (iv).

The parents of a handicapped child need not, however, accept the proferred placement.[3] If parents decide that they wish to send their child to a private school, they are not limited in their choice. They may select a private school that has State approval but is different from the school recommended by the local board. If parents unilaterally select a private school placement when a free appropriate public education is available to a handicapped child, the county is not obligated to pay for the placement. *See* 34 C.F.R. §300.403.

Moreover, parents may select a church-operated private school that is exempt from the requirement that it obtain State approval. COMAR 13A.09.09.01C.[4] Of course, the State does not provide referrals or funds to private schools that have not been approved. *See* ED §§8-403(c), 8-403(d)(6), and 8-409(a)(1).

II

Suspension or Expulsion Procedures

A. Introduction

The suspension or expulsion of students in public schools is governed by ED §7-304 and implementing regulations at COMAR 13A.08.01.07. The regulations contain special procedures and standards with respect to the suspension or expulsion of handicapped students from public schools. COMAR 13A.08.01.07F.

In brief, any suspension of more than 10 days or any expulsion is to be referred to a committee of the local school system. COMAR 13A.08.01.07F(2)(a). The parents have a right to appeal in accordance with the procedure of ED §8-415, and the student "shall be permitted to return to his or her educational program" during the appeal. COMAR 13A.08.01.07F(2)(a).

---

[3] We use the term "parents" in this opinion for brevity's sake, but a child's guardian has the same rights.

[4] Generally, any "noncollegiate educational institution" must obtain a certificate of approval from the State Board of Education. ED §2-206(e)(1). However, "an institution operated by a bona fide church organization" need not be approved. ED §2-206(e)(4).

Neither the statute nor the regulation applies directly to any private school, even those that receive public funds. However, these provisions cannot be read in isolation. As we explain in Part IIB below, federal law mandates certain protections for a handicapped student who is placed in a private school by a local school system (which we will refer to as a "public placement"). In Part IIC below, we explain our view that a State regulation imposes a similar, but not identical, requirement on State-approved private schools for a handicapped student who is placed there by the student's parents independently (which we will refer to as an "independent placement").

B. Public Placements

The federal Education of the Handicapped Act, 20 U.S.C. §1401 *et seq*. ("EHA"), is a federal statute that conditions distribution of federal funds for the education of handicapped children on compliance by the states with its requirements. An important element in the EHA's statutory scheme is that every recipient state must take steps to ensure that when a local educational authority provides services directly to handicapped students, it complies with the EHA in all respects. *See* 20 U.S.C. §1412(2).

Federal regulations state explicitly that this obligation is not altered when a child is placed by the local public school system in a nonpublic school:

> Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:
>
> . . .
>
> (3)(b) Has all of the rights of a handicapped child who is served by a public agency.

34 C.F.R. §300.401. A similar obligation is placed upon the local agency:

> Each public agency in the State is responsible for ensuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

34 C.F.R. §300.2(c).

The "rights" under the EHA include certain "procedural safeguards with respect to the provision of free appropriate public education ...." 20 U.S.C. §1415(a). One safeguard is "written prior notice to the parents or guardians of the child" of any proposal to "change ... the ... educational placement of the child or the provision of a free appropriate public education to the child." 20 U.S.C. §1415(b)(1)(c)(i). The parents are also entitled to "an impartial due process hearing" by local public education officials, review at the state level, and judicial review. 20 U.S.C. §1415(b)(2), (c), and (e)(2). During these proceedings, unless the parties agree otherwise, "the child shall remain in the then current educational placement of such child ...." 20 U.S.C. §1415(e)(3).

In *Honig v. Doe*, 108 S.Ct. 592 (1988), the Supreme Court held that a suspension of a handicapped child for more than ten days is a "significant change in placement" under the EHA, and that therefore a school system could not suspend a child for that length of time or longer unless all EHA procedures were followed. As a practical matter, this means that if a suspension of more than 10 days is disputed by the parent of a handicapped student, the student must stay in his or her current placement until the dispute ends.[5] This provision is a means of protecting the integrity of the child's individualized education program ("IEP"), which the Supreme Court characterized as "the center-piece of the [EHA's] educational delivery system for disabled children ...." 108 S.Ct. at 598.

Maryland accepts federal funding under the EHA and therefore is obligated to ensure that the protections of that act are extended to handicapped children placed in private schools by local boards. State law reflects this obligation. Under ED §8-403(c), "[t]he standards for the education of handicapped children who are enrolled in programs that are operated by an agency other than a county board may not be lower than the standards for the education of children who are enrolled in programs that are operated by a county board."[6]

---

[5] The local school authorities may seek an injunction that orders an extended suspension or an expulsion.

[6] Indeed, as we explain in Part IIC below, State-approved private schools are subject to regulatory requirements intended to safeguard the educational opportunity of *all* handicapped students, however they were placed. *See* COMAR 13A.09.09.15 through .22.

Hence, although the regulation governing the suspension or expulsion of a handicapped child, COMAR 13A.08.01.07F, speaks only of public schools, its procedures apply as well to public placements in private schools. The EHA, as interpreted by the Supreme Court, and state law require no less.[7]

C. Independent Placements

A private school that "offers special education and related services to students with special educational needs ..." and that seeks a State certificate of approval must satisfy the requirements set out in COMAR 13A.09.09.15 through .22.

In particular, a State-approved private school, whether or not it receives public funds, must adopt and implement an IEP for each handicapped child. COMAR 13A.09.09.19D(3). The contents of the IEP are essentially the same as if the student were in a public school. *Compare* COMAR 13A.05.01.06D *with* COMAR 13A.09.09.19D.

An IEP is "a written comprehensive statement which describes the special educational needs of the student and the special education and related services required to meet those needs." COMAR 13A.09.09.16B(1). The term is a borrowing from the EHA. *See* 20 U.S.C. §1401(a)(19). "Special education," also used in the EHA, "means instruction which is specially designed to meet the unique needs of a student with special educational needs and includes ... [c]lassroom instruction ...." COMAR 13A.09.09.16B(4).

Hence, although the regulations do not expressly address lengthy suspensions or expulsions, these disciplinary measures — which by definition remove a student from "classroom instruction" — could significantly affect the student's IEP. *See Honig v. Doe*, 108 S.Ct. at 598. If private schools could arbitrarily suspend or expel handicapped students, thereby changing their placement, the obligation to implement the IEP would be vitiated. In our view, the IEP requirement seeks to ensure that the handicapped child who attends a State-approved private

---

[7] In the 1990 Session, the General Assembly enacted Chapter 702 (House Bill 1498), effective July 1, 1990, which directly regulates the suspension and expulsion of handicapped children by applying standards consistent with *Honig v. Doe*. Its enactment does not alter our analysis.

A proposed amendment to the regulation governing suspension and expulsion of handicapped children, COMAR 13A.08.01.07F, was withdrawn, pending reformulation in light of the passage of Chapter 702.

school does not lose any educational opportunity by virtue of the fact that he or she is being educated in a private, instead of a public, setting.

However, the EHA itself does not apply to such an independent placement. Moreover, the procedures applicable to public placements cannot be applied directly, because they presuppose a role for local public school authorities that these officials simply do not play when they have not placed a child. *See* COMAR 13A.08.01.07F.

Until the State Board adopts regulations specifically addressing the suspension and expulsion of independently placed students in State-approved private schools, we can only advise as follows: A private school should itself formulate procedures that assure appropriate involvement of the independently placed student and the student's parents in decisions about an expulsion or any suspension that constitutes a significant change in placement. The procedures should provide notice to the parents, a due process hearing, and appeal rights to a senior officer within the school or in some other entity. If a school adopts procedures of this kind, it will have complied with its regulatory obligation to afford protection to the educational objectives of the IEP. *See* COMAR 13.09.09.19D(3).[8]

D. Other Placements

If a private school is not State-approved — that is, if it is operated by a church and has chosen not to seek State approval — it is not subject to the IEP requirement or any other State regulation. Therefore, the procedures that such a school may adopt about the suspension or expulsion of handicapped students are left entirely to the school's discretion.

---

[8] Alternatively, a private school may develop an IEP that, as part of the child's educational program, articulates procedures to be followed, including suspensions, in the event of misbehavior in the school environment. If this is done according to proper procedures, with full involvement of the parents, a subsequent suspension consistent with this portion of the IEP would not be a change in educational placement. It therefore would not trigger the procedures that would otherwise have to be followed.

III

Conclusion

In summary, it is our opinion that a State-approved private school must apply the same procedures to the suspension or expulsion of a handicapped child who was placed by a local school system as would be applied if the child were in a public school. If a handicapped child is placed independently of the local school system, a State-approved private school must apply its own procedures, sufficient to afford to the child's parents notice, a fair hearing, and an opportunity to appeal any suspension of more than 10 days or any expulsion.

J. Joseph Curran, Jr.
Attorney General

James P. Abbott
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

EDUCATION — VOCATIONAL EDUCATION AND REHABILITATION — PUBLIC CONTRACTS — LICENSING OF BLIND PERSONS TO MANAGE VENDING FACILITIES IN PUBLICLY OWNED OR LEASED BUILDING

December 21, 1990

Dr. Joseph L. Shilling
State Superintendent of Schools

You have requested our opinion concerning §21-303(c) of the Education Article ("ED" Article), which authorizes the State Department of Education, and in particular the Division of Vocational Rehabilitation ("DVR"), to license blind persons to manage vending facilities in State, county, municipal, and certain privately owned buildings. Specifically, you ask:

1. Does ED §21-303(c) create a priority for licensed blind vendors to operate vending facilities in State, county, and municipal buildings comparable to the priority for blind licensees to operate vending facilities on federal property that was created by the Randolph-Sheppard Act, 20 U.S.C. §107(b)?

2. Does ED §21-303(c) require that all vending facility managers in State, county, and municipal buildings be licensed by DVR?

3. Does this requirement apply to buildings owned or leased by State, county, and municipal entities?

4. Does the term "vending facilities" in ED §21-303(c) apply to "unmanned" vending facilities consisting solely of automatic vending machines? That is, must the managers of vending machines in State, county, and municipal buildings also be licensed by DVR?

For the reasons stated below, we conclude as follows:

1. ED §21-303(c) does not create a priority for licensed blind vendors to operate vending facilities in State, county, and municipal buildings.

2. DVR's licensing authority applies only to blind persons managing vending facilities in State, county, and municipal buildings.

3. ED §21-303(c) applies to all buildings controlled or occupied by State, county, and municipal entities, whether owned or leased.

4. The term "vending facilities" does include automatic vending machines; therefore, blind persons managing "unmanned" vending facilities must also be licensed by DVR.

I

History of the Vending Facility Program in Maryland

DVR's authority to license vending facility managers in federal buildings in this State derives from the Randolph-Sheppard Act, which was enacted in 1936 for the purpose of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting" by authorizing licensed blind persons to operate vending stands in federal buildings. Ch. 638, §1, 49 Stat. 1559 (1936) (codified as amended at 20 U.S.C. §§107 through 107f). This act provided that the state agency for the blind be designated as the agency for licensing blind persons to operate vending stands on federal property. At that time, the Maryland Workshop for the Blind, the predecessor to Blind Industries and Services of Maryland ("BISM"), was the State agency for the blind in Maryland.[1] The Maryland Workshop, therefore, was designated as the State agency to issue licenses to blind persons for vending stands on federal property.

In 1939, the General Assembly passed a bill authorizing the Maryland Workshop for the Blind to license blind persons to operate vending stands in all State, county, and municipal buildings "in order to enlarge the economic opportunities of the blind." Chapter 513, Laws of Maryland 1939.[2] The General Assembly made the Maryland

---

[1] The Maryland Workshop for the Blind was renamed Blind Industries and Services of Maryland by Chapter 164 of the Laws of Maryland 1973.

[2] The entire provision was repealed and reenacted with amendments in 1941, including the following:

> The construction of said vending stands and the location thereof shall be such as meets the approval of the custodian having charge of the building in which the vending stand is to be located, but such vending stands

(continued...)

Workshop for the Blind the licensing authority for virtually all vending stands in Maryland buildings in 1955 by authorizing it to enter into agreements with the owners of privately owned buildings for the operation of vending stands by licensed blind persons. Chapter 5, Laws of Maryland 1955.

In 1954, amendments to the Randolph-Sheppard Act required that the State vocational rehabilitation agency be designated as the State licensing agency for licensing blind persons to operate vending stands on federal property within four years. The amended act also required that, "In authorizing the operation of vending stands on Federal property, preference shall be given, so far as feasible, to blind persons licensed by a State agency as provided in this Act; and the head of each department or agency in control of the maintenance, operation, and protection of federal property shall ... prescribe regulations designed to assure such preference ...." Pub. L. No. 83-565, §4, 68 Stat. 663 (1954).

In 1958, to comply with the 1954 amendments, the General Assembly authorized the State Board of Education to carry out the provisions of the Randolph-Sheppard Vending Stand Act. Chapter 3, Laws of Maryland 1958 (Special Session). Thus, the Division of Vocational Rehabilitation was designated as the State licensing agency for federal vending facility managers, but BISM's predecessor, the Maryland Workshop for the Blind, remained the State licensing agency for non-federal vending facility managers.

The Randolph-Sheppard Act was again amended in 1974, in pertinent part by granting licensed blind vendors a priority to operate vending facilities on federal property and by requiring the establishment of vending facilities on federal property wherever feasible. The 1974

---

[2](...continued)

> shall be permitted to be installed in all of the public buildings hereinbefore mentioned wherever physically practicable, but under no circumstances shall any such vending stands be permitted to be installed which would in any way be in competition with any stands or concessions already in operation and with the further provision that the burden of establishing the physical practicability with a reasonable public necessity and convenience of such stands shall rest upon the applicant for the desired privilege.

Chapter 368, Laws of Maryland 1941.

amendments also provided that income from vending machines on federal property would accrue to blind licensees or, if there were no licensee on the property, to the State licensing agency, for restricted program uses. These and other 1974 amendments lead to significant differences in the treatment of federal and non-federal vending facility managers in Maryland.

To unify the program, the General Assembly in 1980 transferred the authority to license blind persons to manage vending facilities in State, county, municipal, and privately owned buildings to the State Department of Education. Chapter 743, Laws of Maryland 1980.[3] Presently, ED §21-303(c) states:

> The State Department of Education shall, in addition to licensing vending facility managers in federal buildings in this State under §21-302(c) pursuant to the federal acts, license blind persons to manage vending facilities in all State, county, and municipal buildings and in all privately owned buildings and premises in this State in the event of contract with such person. The Division of Vocational Rehabilitation in the State Department of Education shall be the licensing agency for all vending facilities within this State licensed under this subtitle.

II

Choice of Vendors

The beginning point of statutory construction is always the language of the statute itself. The words of the statute are assumed to have their natural, ordinary, and generally understood meaning in the absence of evidence to the contrary. *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235 (1990). Even where the meaning of the words appears plain, however, we may look to the context within which the statutory language appears and may consult the legislative history of the statute in order to understand the legislative intent. *Morris v. Prince George's County*, 319 Md. 597, 603-04, 573 A.2d 1346 (1990).

---

[3] The only subsequent change in the statute was made by the General Assembly in 1985 for the purpose of providing that DVR "shall be the licensing agency for, rather than the employer of, all licensed vending facilities operators in the State" and to eliminate "the State responsibility for fringe benefits paid licensed vending facilities operators." Chapter 709, Laws of Maryland 1985.

By its language, ED §21-303(c) simply grants DVR the authority to "license blind persons to manage vending facilities in all State, county, and municipal buildings and in all privately owned buildings and premises in this State in the event of contract with such person." Before the authority was transferred to DVR, BISM was granted the "authority to issue licenses to blind persons ... for the operation of stands in all State, county and municipal buildings ..." and "to make agreements and contracts with the owner or lessee of any privately owned buildings or premises in this State whereby Blind Industries would have authority to issue licenses to blind persons ... for the operation of vending stands in a private building or on private premises ...." Former Article 30, §§9 and 10 (repealed by Chapter 743, Laws of Maryland 1980). On its face, then, the statute does not create a priority for the vending facility program to install vending stands on State, county, or municipal property.

Upon examination of the legislative history and historical context of the statute, we find no support for a priority in favor of licensed blind vendors. State licensing authority for blind vendors on non-federal property was first granted to BISM's predecessor three years after the Randolph-Sheppard Act was enacted and was roughly patterned after the federal act. At that time, the federal act did not create a priority for blind persons to operate vending facilities on federal property. By the time that licensing authority for non-federal property was transferred to DVR, the Randolph-Sheppard Act had been expressly amended to create such a priority.

In contrast, the State legislation has never expressly granted a priority or preference to blind persons to operate vending facilities on non-federal property. The closest the General Assembly may have come to establishing a priority was in the 1941 amendments, which required that "vending stands shall be permitted to be installed in all of the public buildings hereinbefore mentioned wherever physically practicable." Chapter 368, Laws of Maryland 1941. We do not believe that this grant of "permission" rises to the level of a priority. In any event, the language was removed when licensing authority was transferred to DVR in 1980.

Legislation granting blind persons a priority to operate, and accrue the income from, vending stands or vending machines on State, county, or municipal property would constitute a significant departure from past practice. Historically, neither BISM nor DVR in administering the program has asserted a priority right to operate vending stands on State, county, or municipal property. In addition, in recent years BISM has relied on its procurement preference under §§14-102 and 14-

103 of the State Finance and Procurement Article, rather than a priority inherent in ED §21-303(c), to assert a preferential right to operate vending stands or provide vending machine services on State property. The longstanding administrative construction of a statute by an agency charged with administering the statute is entitled to deference. *Morris v. Prince George's County*, 319 Md. at 613. Legislative acquiescence to the agency's interpretation gives rise to a strong presumption that the interpretation is correct. *Id.* The General Assembly's reenactment of the licensing authority without substantive change confirms its acceptance of the construction that no such priority exists.[4]

Thus, in answer to your first question, we conclude that ED §21-303(c) does not create a priority for licensed blind vendors to operate vending facilities in State, county, or municipal buildings.

III

Scope of Licensing Authority

Your second question is whether the statute requires all vending facility managers in government buildings to be licensed by DVR. ED §21-303(c) states, however, that DVR shall "license blind persons" to manage vending facilities in governmental buildings. Furthermore, since its inception, the vending facility program has been for the purpose of "enlarg[ing] the economic opportunities of the blind" by authorizing blind persons to operate vending stands. *See* Chapter 513, Laws of Maryland 1939. Thus, we conclude that the licensing authority granted by ED §21-303(c) applies only to blind persons seeking to manage such vending facilities. Because there is no priority under the State law, a State, county, or municipal agency could elect to engage a person who is not blind to operate a vending stand on its property without a license from the Division of Vocational Rehabilitation.

Your third question is whether the licensing requirement applies to vending facilities in buildings owned or leased by State, county, and

---

[4] It is notable that other states that have seen fit to grant a priority to blind persons to operate vending facilities on State or other governmental property have done so through express statutory enactment (often referred to as "Mini Randolph-Sheppard Acts"). *See, e.g.*, Ark. Stat. Ann. §22-3-1303 *et seq.* (1987); Cal. Welf. & Inst. Code §§19625 and 19630 (West 1980); Fla. Stat. Ann. §413.051 (West 1986); Ill. Ann. Stat. ch. 23, §3331 *et seq.* (Smith-Hurd 1988).

municipal entities. ED §21-303(c) states that the licensing authority applies to "*all* State, county and municipal buildings." Because the General Assembly used the inclusive term "all" and also extended licensing authority to privately owned property, we conclude that it intended for this licensing authority to be construed as expansively as possible to apply to all buildings in the State in which a blind person might endeavor to manage a vending facility. Thus, we interpret "all" to mean buildings occupied or controlled by a State, county, or municipal entity, whether that entity owns or leases the building. This interpretation is supported by comparison to the Randolph-Sheppard Act, which has defined "federal property" since 1954 to mean "any building, land, or other real property *owned, leased*, or *occupied* by any department or agency of the United States ...." Pub. L. No. 83-565, §4, 68 Stat. 664 (codified as amended at 20 U.S.C. §107e(3)) (emphasis added).

Your fourth question is whether the term "vending facility" extends to automatic vending machines. The term "vending facility" was first used in the Maryland statute when the licensing authority for non-federal properties was transferred to DVR in 1980. The earlier versions had referred, instead, to "vending stands." *See* former Article 30, §§9 and 10. The 1974 amendments to the Randolph-Sheppard Act also replaced the term "vending stand" with "vending facility," which is defined as "automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment ...." Because ED §21-303(c) refers to vending facilities in both federal and non-federal buildings in the same sentence, we conclude that the General Assembly intended that the term would have the same meaning with respect to vending facilities on both federal and non-federal property. Therefore, we conclude that the term "vending facility" in ED §21-303(c) does include facilities consisting solely of automatic vending machines.[5]

---

[5] However, we caution that this definition cannot, by itself, require that all managers of automatic vending machines be licensed by DVR. As with manned vending facilities, it only requires that blind persons seeking to manage a vending facility in a State, county, or municipal building be licensed by DVR.

IV

Conclusion

In summary, it is our opinion that ED §21-303(c) authorizes the Division of Vocational Rehabilitation to license blind persons to manage manned or unmanned vending facilities in any building occupied or controlled by a State, county, or municipal entity, but does not create a priority requiring such entities to give blind persons the first opportunity to operate vending facilities in their buildings. Such a priority would have to be created by the General Assembly.

J. Joseph Curran, Jr.
Attorney General

Caroline E. Emerson
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

ELECTIONS

MUNICIPALITIES — VOTER REGISTRATION — APPLICATION OF PURGE PROVISIONS

April 4, 1990

Richard S. McKernon, Esquire

On behalf of the Commissioners of Poolesville, you have requested our opinion on whether Article 33, §3-20 of the Maryland Code applies to municipal elections.[1]

For the reasons stated below, we conclude as follows: Article 33, §3-20, which requires county boards of election supervisors to cancel the registration of voters who have not voted in any election for five years, does not apply to registration lists maintained by municipal corporations like the Town of Poolesville. A municipality is free to apply its own cancellation provisions to the registration list that it maintains. However, even if a resident of a municipality has been deleted from the municipal registration list as a result of a local "purge" provision, that resident nevertheless remains entitled to vote in municipal elections so long as he or she is registered with the county.

---

[1] A suit currently pending in federal court challenges the constitutionality of §3-20. *Hoffman, et al. v. State of Maryland, et al*, Civil Action No. K-90-669 (D. Md. filed Feb. 28, 1990). However, the suit raises no issue about the applicability of §3-20 to municipal elections. Hence, we are not foreclosed from addressing your inquiry.

I

Poolesville Charter Provisions

The Town of Poolesville requires registration of its voters. §82-6A, D, E, and F of the Poolesville Charter. In general, residents of the town are qualified as voters.[2]

The Poolesville Charter requires its supervisors of elections to cancel the registration of any voter who "has not participated in an election within five (5) preceding calendar years." Charter §82-6J. An "election" means a municipal election, at which voters vote for a Poolesville public officer or ballot question. Charter §82-6A.

II

Article 33, §3-20

Section 3-20(a)(1) provides, in pertinent part, that a county board of elections is to cancel the registration of a voter who "has been registered but has not voted at least once in a primary, general, or special election within the five preceding calendar years ...." Participation in a municipal election does not satisfy this requirement. *See* Article 33, §1-1(a)(6). Nor does §3-20 impose any duty on municipal election officials. *See* Article 33, §2-9(a).[3]

---

[2] "Residents of the Town of Poolesville shall be registered and qualified as voters if they are citizens of the United States of America, over the age of eighteen (18) years on or before the date of election, residents of the Town of Poolesville for thirty (30) days preceding and election, have not been convicted of an infamous crime (unless pardoned by the Governor), and are not under guardianship proceedings or a judgment of non composmentis." Charter §82-6D.

[3] Section 2-9(a) provides as follows: "[I]n any incorporated city or town in the State (other than the City of Baltimore) in which the municipal ... elections are regulated by ... the charter of the municipality, the conduct of municipal or charter elections shall continue to be so regulated as heretofore or may hereafter be provided by ... the charter of the municipality and the same shall continue in force therein."

III

Effect of Universal Registration

The purge provisions of the Poolesville Town Charter and of the State Election Code are neither overlapping nor conflicting. The former applies to the registration list maintained by the Town of Poolesville. The latter applies to the registration list maintained by the Board of Supervisors of Elections for Montgomery County. Nothing in State law prohibits Poolesville from applying its purge provision to voters on its registration list.

However, it does not follow that a voter removed from the Poolesville list because the voter has not voted in a Poolesville election for five years is necessarily precluded from voting in a Poolesville election in the future. The newly effective universal registration law contains the following provision: "Registration with a county board of elections, by a voter who resides in a municipal corporation located within the county shall be deemed registration for elections in that municipal corporation." Article 33, §3-2(d)(2).

Thus, if a voter has been deleted from the Poolesville registration list pursuant to Charter §82-6J but nevertheless has voted in a State or county election and thus has not been removed from the county registration list pursuant to §3-20, that voter "shall be deemed" to be registered for elections in Poolesville. In this context, the phrase "shall be deemed" means "shall be treated as if." *See Watts v. Brewer*, 243 N.C. 422, 90 S.E.2d 764, 767 (1956). *See also Swanson v. Employment Sec. Agency*, 81 Idaho 385, 342 P.2d 714, 719 (1959). Hence, such a voter would be entitled to vote in Poolesville elections.

This construction of Article 33, §3-2(d)(2) does not make a nullity out of Poolesville's separate purge provision. Poolesville is free to administer and maintain "a supplemental list of those persons who are not registered with the county board but who may otherwise be qualified to register to vote with a municipal corporation." Article 33, §3-2(d)(9). Thus, if Poolesville applied the purge provision of Charter §82-6J to a voter who was on the supplemental list only, that person would not be entitled to vote in Poolesville elections until the person reregistered with Poolesville (or, if the person were a resident of Poolesville, registered with the county).

IV

Conclusion

In summary, our opinion is as follows: Article 33, §3-20 of the Maryland Code does not apply to registration lists maintained by municipalities and does not preclude a town's application of its separate purge provision. Nevertheless, if a resident of a municipality remains on the county's registration list, that voter may vote in municipal elections even if the voter has been removed from the town's registration list as a result of a purge provision in the municipal charter.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

ELECTIONS — CANDIDATES — BALLOTS — BALLOT DESIGNATION OF PETITION CANDIDATES

August 8, 1990

Mr. Marvin Meyn
Deputy Administrator
State Administrative Board of Election Laws

You have conveyed the request of Douglas Jernigan, Elections Administrator for Montgomery County, that we reconcile, to the extent possible, certain inconsistencies in Article 33 of the Maryland Code ("the Election Code" or "the Code") relating to the designation of petition candidates on the general election ballot.[1] Specifically, you ask whether a candidate who is registered as "declined" — that is, unaffiliated with any political party having legal status in Maryland — and who desires to appear on the ballot as an "independent" may be designated as such in light of two ambiguous and seemingly conflicting provisions of the Code, §§9A-1 and 16-5(g). Furthermore, you ask for guidance in ballot designation for petition candidates who are registered as "declined" but who are affiliated with an organized group that is not a political party and who wish to be designated on the ballot as that group's candidate.

For the reasons stated below, we conclude as follows:

(1) A petition candidate who is registered as "declined" and who is not affiliated with a partisan organization may be listed on the general election ballot only under the designation "independent."

(2) A petition candidate who is registered as "declined" but who is affiliated with a partisan organization that is not a political party may be listed on the general election ballot only under the designation "other candidates."

(3) A petition candidate who is registered with a political party that nominates its candidates by petition, rather than by primary

[1] Except as otherwise specifically indicated, all statutory references in this opinion are to Article 33.

election, and who is the nominee of that party may be listed on the ballot only under the designation of that party.

(4) A petition candidate who is registered with a political party but who is running not as the nominee of that party but rather as the representative of a partisan organization may be listed on the ballot only under the designation "other candidates."[2]

I

Statutory Background

A. *Political Entities*

The Election Code defines a "political party" as "an organized group of the electorate that attempts to control government through the election of its candidates to office" and that meets one of two criteria: for parties that have previously attained legal status, polling "3 percent or more of the entire vote cast in the State in the last general election ..."; or for parties seeking to gain (or regain) legal status, filing a valid petition with the signatures of at least 10,000 registered voters. §§1-1(a)(15) and 4B-1(a).[3]

The Election Code also recognizes a type of political entity that is not necessarily a political party, the "partisan organization": "'Partisan organization' means any combination of two or more persons formed for the purpose of assisting the promotion of the success or defeat of any candidate, political party, principle, or proposition to be submitted to a vote at any election." §1-1(a)(12). If, for example, a political party lost its party status but its adherents continued to act jointly in pursuit of its electoral objectives, the former party would be a "partisan organization."

---

[2] A petition candidate may not be listed on the general election ballot with the designation of a party required to nominate its candidates by primary election (presently, the Democratic and Republican parties). §5-1(a). Nor, except for candidates for President or judicial offices or in the case of a vacancy in nomination, may a candidate who loses a primary election appear as a petition candidate for *any* office on the general election ballot. §8-2(a).

[3] If a party is formed by petition but then fails to obtain at least three percent of the vote for statewide candidates, it loses its party status. §4C-1(a) and (b). Thereafter, it can regain party status by filing the requisite petition for party formation. §4C-1(c).

B. Methods of Nomination

Article 33 sets forth two methods by which a candidate, other than a candidate for President of the United States and a delegate to a national convention, may have his or her name printed on the general election ballot: nomination by primary election and nomination by petition.

The first is expressly limited to a political party with which at least ten percent of the State's registered voters are affiliated ("a major party"). Section 5-1(a) requires major parties to nominate all of their candidates for public office at primary elections. Furthermore, boards of election are not permitted to print the names of any candidate on a general election or special election ballot representing a major party if the candidate not nominated at the preceding primary election. *Id.* Nor, except for candidates for President or judicial offices or in the case of a vacancy in nomination, may a person who loses a primary appear on the succeeding general election ballot as a candidate for any office. §8-2.

The second method, nomination by petition, is open to any of three types of candidates: (i) "a candidate for public office who is registered as an independent"; (ii) a candidate "who is a member of or affiliated with a partisan organization which is not a political party as defined in this article"; or (iii) a candidate "who is not a member of a political party whose nominees must be nominated by means of primary elections ...." §7-1(a).

C. Ballot Designation

Although §7-1 identifies the categories of petition candidates, it does not itself indicate how the several categories are to be listed on the ballot. For that one must turn to two provisions, §§9A-1 and 16-5(g), that are opaque even by the standards of the Election Code.

Section 9A-1 provides:

> A candidate for public office may not designate the political party with which he is affiliated on the ballot at any election held hereunder unless such party is a political party as defined in §1-1(a)(15) of this article. Candidates for public office who are not affiliated with a political party as defined in §1-1(a)(15) of this article shall be classified under the heading "other candidates" on the ballot. The

> provisions of this section shall not apply, however, to candidates for public office who are registered as an independent.[4]

At least the first sentence of the provision is clear, and correlates with the portion of §7-1(a) that authorizes nomination by petition of political party members whose party is not required to nominate its candidates by primary election. A candidate of either a new party (one recently formed by petition) or a minor party (one that garnered between three and ten percent of the statewide candidates' vote in the prior general election) who files the requisite nominating petition appears on the ballot under that party's name. *See* 57 *Opinions of the Attorney General* 210, 213 (1972).

The section's last two sentences suggest a dichotomy: Those "who are not affiliated with a [legally recognized] political party" are to be listed under "other candidates," except for those "who are registered as an independent" and who presumably are to be listed under the designation "independent."

Candidates "who are not affiliated with a political party" might fall in the second group of petition candidates under §7-1(a), those "who [are] member[s] of or affiliated with a partisan organization which is not a political party" — if, for example, the candidate is representing a former party that lost its official status.

But *some* "partisan organization" petition candidates might be affiliated with a political party, and their ballot designation status is not clear under §9A-1. In *Auerbach v. Mandel*, Civil Nos. 72-141 and 72-142 (D. Md. 1972), the federal district court found that a person who is associated by registration with a major party nevertheless may be nominated by petition as a candidate for a partisan organization with which the candidate is affiliated (provided that the candidate did not appear on the primary election ballot). This interpretation has been extended to a petition candidate who is registered as a member of *any* validly formed political party. *See* 58 *Opinions of the Attorney General* 277, 278-80 (1973) ("[A] candidate who is affiliated with a partisan organization may be nominated by petition, regardless of whether he is also affiliated with a political party recognized under Maryland law."). *See also Anderson v. Morris*, 636 F.2d 55, 58 n.9 (4th Cir.

---

[4] When this provision was originally enacted as Chapter 354 of the Laws of Maryland 1971, the word "independent" was capitalized. The change in capitalization was made in Chapter 11, Laws of Maryland 1987, at the same time that certain technical style changes were made.

1980). Such a candidate represents the partisan organization, not the political party.

The last sentence of §9A-1, making the rest of the section inapplicable to "candidates ... who are registered as an independent," is also problematic. It tracks the language of the portion of §7-1(a) allowing nomination by petition if a candidate "is registered as an independent." An "independent" is defined in the Election Code as "any voter who has declined to affiliate with a political party." §1-1(a)(8B). However, few if any candidates are "registered as an independent." Voters who do not affiliate with a political party are registered as "declined," not "independent." *See* §3-8(b)(1) and (4); Instructions of the Attorney General For the Use of Officers of Registration and Elections at 8 (1988).[5]

The treatment of "independent" petition candidates is further complicated by another provision, §16-5. This section sets forth in detail the form and arrangement of ballots, including specific directions relating to the order of offices and candidates as well as the ballot designation for those offices. The term "independents" is used in two different subsections of §16-5. Subsection (e) simply provides that "independents" shall be listed on the ballot after candidates of the principal majority party, candidates of the principal minority party, and candidates of other parties listed in order of highest voter registration.

Subsection (g), after directing that a petition candidate who is the candidate of a political party shall have the name of that party stated on the ballot to the right of the name of the candidate, provides:

---

[5] These instructions provide: "Whenever a voter declines to state a party affiliation, the word 'Declined' should be recorded opposite his or her name so that, for every registered voter, either a party affiliation or the word 'Declined' is recorded. The preferred term to use is 'Declined' rather than 'Independent'." The Election Code requires the Attorney General to issue "necessary" instructions. §25-3.

On the official registration form, a voter may check "Democratic," "Republican," "Decline to affiliate with a Political Party" or "Other (Specify)." Hence, a voter may simply check the "Decline" line or write in the name of a minor party or partisan group with which the voter is affiliated, or the voter may even write in the word "independent." Although some of the larger counties keep a record of the voter's actual designation of choice, all official registries throughout the State reflect only a party designation or "declined."

> [B]ut if there shall have been any nomination for the same office by a primary election claiming the same party name, duly certified as hereinbefore provided, there shall be then printed to the right of the name of the candidate so nominated by petition, only the word "Independent" and none other. If the same party name shall be claimed on behalf of nominations made by more than one primary election and duly certified as aforesaid, the officers by whom the ballots are to be prepared, or a majority of them, shall determine which nominees are justly entitled to the party name, and to the right of the names of other nominees there shall be printed upon the ballot only the word "Independent" and none other.

The phrase "and none other" might suggest that the term "independent" is to be used only under the peculiar circumstances identified in §16-5(g).

II

Legislative History

The substantive equivalent of the current §16-5(g) was enacted as part of a complete revision of the Election Code, Chapter 202 of the Laws of Maryland 1896, §50. The pertinent language was as follows:

> [I]f there shall have been any nomination for the same office by a convention or primary election claiming the same party name, duly certified, as hereinbefore provided, the word "independent" shall precede the party name .... If the same party name or emblem shall be claimed on behalf of nominations made by more than one convention or primary election and duly certified, as aforesaid, the officers by whom the ballot is to be prepared, or a majority of them, shall determine which nominees are justly entitled to the party name, or emblem and the word "independent" shall precede the party name of the other group or groups of nominees ....

The main difference between the language then and now is that the original enactment permitted the party name to follow the word "independent."[6] Under the fairly liberal candidacy requirements of the time, the Code imposed no restrictions on who could be nominated by petition. *See* former §42. Indeed, former §54 expressly recognized that one candidate could appear on the ballot representing more than one party or principle if nominated by multiple certificates.

In an apparent effort to bring some order out of what must have been a fairly chaotic ballot, the General Assembly changed the ballot arrangement section to require a candidate nominated by multiple parties to choose a single party for the ballot designation and added the proviso, retained in the Code today (§16-5(d)), that a party name shall consist of one word only. Chapter 124, Laws of Maryland 1912. The same legislation made another change, of significance to the construction of §16-5(g) in the current Code — the phrase "the word 'Independent,' and none other" replaced the phrase "the word 'Independent' shall precede the party name." Thus, the original meaning of "and none other," language retained in §16-5(g) today, was the disallowance of the party name along with the word "independent." Except for minor, non-relevant differences, the ballot access language in the 1912 statute is reflected in the current §16-5(g).

The term "independent" was defined for the first time by Chapter 392 of the Laws of Maryland 1967, at which time the Election Code was repealed in its entirety and a new Code enacted. The new definition, former §1-1(a)(8A), was as follows:

> "Independent" means any voter who has declined to affiliate with a political party entitled to nominate candidates at a primary election or primary meeting [*i.e.*, major or minor parties, but not new parties].

It is not clear why the General Assembly chose to add a definition of "independent," since no other provision of that recodification made a specific reference to independents, except the historic ballot arrangement provision discussed above. Perhaps there was some connection, not now discernable, to a well-publicized independent candidacy for Governor the year before.

In 1971, as a result of a fairly extensive revision of Article 33, three separate additional provisions relating to independents were

---

[6] Chapter 392 of the Laws of Maryland 1967 deleted the prior reference to nomination by convention.

enacted. *See* Chapters 352 and 354, Laws of Maryland 1971. The definition of "independent" was revised and renumbered to read as it does today.[7] More importantly, the same law, Chapter 354, enacted §9A-1, with its exception for "independents," and §7-1, with its provision for petition candidacy for "independents."

III

Analysis

In an effort to discern a rational purpose behind the drafting of §9A-1, we look first at the language itself. In drafting the exemption contained in the third sentence of §9A-1, the General Assembly declared that the independent candidates to which the section does not apply are those "registered as an independent," not those declared to be independents through the operation of §16-5(g). Indeed, those declared to be independents under §16-5(g) would in all likelihood be registered as a member of a major party. Since the General Assembly did not link the reference to independents in §9A-1 to the substance of §16-5(g), only four possible interpretations remain.

The first is that the exemption in the last sentence of §9A-1 is meaningless — that is, since no one is officially registered as an "independent," the proviso applies to no one. This interpretation must be avoided if at all possible. "When we look at the statutory language, we attempt to give effect to all the words in the statute." *Morris v. Prince George's County*, 319 Md. 597, 603, 573 A.2d 1346 (1990). Indeed, we are particularly reluctant to treat this language as a nullity in light of the fact that, during the same legislative session, the General Assembly also modified the definition of "independent" and provided that candidates registered as independents could run as petition candidates. "[R]esults that are unreasonable, illogical or inconsistent with common sense should be avoided ...." *Potter v. Bethesda Fire Department*, 309 Md. 347, 353, 524 A.2d 61 (1987) (quoting *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975)).

The second interpretation is that the General Assembly drafted the exemption in 9A-1 to permit a candidate affiliated with an official political party known as the Independent Party, should such a party

---

[7] The change clarified the definition's reference to political party by including any party meeting the §1-1(a)(15) definition. Therefore, new parties were encompassed by the reference to "political party."

ever exist, to be listed on the ballot as an Independent. However, the first sentence of §9A-1 already permits candidates affiliated with official political parties to be designated under the party name. Thus the exemption would deny the party name to Independent Party candidates. This interpretation, too, is implausible.

The third interpretation is that the General Assembly meant to encompass *all* candidates registered as "declined" under the term independent for the purpose of the §9A-1 exemption. Following that interpretation through to its logical conclusion, however, only candidates registered with a minor or new party but affiliated with a partisan organization would then be designated as "other candidates." Such a result makes little sense; it is hard to see why the General Assembly would have wanted to treat petition candidates affiliated with a partisan organization who are registered with a party differently than those who are registered as "declines," when both are representing the partisan organization.

The fourth interpretation reflects an effort to discern the "legislative purpose, the general aim or policy, the ends to be addressed ...," and measure the meaning of the statute by "the context within which statutory language appears." *Morris v. Prince George's County*, 319 Md. at 603-04. *See also Kaczorowski v. City of Baltimore*, 309 Md. 505, 525 A.2d 628 (1987).

Taking context into account, our best assessment is that the General Assembly intended to permit a candidate who is registered as a "decline" and who wants to represent to the voter that his or her candidacy is unfettered by ties to party or partisan organization to be listed on the ballot as an "independent."

In the late 1960's, not long before §9A-1 was enacted, there had been two well-publicized State races in which candidates registered as "declined" were officially listed on the ballot as independents. In 1966, Hyman A. Pressman appeared on the general election ballot as an independent candidate for Governor of Maryland. And in 1968, George P. Mahoney appeared on the general election ballot as an independent candidate for Senate of the United States.

Mr. Mahoney's desire for an independent candidacy gave rise to a decision by the Court of Appeals, *Lee v. Secretary of State*, 251 Md. 134, 246 A.2d 562 (1968), in which the right of a candidate to be designated on the ballot as an independent was explicity recognized. Mr. Mahoney, having failed to attain elective office as a registered Democrat, changed his registration to "decline" in order to run for the

Senate of the United States as an independent petition candidate. The fact that the Baltimore County Board of Supervisors of Elections reopened the registration books during a period when the books were to remain closed, in order to let Mahoney change his registration, fueled the ire of a Mr. Lee, who filed suit seeking to enjoin Mahoney's independent candidacy. The Court of Appeals found that the Baltimore County Board erred in letting Mahoney change his registration when the books should have been closed, but also decided that Lee failed to seek correction of the registration records in accordance with the statutory remedy, thus depriving the courts of jurisdiction to accomplish the result sought, the disqualification of Mahoney as an independent candidate.

In so holding, the Court of Appeals affirmed Mahoney's right to run as an independent if he was registered as a decline: "The weakness of [Lee's ineligibility argument] is that Mahoney's eligibility to run as an independent candidate depended on whether the registration lists showed, at the time he sought to do so, that he was registered as a decline." 251 Md. at 141. *See also Fisher v. Dudley*, 74 Md. 238, 24 A. 155 (1891).

Moreover, the General Assembly has not altered the language of §9A-1 in the face of post-1971 races in which candidates have appeared on the ballot as independents. In 1976 Bruce Bradley appeared on the November 2, 1976 general election ballot as an independent candidate for the United States Senate; in 1980 John B. Anderson and his running mate appeared on the November 4, 1980 general election ballot as independent candidates for President and Vice President of the United States; and in 1984 Lawrence K. Freeman appeared on the November 6, 1984 general election ballot as an independent candidate for United States Senator.

Moreover, our interpretation of §9A-1 parallels and is a logical extension of the categories of candidates nominated by petition. As discussed in Part I above, §7-1(a) recognizes that subcategories of "declined" voters exist for purposes of candidate differentiation: those who wish to register as independent, having no party or organizational allegiance or affiliation; and those who wish to be politically affiliated with a partisan organization that is not a party. Both groups of candidates are composed of voters who are listed on the registration rolls as "declined." Section 7-1(a) also permits a candidate not registered as declined to be on the ballot as a representative of a partisan organization that is not a party.[8]

The practical result of our analysis of the statutory provisions relating to ballot designation for petition candidates is the following categorization: Minor party and new party candidates are listed under their party name; petition candidates affiliated with non-party partisan organizations, whether registered as "declined" or as a member of a legally recognized political party, are listed under "other candidates"; and candidates registered as "declined" who are not affiliated with a partisan organization are listed under "independents."[9] A petition candidate who is registered as a member of a political party may be designated as "independent" only if the circumstances identified in §16-5(g) occur.[10] We recommend that the certificate of candidacy form for petition candidates be revised to obtain the information necessary for the correct ballot designation.

---

[8] A recent example of a candidate representing a partisan organization is Thomas P. Mathers, who appeared on the May 19, 1981 special election ballot as a candidate for United States Congress (Fifth District) under the designation "other candidates." Mr. Mathers was the candidate of the Libertarian Party of Maryland, an organization that qualified as a political party in 1980 but lost its party status in 1981 because of the failure of its presidential candidate to poll at least three percent of the vote statewide. *See Mather v. Morris*, 649 F.2d 280 (4th Cir. (1981).

[9] We hereby overrule the portion of 58 *Opinions of the Attorney General* 277, 280 (1973) asserting that "a candidate who qualifies for nomination by petition because he is an independent ..., must be listed on the ballot under the heading 'other candidates'." Inexplicably, the former conclusion was reached without any discussion of the proviso excepting candidates registered as independents from the requirements of §9A-1.

[10] Although surely an infrequent occurrence, the kind of dispute identified in §16-5(g) could still occur. A ballot designation challenge growing out of the adoption of the Baltimore County Charter in 1956 caused the Court of Appeals in *Tyler v. Board of Supervisors*, 213 Md. 37, 131 A.2d 247 (1957) to decide that the nominees of the Democratic State Central Committee for the first election of members of the County Council should be designated as Democrats (pursuant to §1103 of the Charter of Baltimore County) and that a petition-challenger, a registered Democrat, was to be designated as "independent" pursuant to former §69 of Article 33, which is now §16-5(g).

IV

Conclusion

In summary, it is our opinion that petition candidates who are registered as "declined" are to be designated on the ballot as "independent" if they are unaffiliated with either a political party or a partisan organization. Petition candidates, whether registered as "declined" or with a party affiliation, who are affiliated with a partisan organization that is not a political party are to be designated on the ballot under "other candidates."

J. Joseph Curran, Jr.
Attorney General

Elizabeth L. Nilson
Special Assistant to the Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

ENVIRONMENT

Controlled Hazardous Substance Facility — Financial "Security" — Department of Environment May Accept Corporate Guarantees Meeting Federal Requirements

February 8, 1990

Mr. Robert Pericasepe
Deputy Secretary of the Environment

You have requested our opinion on whether the Department of the Environment has the authority to allow a controlled hazardous substance facility permit holder to offer a corporate guarantee in satisfaction of the financial assurance requirement of the statute. The Legislative Auditor has expressed the view that a corporate guarantee would not satisfy that requirement, set out in §7-242(a)(1) of the Environment Article ("EN" Article).

Your counsel had previously advised that the Department had the authority to accept corporate guarantees or similar financial assurances from permit holders. For the reasons stated below, we agree with this advice.

I

Statutory Background

Under EN §7-232(a), "a person shall hold a facility permit before the person may own, establish, operate, maintain a controlled hazardous substance facility in this State."[1] An applicant for a permit is required:

---

[1] The terms "controlled hazardous substance," "controlled hazardous substance facility," and "facility permit" are defined in EN §7-201(b), (c), and (j), respectively.

> (1) To provide evidence of financial ability to properly establish, operate, and maintain a controlled hazardous substance facility; [and]
>
> (2) To file with the Department acceptable evidence of a bond or other security that the Department requires under [EN] §7-242 ....

EN §7-242, in turn, sets standards that a permit holder must meet in order to keep a facility permit. One of these requirements covers financial assurances, requiring each permit holder to:

> Maintain a bond or other security that the Department considers sufficient to cover any cost for:
>
> (i) Guaranteeing fulfillment of all requirements related to the facility permit;
>
> (ii) Monitoring, maintaining, or closing the controlled hazardous substance facilities; and
>
> (iii) Assuring the security of the controlled hazardous substance facility after closing; ....

EN §7-242(a)(1).

The Department has the power "to adopt rules and regulations to carry out the provisions of [the hazardous substance] subtitle." EN §7-208(a). Under EN §7-208(d)(4), "[i]f an exemption is consistent with federal law or federal regulation," a regulation may "exempt persons from any requirements of this subtitle."

II

Nature of "Security"

Neither the statute nor the Department's regulations themselves define the term "security." Instead, the Department's regulation, entitled "Financial Requirements," incorporates by reference the pertinent regulations of the federal Environmental Protection Agency. *See* COMAR 26.13.05.08.[2]

The federal regulations, in turn, set out extremely detailed requirements by which the "owner or operator of each facility must establish financial assurance for closure of the facility." 40 C.F.R. §264.143. *See also* 40 C.F.R. §§264.145 (post-closure care) and 264.151 (wording of instruments). Under the federal scheme, the operator may choose from one of a number of specified options, including the creation of a trust fund and the posting of a surety bond.

Another of these options is the "financial test and corporate guarantee for closure." 40 C.F.R. §264.143(f). To pass the financial test, the owner or operator must meet various criteria relating to assets, liabilities, net working capital, tangible net worth, and bond rating. 40 C.F.R. §264.143(f)(1). The federal regulation also provides that an owner or operator complies with its financial assurance obligations "by obtaining a written guarantee ... [from] the parent corporation of the owner or operator," which itself must meet the financial criteria of the regulation. 40 C.F.R. §264.143(f)(10).[3]

In our view, the Department permissibly may construe the term "security" in EN §7-242(a)(1) to encompass this form of financial assurance. We understand the Legislative Auditor's concern, for most commonly the term "security" denotes some "obligation, pledge, mortgage, deposit, lien, etc. given by a debtor in order to assure the payment or performance of his debt, by furnishing the creditor with a *resource* to be used in case of failure in the principal obligation." *Black's Law Dictionary* 1216 (5th ed. 1979) (emphasis added). A corporate guarantee is not itself a "resource" like a bond.

---

[2] "[T]he Department adopts as its regulations the federal regulations at 40 C.F.R. 264.140-.148, and 264.151 as amended through the Federal Register of January 2, 1987 (Volume 52, No. 1)."

[3] The provisions of the federal Resource Conservation and Recovery Act dealing with financial responsibility give broad discretion to the EPA Administrator in establishing evidence of financial responsibility. 42 U.S.C. §6924(t)(1). The statute does not use the term "security."

The term "security" does not have an unvarying meaning, however, but rather one that can vary from one context to another.[4] As the California Supreme Court observed, in some settings the term can apply broadly: "Whenever the performance of some undertaking is necessary to 'secure' or preserve the value of some asset or some other agreement, we could possibly refer to the undertaking as one that has been given as 'security.'" *Greve v. Leger, Limited*, 64 Cal. 2d 853, 52 Cal. Rptr. 9, 13 (1966). *See also Tahoe National Bank v. Phillips*, 4 Cal. 3d 11, 92 Cal. Rptr. 704, 711 (1971). *But see State ex rel. Landis v. Rosenthal*, 148 So. 769 (Fla. 1933) (personal bond of grantee of franchise does not satisfy statutory requirement of "security").

Moreover, the statute speaks not of a "security" in the abstract, but one "that *the Department* considers sufficient ...." (Emphasis added.) The federal criteria are designed to achieve the same results as the financial assurance provision of the Maryland statute. Because the agency's construction is not precluded by the statutory language or its evident purpose, that construction is entitled to considerable deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Batterton v. Francis*, 432 U.S. 416, 424-25 (1977); *Holy Cross Hosp. v. Health Services Cost Review Comm'n*, 283 Md. 677, 685, 393 A.2d 181 (1978).[5]

III

The Department's Exemption Authority

Even if the term "security" in EN §7-242(a)(1) could only be construed narrowly, so that corporate guarantees would not satisfy that provision, nevertheless the regulation in question would still be permissible. The Department has express power to adopt a regulation that "exempt[s] persons from any requirements of this subtitle," so long

---

[4] Indeed, this opinion should not be understood to be addressing the scope of the term "security" in any other context.

[5] On October 12, 1983, the Attorney General certified that Maryland law regarding hazardous substance control met certain federal requirements. As part of the certification, the Attorney General observed that "'[o]ther security' in [EN] §7-242(a) also may include letters of credit or other forms of financial assurance as deemed sufficient by the Department."

as the exemption "is consistent with federal law or federal regulation ...." EN §7-208(d)(4).[6]

The option to provide a corporate guarantee can be viewed as an exemption from the statutory requirement that a permit holder maintain a bond or other security. Hence, the exemption is permissible under EN §7-208(d)(4). The provision allowing corporate guarantees is manifestly "consistent with ... federal regulation," for it incorporates a federal regulation.

IV

Conclusion

In summary, it is our opinion that the Department of Environment acted within its authority in allowing facility permit holders to maintain a corporate guarantee that satisfies the financial assurance requirements in the pertinent federal regulation.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[6] This provision was enacted for the purpose of "authorizing the Secretary of the Environment to exempt certain persons from the requirements of the Controlled Hazardous Substances Law under certain circumstances." Chapter 115, Laws of Maryland 1988 (title).

FINANCIAL INSTITUTIONS

FEDERAL SAVINGS ASSOCIATIONS — ESCROW ACCOUNTS — PREEMPTION — MARYLAND STATUTE REQUIRING INTEREST ON ESCROW ACCOUNTS IS PREEMPTED BY FEDERAL REGULATION

May 29, 1990

Ms. Margie H. Muller
Bank Commissioner

You have requested our opinion on whether a federal savings bank doing business in Maryland is required by §12-109 of the Commercial Law Article ("CL" Article) to pay interest on escrow accounts established in connection with residential first mortgage loans.

For the reasons set forth below, we conclude that CL §12-109 may not be applied to institutions regulated by the federal Office of Thrift Supervision, because the Maryland requirement has been preempted by federal law. A federal savings association must pay interest on mortgage escrow accounts only if it is contractually obligated to do so.

I

Background

Maryland law requires that "[a]fter May 31, 1974, a lending institution which lends money secured by a first mortgage or first deed of trust on any interest in residential real property and creates or is the assignee of an escrow account in connection with that loan shall pay interest to the borrower on the funds in the escrow account ...." CL §12-109(b). "Lending institution" is defined as "a bank, savings bank, or savings and loan association doing business in Maryland." CL §12-109(a)(2). This statute, on its face, requires that a federal savings institution doing business in this State pay interest on first mortgage escrow accounts.

The inquiry, however, does not end with Maryland's statute. Federal savings institutions are also subject to regulation by the federal Office of Thrift Supervision ("OTS").[1]

The predecessor of the OTS, the Federal Home Loan Bank Board ("FHLBB"), at one time required federal associations to pay interest on escrow accounts if state law required state savings and loan associations to do so.[2] That regulation was held to be "explicitly exclusive" and therefore preemptive of a state statute that imposed additional requirements. *First Federal Savings and Loan Association of Boston v. Greenwald*, 591 F.2d 417 (1st Cir. 1979).

Effective May 26, 1983, the regulation was repealed. Currently, no OTS regulation addresses the payment of interest on escrow accounts.

---

[1] The Office of Thrift Supervision is part of the new federal regulatory apparatus for thrift institutions. *See* Title III of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA").

[2] That regulation, 12 C.F.R. §545.6-11(c) (1975), provided as follows:

> A Federal association which makes a loan on or after June 16, 1975 on the security of a single-family dwelling occupied or to be occupied by the borrower ... shall pay interest on any escrow account maintained in connection with such a loan (1) if there is in effect a specific statutory provision or provisions of the State in which such dwelling is located by or under which State-chartered savings and loan associations, mutual savings banks and similar institutions are required to pay interest on such escrow accounts, and (2) at not less than the rate being required to be paid by such State-chartered institutions but not to exceed the rate being paid by the Federal association in its regular accounts .... Except as provided by contract, a Federal association shall have no obligation to pay interest on escrow accounts apart from the duties imposed by this paragraph.

II

Federal Preemption

Under the Supremacy Clause of the United States Constitution, Article VI, clause 2, "[f]ederal regulations have no less pre-emptive effect than federal statutes," if a regulation is within the agency's statutory authority and is not arbitrary. *Fidelity Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). In *Fidelity*, the Supreme Court reasoned that if the FHLBB had unambiguously intended to preempt conflicting state law and Congress had authorized the preemption, a state law that conflicted with the FHLBB regulation was preempted.

Fidelity conclusively established the authority of the FHLBB to issue preemptive regulations. The Court found that Congress' broad delegation of authority in §5(a) of the Home Owners' Loan Act of 1933 gave the FHLBB plenary authority to issue regulations.[3] Further, Congress intended for the FHLBB to "establish and regulate 'a uniform system of [savings and loan] institutions,'" based on the FHLBB's determinations of the "best practices" of local thrifts. 458 U.S. at 166.

Because Congress has "not completely displaced state regulation" of federal savings institutions, 458 U.S. at 153, the key question is whether CL §12-109 conflicts with federal law. On the surface, Maryland's law and the absence of a federal regulation on the subject of interest on escrow do not conflict. Maryland law requires the payment of interest on escrow accounts; the OTS does not prohibit such payments. So it is not impossible for a federal association to comply with both the federal law and the State law. *Cf. Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). The State law nevertheless may be viewed as conflicting if it creates an obstacle to the accomplishment of the full purposes and objectives of the federal law. *Fidelity*, 458 U.S. at 156.

---

[3] The pertinent statute, 12 U.S.C. §1464(a), provided that the FHLBB was "authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations ... and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." Although somewhat reworded by FIRREA, the substance of current 12 U.S.C. §1464(a) is identical, vesting in the Director of OTS the same broad grant of rulemaking authority.

The FHLBB expressed its reasons for deleting the interest on escrow provisions in the preamble to the entire set of "operations" regulations adopted in May 1983: "The Board has decided to remove the substantive provisions pertaining to escrow accounts, allowing such matters to be governed by the loan contract, and in their place require a more detailed disclosure about the accounts. In light of this disclosure and the provisions of RESPA [Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §§2601-2617], the Board believes that the existing provisions on escrow accounts are no longer necessary and for that reason has deleted them." 48 Fed. Reg. 23032, 23039 (May 23, 1983).

In *Fidelity*, the Supreme Court stated that if the FHLBB "conspicuously has chosen" to allow its regulated institutions flexibility in arranging the economic elements of their loan transactions, a state law limiting that flexibility is preempted. 458 U.S. at 155. The preamble to the removal of the interest on escrow provision conspicuously stated the FHLBB's intent that anything concerning escrow accounts "be governed by the loan contract." Maryland's statute requiring interest on escrow interferes with the flexibility that the FHLBB intended to create by not allowing a federal association to decide whether to make interest on escrow part of a loan contract.

Further, the federal regulations are plainly intended to preempt state laws requiring the payment of interest on escrow accounts. The OTS has stated that the regulations in 12 C.F.R. Part 545, "Operations", are to be the only restrictions on the operations of federal associations: "The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Office to regulate all aspects of the operations of Federal savings associations, as set forth in section 5(a) of the Act. This exercise of the Office's authority is preemptive of any state law purporting to address the subject of the operations of a Federal savings association." 12 C.F.R. §545.2.

The FHLBB thought that interest on escrow provisions concerned "operations," for its prior provisions requiring interest were found in Part 545. Nor is there any basis for concluding otherwise. As the Supreme Court observed, "a savings and loan's mortgage lending practices are a crucial aspect of its 'operation' over which the Board unquestionably has jurisdiction." *Fidelity*, 458 U.S. at 167.

Given the FHLBB's overall intent to preempt state laws on operational matters and its specific purpose in deleting the prior interest on escrow requirement, both of which were stated explicitly at the time that the changes were adopted, we are compelled to conclude that CL

§12-109(b), Maryland's interest on escrow requirement, is preempted. Moreover, our opinion is consistent with that of the federal regulators, who since 1983 have taken the position that any state law requiring the payment of interest on mortgage escrow accounts was preempted. *See, e.g.*, Opinion of the FHLBB Office of the General Counsel (September 14, 1983); Opinion of the FHLBB Office of the General Counsel (August 13, 1985). The Attorney General of Nebraska has reached a similar conclusion. *Attorney General's Opinion* No. 61 (1975).

III

Conclusion

In summary, it is our opinion that CL §12-109(b) may not be applied to federal savings associations because it has been preempted by federal regulation. The State may not require a federal savings association to pay interest on escrow accounts established in connection with first mortgage loans. However, an association may be bound by the terms of particular contracts to continue paying interest on such loans.

J. Joseph Curran, Jr.
Attorney General

Dorothy Mara
Staff Attorney

Jack Schwartz
Chief Counsel
Opinions & Advice

FINANCIAL INSTITUTIONS — ESCROW ACCOUNTS — CREDIT GRANTOR PROVISIONS — INTEREST ON ESCROW ACCOUNT REQUIREMENT APPLIES TO RESIDENTIAL FIRST MORTGAGE LOANS MADE UNDER CREDIT GRANTOR SUBTITLE

August 7, 1990

Ms. Margie H. Muller
Bank Commissioner

You have requested our opinion on whether §12-109 of the Commercial Law Article ("CL" Article), which requires lenders to pay interest on certain escrow accounts, is applicable to residential first mortgage loans made under CL Title 12, Subtitle 10, the credit grantor closed end credit provisions. For the reasons set forth below, we conclude that the escrow interest requirement of CL §12-109 applies to residential first mortgage loans made under any subtitle of CL Title 12, including Subtitle 10.

I

Legislative History Of Interest On Escrow Provision

Under CL §12-109(b), "a lending institution which lends money secured by a first mortgage or first deed of trust on ... residential property and creates or is the assignee of an escrow account in connection with that loan shall pay interest to the borrower on the funds in the escrow account ...."[1]

---

[1] CL §12-109(b) provides in full as follows:

> (1) After May 31, 1974, a lending institution which lends money secured by a first mortgage or first deed of trust on any interest in residential real property and creates or is the assignee of an escrow account in connection with that loan shall pay interest to the borrower on the funds in the escrow account at the greater of:
>
> (i) A rate of three percent per annum simple interest; or

(continued...)

This escrow interest requirement was enacted as part of Chapter 420 of the Laws of Maryland 1974, the main purpose of which was to allow residential first mortgage lenders to charge interest at a higher rate than otherwise allowable if certain conditions were met. The interest rate could not exceed 10%, the loan agreement had to be in writing, and no prepayment penalty was permitted. After several later amendments, including the codification of the new Commercial Law Article in 1975, this provision became the current CL §12-103(b), governing the interest rate chargeable on first mortgage loans secured by residential real property.[2]

Chapter 420 included two additional provisions. The first required all banks and thrift institutions to pay interest on certain first mortgage escrow accounts after June 1, 1974, the provision now found at CL §12-109. The second prohibited any lender from refusing loans to any person on the basis of geographic area, race, creed, color, age, sex,

---

[1](...continued)

(ii) The rate of interest regularly paid by the lending institution on a regular passbook savings accounts.

(2) Interest on these funds shall be:

(i) Computed on the average monthly balance in the escrow account; and

(ii) Paid annually to the borrower by crediting the escrow account with the amount of interest due.

(3) The lending institution shall annually provide the borrower with a statement of the escrow balance.

The term "lending institution" is defined in CL §12-109(a)(2) as "a bank, savings bank, or savings and loan association doing business in Maryland." However, federal law prevents the applicability of CL §12-109 to institutions regulated by the federal Office of Thrift Supervision. 75 *Opinions of the Attorney General* 218 (1990).

[2] The relevant portion of CL §12-103(b) provides as follows:

(1) A lender may charge interest at any effective rate of simple interest on the unpaid principal balance of a loan if:

(i) There is a written agreement signed by the borrower which sets forth the stated rate of interest charged by the lender;

(ii) The loan is secured by a first mortgage or first deed of trust on any interest in residential real property; [and]

(iii) There is no prepayment penalty in connection with the loan.

marital status, handicap, or national origin, a provision now found at CL §12-113. The escrow interest and antidiscrimination provisions were at the time codified in former Article 49, §13, which comprised the provisions on interest and usury.

The 1974 provision increasing the allowable rate of interest applied to "any loan secured by a first mortgage or first deed of trust on residential real property." The companion escrow interest requirement applied to "any bank, savings bank, savings and loan association, or building and loan association ... doing business in Maryland which lends money to a borrower secured by real property" and which created or received an assignment of an escrow account for taxes, insurance premiums, and the like.[3] The antidiscrimination provision applied more broadly to all loans made to any person.

When the various credit regulation laws were recodified in 1975 as Title 12 of the new Commercial Law Article, most of the provisions of former Article 49 were incorporated into Subtitle 1, likewise comprising interest and usury regulations. The Revisor's Note to the escrow interest provisions of new CL §12-109 stated that "[t]his section is new language derived without substantive change from Art. 49, §13(b)". Chapter 49, Laws of Maryland 1975 at 393. The laws governing small loans, consumer loans, secondary mortgages, retail credit accounts, and retail installment sales were gathered together as Subtitles 2 through 6 of Title 12, the new credit regulation title. Except for Subtitle 1, which set forth the general constitutional usury limitation and contained other provisions of more general application, each of the subtitles of Title 12 governed a specific type of loan.

As part of the code revision process, the Revisor added to Subtitle 1 of Title 12 certain definitions that had not been part of former Article 49. Among these were the definitions of "lender" under CL §§12-101(f), 12-201(b), and 12-301(c), and the definition of "borrower" under CL §12-101(b), in each case referring to the lender or the borrower "under this subtitle." The remaining subtitles of Title 12 either define "lender" or "borrower" differently or do not define these terms at all.

---

[3] The escrow interest provision was amended during the 1975 recodification to clarify that it was intended to apply only to residential mortgage loans. Chapter 49, Laws of Maryland 1975 at 393-94 (Revisor's Note).

II

Subtitle 10 Loan Provisions

Subtitles 9 and 10 of the Commercial Law Article were enacted as Chapter 143 of the Laws of Maryland 1983. This statute was an aspect of lending deregulation, aimed at increasing the competitiveness of Maryland lending institutions. Subtitle 10 governs "closed end credit" and is broad enough to cover residential first mortgage loans, among others.

Several provisions of Subtitle 10 demonstrate a clear legislative intent to override conflicting provisions found elsewhere in the law. CL §12-1013(a) specifically overrides the provisions of "any other law of this State" relating to interest, points, fees, or other charges levied against the borrower. CL §12-1014(c) provides that "[n]otwithstanding any provisions of [Title 12], a loan under this subtitle is subject only to the disclosure requirements of this subtitle ...." Certain other provisions of Subtitle 1 are repeated, without substantial modification, in Subtitle 12. Among these are the repossession provisions (CL §§12-115 and 12-1021) and the sections governing insurance binders and property insurance generally (CL §§12-123 and 12-124 and §§12-1007 and 12-1007.1).

However, certain provisions in Subtitle 1 are neither overridden by nor directly incorporated into Subtitle 10. This category includes the escrow interest provisions, CL §12-109, and the antidiscrimination provision, CL §12-113.[4] No provision of Subtitle 10 is inconsistent with the requirement of CL §12-109 that interest be paid on escrow accounts established in connection with residential first mortgage loans.

III

Analysis

We first consider the possibility that the provisions of Subtitle 1 of Title 12, and specifically the escrow interest requirement, apply only to loans made "under this subtitle" — that is, under Subtitle 1 — and

---

[4] This category also includes two other provisions relating to escrow accounts, CL §§12-109.1 and 12-109.2; a financing agreement requirement, CL §12-125; and the "notice as to private mortgage insurance" provision of CL §12-106(d), which refers to any "loan under this title secured by residential real property."

cannot therefore apply to loans made under any other statutory authority. The phrase "under this subtitle" appears in CL §12-101(b) and (f), the definitions of "borrower" and "lender" for purposes of Subtitle 1. Certainly, that phrase is unambiguous. However, "[e]ven when the words of a statute carry a definite meaning, we are not 'precluded from consulting legislative history as part of the process of determining the legislative purpose or goal' of the law." *Morris v. Prince George's County*, 319 Md. 597, 604, 573 A.2d 1346 (1990) (quoting *Wilde v. Swanson*, 314 Md. 80, 92, 548 A.2d 837, 843 (1988)).

As discussed in Part I above, the various components of Chapter 420 of the Laws of Maryland 1974 applied by their terms to very broad classes of loans. That statute contained no definitions of "lender" or "borrower," because no such definitions were needed. All banks and thrift institutions wishing to make first mortgage loans on residential real property were required to pay interest on borrowers' funds held in escrow. The only question, then, is whether the use of the terms "lender under this subtitle" and "borrower under this subtitle," added to the law by the Revisor when the Commercial Law Article was enacted in 1975, brought about a narrowing of the scope of the escrow interest requirement.

As the Court of Appeals pointed out in *Hoffman v. Key Federal Savings & Loan Association*, 286 Md. 28, 37, 416 A.2d 1265 (1979), the present usury statute is "but a recodification" of prior law. The Court stated:

> Recodification of statutes is presumed to be for the purpose of clarity rather than change of meaning and, thus, even a change in the phraseology of a statute by a codification will not ordinarily modify the law unless the change is so radical and material that the intention of the Legislature to modify the law appears unmistakably from the language of the Code.

At the time of recodification, the references to lenders and borrowers "under this subtitle" were consistent with the residential mortgage lending provisions of prior law (although apparently not with the antidiscrimination provision), because lenders generally made residential mortgage loans under new CL §12-103(b) in order to take advantage of the liberal interest rate provisions contained in former Article 49, §13(b). No broader definition of "lender" or "borrower" was needed; the intention to require escrow interest on all residential first mortgage loans was abundantly clear under the original enactment.

The escrow interest requirement was intended as a pro-consumer provision permitting borrowers to derive at least some benefit from idle funds previously invested wholly for the benefit of the lender. The Attorney General stated that this requirement creates "statutorily granted rights [that] are inherent in the mortgage." 59 *Opinions of the Attorney General* 458, 464 (1974). The Revisor's addition to Subtitle 1 of a definition of "borrower" limited to "this subtitle" should not be construed to have changed the substantive meaning of the original statute, which created an obligation to pay interest on escrow accounts with respect to all residential first mortgage loans made by a "lending institution" as defined in CL §12-109.[5]

Nor, in our view, did the later enactment of Subtitle 10 repeal by implication the escrow interest requirement for residential mortgage loans made under that subtitle. Although there is no indication from the legislative history that the General Assembly actively considered the possible applicability of CL §12-109 to loans made under Subtitle 10, the fact that certain other provisions of Title 12 were specifically made inapplicable to loans under Subtitle 10 precludes finding a clear legislative intent to override the escrow interest provision. As discussed above, CL §12-1013 overrides other laws dealing with interest, fees, and other charges levied *against* the borrower but conspicuously fails to address laws such as CL §12-109 that govern amounts payable *to* the borrower. The obligation to pay interest on escrow accounts survived the enactment of Subtitle 10 and is not inconsistent with any of its provisions.

Principles of statutory construction indicate that laws enacted at different times as part of the same statutory scheme should be read together to the fullest extent possible so as to give maximum effect to each. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 525 A.2d 628 (1987); 70 *Opinions of the Attorney General* 138, 143 (1985). A new statute does not supplant the old unless there is no way to reconcile the two. *See, e.g., Management Personnel Services, Inv. v. Sandefur*, 300 Md. 332, 341, 478 A.2d 310 (1984).

---

[5] *See* note 1 above.

IV

Conclusion

In summary, it is our opinion that the escrow interest requirement of CL §12-109 applies to residential first mortgage loans made under CL Title 12, Subtitle 10, by any lender subject to CL §12-109.

J. Joseph Curran, Jr.
Attorney General

David M. Porter
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

The interrelationship of provisions in the various credit regulation titles of the Commercial Law Article was the subject of an important Court of Appeals decision, *Biggus v. Ford Motor Credit Corp.*, 328 Md. 188 (1992), and of subsequent remedial legislation, Chapter 404 (House Bill 424) of the Laws of Maryland 1993.

HANDGUNS

HANDGUN ROSTER LAW PROHIBITS PHYSICAL DELIVERY OF OR OFFER TO SELL UNAPPROVED HANDGUN IN MARYLAND, EVEN IF SELLER IS LOCATED IN ANOTHER STATE, BUT DOES NOT PROHIBIT MARYLAND DEALER FROM SELLING UNAPPROVED HANDGUN FOR PHYSICAL DELIVERY IN ANOTHER STATE IF NO OFFER TO SELL IS MADE IN MARYLAND

December 4, 1990

Colonel Elmer H. Tippett
Chairman, Maryland Handgun Roster Board

You have requested our opinion on the effect of Article 27, §36-I(b) of the Maryland Code, which prohibits selling or offering to sell certain handguns, on handgun transactions between residents of Maryland and residents of other states.

For the reasons given below, we conclude that §36-I(b) prohibits the sale of an unapproved handgun if the purchaser takes physical delivery in Maryland, even if the seller is located in another state, and also prohibits any seller from making in Maryland an offer to sell an unapproved handgun, even if the purchaser would take physical delivery in another state. However, the statute does not prevent a Maryland-based seller from selling an unapproved handgun for delivery in another state, so long as no offer to sell is made in Maryland.

I

Background

Article 27, §36-I was enacted as part of Chapter 533 of the Laws of Maryland 1988, which established the Handgun Roster Board to compile a roster of handguns useful for legitimate purposes in sports, self-protection, or law enforcement. Under §36-I(b), "[a] person may not sell or offer for sale in the State a handgun manufactured after January 1, 1985 that is not on the handgun roster." That provision thus prohibits two acts, whether by a licensed dealer or by any other person: selling an unapproved handgun and offering an unapproved handgun for sale. *See also* Article 27, §36-I(g)(3) ("each handgun manufactured, sold, or offered for sale in violation of this subsection shall be a separate violation").

Under 18 U.S.C. §922(a)(3), a person who does not hold a federal firearms license may not "transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State ...." Thus, transfers of handguns between residents of different states may be accomplished only by and through persons who hold federal firearms licenses. *See also* 18 U.S.C. §922(a)(2) (prohibiting licensees from shipping or transporting in interstate or foreign commerce any firearm to any nonlicensee). A licensee who wishes to sell a firearm to a nonlicensee who resides in a different state must transfer the firearm to a licensee in the purchaser's state, who then retransfers the firearm to the purchaser.

You have asked whether Article 27, §36-I(b) would be violated in any of four situations in which an interstate transaction in a handgun could occur: (i) when an out-of-state holder of a federal firearms license sells a handgun not on the roster to a Maryland resident directly or through another federal licensee; (ii) when a seller whose residence or place of business is located in Maryland sells a handgun not on the roster to a purchaser located in another state; (iii) when a Maryland holder of a federal firearms license, while in another state, purchases a handgun not on the roster and then returns to Maryland, bringing the handgun; or (iv) when an exhibitor at a gun show in Maryland takes orders for handguns that are not on the roster. The legality of each of these kinds of transactions depends upon whether a sale or an offer to sell takes place in Maryland.

II

Place of Sale or Offer

The place at which a sale of any item is ordinarily deemed to occur is the place at which the purchaser takes physical possession of the item. *See May Dep't Stores Co. v. Director of Revenue*, 748 S.W.2d 174, 175 (Mo. 1988). Thus, for example, §2-401(2) of the Commercial Law Article ("CL" Article) provides that the passage of title to an item from the seller to the buyer — a "sale" as defined in CL §2-106(1) — ordinarily occurs at the place where completion of physical delivery of the item occurs. *See also* CL §2-310(a) (payment ordinarily due at time and place of buyer's receipt of goods).

An offer to sell an item cannot be said to have been made unless a potential buyer is made aware of the offer. Hence, an offer to sell is likewise deemed to have been made at the place where the potential buyer receives the offer. *See Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 539, 369 A.2d 1017 (1977).

Applying these general principles to the transactions about which you inquire, we conclude that a sale of a handgun occurs in Maryland in the first situation you describe, when the purchaser takes delivery in Maryland. Whether the delivery is made directly from an out-of-state seller to a Maryland buyer who holds a federal firearms license or through another Maryland resident who holds a federal firearms license and has agreed to serve as a conduit for the transaction, the handgun itself reaches the actual buyer while he or she is in Maryland. *See also* Opinion No. 89-049 (December 22, 1989) (unpublished) (Maryland resident who frequently serves as conduit for interstate handgun sales is engaged in business of selling firearms in Maryland). Conversely, the sale takes place in another state in the second situation, when the purchaser takes physical delivery of the handgun in the other state, whether directly or through a federal licensee in that state.

In the third situation, when a Maryland resident who holds a federal firearms license travels to another state and there buys a handgun, the place of the sale depends upon whether the licensee is the ultimate purchaser or a mere conduit. If the licensee buys the handgun for his or her own use, the place of the sale is in the other state; however, if the licensee travels to another state to buy a handgun on behalf of another Maryland resident who is not a licensee, the place of the sale is Maryland. In this latter case, the situation is no different in substance than if the out-of-state seller ships the handgun to a dealer in Maryland to be there picked up by the true buyer. *Cf. United States v. Lawrence*, 680 F.2d 1126 (6th Cir. 1982) (person is not purchaser for purposes of 18 U.S.C. §922 where person acted under control and direction of third party and guns were purchased with third party's money).

Finally, when a person who is in Maryland in connection with a gun show offers to sell his or her handguns, the person is making the offer in Maryland, even if the buyer would take delivery in another state. Because selling and offering to sell are separate offenses, one may make a prohibited offer in Maryland albeit the person does not subsequently make a sale in Maryland.

These results, in each case, comport with the purpose for which the handgun roster law was enacted. That law was intended to remove certain handguns from Maryland by removing all aspects of the traffic in those handguns from Maryland. Chapter 533, Laws of Maryland 1988, Preamble. Construing the place of a sale or an offer as the location of the seller's business or residence would instead merely shift commerce in those handguns from Maryland dealers to out-of-state dealers.

We recognize that CL §2-401(2) generally allows a buyer and seller to agree that title to the item sold will pass from seller to buyer — that is, that the sale will occur — at a place other than the place of physical delivery of the item. If that kind of agreement with respect to the sale of unapproved handguns were permissible, however, out-of-state sellers could freely sell those handguns to Maryland residents. The General Assembly could not have intended that a criminal statute proscribing sales of certain handguns would be subject to circumvention by agreement between the parties to an unauthorized sale. Hence, the place of a handgun sale for purposes of Article 27, §36-I must be the place of the handgun's physical delivery to the buyer, notwithstanding any attempted agreement of the parties. "Results that are unreasonable, illogical, or that are at odds with the legislative purpose should be avoided." *Harford County v. Edgewater*, 316 Md. 389, 397, 558 A.2d 1219 (1989).

This construction of Maryland's law is consistent with federal law regarding firearms sales. The federal Gun Control Act is intended to assist states in regulating firearms distribution, for the safety of their own citizens, by shutting off the flow of firearms across their borders. *United States v. Flores*, 753 F.2d 1499, 1502 (9th Cir. 1985).

III

Conclusion

In summary, it is our opinion that Article 27, §36-I(b) prohibits the sale of an unapproved handgun if the purchaser takes physical delivery in Maryland, regardless of the seller's location. The statute also prohibits any seller from making in Maryland an offer to sell an unapproved handgun, regardless of where physical delivery of the handgun would take place. However, the statute does not prevent a Maryland-based seller from selling an unapproved handgun for delivery in another state, so long as no offer to sell is made in Maryland.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel,
Opinions and Advice

HEALTH

HEALTH SERVICES COST REVIEW COMMISSION — NURSING HOMES — RATE APPROVAL

June 12, 1990

The Honorable John C. Astle
Maryland House of Delegates

You have requested our opinion about the following questions:

1. Whether nursing homes are included within the definition of "facility" in §19-343(a) of the Health-General Article ("HG" Article); and

2. Whether comprehensive care facilities or extended care facilities are within the rate approval jurisdiction of the Health Services Cost Review Commission.

For the reasons stated below, we conclude as follows:

1. Nursing homes are included in the definition of "facility" in HG §19-343(a).

2. Comprehensive care facilities and extended care facilities are not within the rate approval jurisdiction of the Health Services Cost Review Commission.

I

Definition of "Facility"

The crux of your first question is whether residents of nursing homes are entitled to the protections afforded by HG §§19-344 and 19-345, which are framed in terms of protections for "a resident of a facility." *See* HG §§19-344(a) and 19-345(a). For purposes of these sections, "'facility' means a related institution that, under the rules and regulations of the Department [of Health and Mental Hygiene] is a comprehensive care facility or an extended care facility." HG §19-343(a).

Although this definition does not use the phrase "nursing home," the definition of "related institution" encompasses nursing homes:

> "Related institution" means an organized institution, environment, or home that:
>
> (i) Maintains conditions or facilities and equipment to provide domiciliary, personal, or nursing care for two or more unrelated individuals who are dependent on the administrator, operator, or proprietor for nursing care or the subsistence of daily living in a safe, sanitary and healthful environment; and
>
> (ii) Admits or retains the individuals for overnight care.

HG §19-301(l). Moreover, HG §19-307 classifies related institutions as either "care homes" or "nursing homes." Finally, the regulatory definition of "comprehensive care facility" describes nursing homes and has always been construed administratively as so applying: "'Comprehensive care facility' means a facility which admits patients suffering from disease or disabilities or advanced age, requiring medical service and nursing service rendered by or under the supervision of a registered nurse." COMAR 10.07.02.01F.

In sum, we believe it to be beyond doubt that the term "facility" in HG §19-343(a) includes nursing homes.[1]

[1] Hence, we affirm the advice rendered to you by Assistant Attorney General Kathryn M. Rowe on December 18, 1989.

II

Jurisdiction of the Health Services Cost Review Commission

A. Legislative History

The statute creating the Commission gave it jurisdiction over "all hospitals, health care and related institutions ...." Former Article 43, §568-I, enacted by Chapter 627, Laws of Maryland 1971.[2] In particular, the Commission was, as of July 1, 1974, "to assure all purchasers of health care institutional services" of the reasonableness of rates at both hospitals and related institutions.[3] Former Article 43, §568H b. "In order to properly discharge these obligations, the Commission shall have full power to review and approve the reasonableness of rates established or requested by any institution subject to the provisions of this subtitle." Former Article 43, §568U.

In 1973, the General Assembly drew the first distinction between hospitals and related institutions in this statute. Chapter 306, Laws of Maryland 1973. In the provisions quoted above, the term "hospital" was inserted in lieu of the term "institutional" and "institution," and corresponding changes were made elsewhere in former §§568H b and 568U.[4] But the 1973 legislation also provided that the Commission's

---

[2] "Related institutions" included "nursing homes" and "care homes." Former Article 43, §556(d) and (e).

[3] In full, this provision read:

> After July 1, 1974, an additional responsibility of this Commission is to assure all purchasers of health care institutional services that the total costs of the institution are reasonably related to the total services offered by the institution; that the institution's aggregate rates are set in reasonable relationship to the institution's aggregate costs; and that rates are set equitably among all purchasers of services without undue discrimination.

[4] With this change, the statement of legislative intent in §568H b spoke of the Commission's responsibility "to assure all purchasers of health care *hospital* services that the total costs of the *hospital* are reasonably related to the total services offered by the *hospital*; that the *hospital*'s aggregate rates are set in reasonable relationship to the *hospital*'s aggregate costs; and that the rates are set equitably among all purchasers of services without undue (continued...)

rate approval jurisdiction would "apply to related institutions ... from and after July 1, 1975." Former Article 43, §§568H c and 568U(d). Thus, the General Assembly delayed, but did not eliminate, the exercise of the Commission's jurisdiction over related institutions.

In 1977, the General Assembly amended former §568H to itemize the types of related institutions over which the Commission had jurisdiction, including extended care facilities. Chapter 760, Laws of Maryland 1977.[5]

That same year, however, the General Assembly added to former §568U(d) the following language: "[T]he Commission may not set rates [for related institutions] until State law authorizes the medical assistance program of the Department of Health and Mental Hygiene to reimburse at the Commission rates, and until the [federal government] has agreed to accept the Commission rates as a method of providing federal financial participation to the State's medical assistance program." Chapter 705, Laws of Maryland 1977. The Attorney General characterized this provision as "clearly limit[ing] the [Commission's] ability to set rates for related institutions. Until such time as the statute is changed or Medicaid adopts regulations accepting [the Commission's] rates for nursing homes, [the Commission] may not set a rate for related institutions." 65 *Opinions of the Attorney General* 247, 253 (1980).

When the Health-General Article was adopted in 1982, the Revisor included a definition of "related institution" that included the then-current classifications: "'Related institution' means ... (i) [a]n extended care facility; (ii) [a]n intermediate care facility; or (iii) [a]n intermediate care facility — mental retardation." *See* Revisor's Note to former HG §19-201(d) (1982).

---

[4](...continued)
discrimination." The corresponding grant of rate approval authority, §568U(b), vested in the Commission "full power to review and approve the reasonableness of rates established or requested by any *hospital* subject to the provisions of this subtitle."

[5] As a result of this legislation, the Commission's jurisdiction was limited to "institutions that are licensed as nursing homes — extended care, intermediate care facilities — long-term care (Type A), or intermediate care facilities — personal care (Type B) or intermediate care facilities — mental retardation ...." Former §568H(3). *See* 65 *Opinions of the Attorney General* 247, 251 (1980).

Finally, in Chapter 370 of the Laws of Maryland 1984, the General Assembly amended this definition of "related institution." The bill's title stated that it was for the purpose of "altering the definition of a 'related institution' ... by restricting the term to refer to a certain comprehensive care facility that is presently regulated by the Commission; and excluding an extended care facility from the definition of a 'related institution'."

B. Current Provisions

The rate approval jurisdiction of the Health Services Cost Review Commission is set out in HG §19-209. In general, "the Commission has jurisdiction over hospital services offered by or through all facilities." HG §19-209(a)(1). The statute then sets out the following restriction:

> The Commission may not set rates for related institutions until:
>
> (1) State law authorizes the State Medical Assistance Program to reimburse related institutions at Commission rates; and
>
> (2) The United States Department of Health and Human Services agrees to accept Commission rates as a method of providing federal financial participation in the State Medical Assistance Program.

HG §19-209(b). *See also* COMAR 10.37.11.02I.

The term "related institution," for purposes of the Commission's jurisdiction, includes "[a] comprehensive care facility that is currently regulated by the Commission." HG §19-201(e)(1)(i).[6] However, because "State law" does not "authoriz[e] the State Medical Assistance Program to reimburse related institutions at Commission rates," comprehensive care facilities are not presently within the rate approval

---

[6] Under the regulations of the Medical Assistance Program, "comprehensive care facility" is defined as "a nursing facility licensed pursuant to COMAR 10.07.02." COMAR 10.09.10.01A(8). Under the licensing regulations, in turn, "comprehensive care facility" is defined as "a facility which admits patients suffering from disease or disabilities or advanced age, requiring medical service and nursing service rendered by or under the supervision of a registered nurse." COMAR 10.07.02.01F.

jurisdiction of the Commission. *See* 65 *Opinions of the Attorney General* at 253. *See also* Revisor's Note to HG §19-209 (1982).

Extended care facilities are not within the definition of "related institutions" in HG §19-201(e).[7] Indeed, as discussed in Part IIA above, the General Assembly specifically removed them from the definition. Therefore, they are not subject to the Commission's jurisdiction.

III

Conclusion

In summary, it is our opinion that:

1. Nursing homes are included in the definition of "facility" in HG §19-343(a).

2. Comprehensive care facilities and extended care facilities are not within the rate approval jurisdiction of the Health Services Cost Review Commission.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[7] An extended care facility is defined in COMAR 10.07.02.01J. It is a "related institution" for licensing and other purposes.

HEALTH — MEDICAL ASSISTANCE PROGRAM — EXCLUSION OF PRISONERS FROM COVERAGE IS AUTHORIZED UNDER FEDERAL AND STATE LAW AND IS NOT UNCONSTITUTIONAL

July 5, 1990

Neal M. Janey, Esquire
City Solicitor

You have requested our opinion on whether the Maryland Medical Assistance Program may lawfully exclude prisoners from its coverage. Specifically, you ask (1) whether State law authorizes Medical Assistance Program regulations that exclude persons incarcerated in detention centers from coverage;[1] and (2) if so, whether this exclusion violates the prisoners' equal protection rights.

For the reasons stated below, we conclude as follows:

(1) The State's policy of excluding persons incarcerated in detention centers from Medical Assistance Program coverage is authorized under federal and State law.

(2) This exclusionary classification does not violate the equal protection requirements of the United States or Maryland Constitution.

I

Background

The Maryland Medical Assistance Program, which is administered by the Maryland Department of Health and Mental Hygiene ("DHMH"), provides a broad range of health care benefits for certain indigent individuals. It comprises two parts, designed to reach different populations in response to different funding sources. One part, referred to as the federal/State program or Medicaid, is funded by both the federal and State governments and is subject to federal, as

[1] The term "detention centers" is used in this opinion to refer to both prisons and jails.

well as State, statutes and regulations.[2] Eligibility for the federal/State program extends to certain indigent persons, such as those who receive Aid to Families with Dependent Children or Supplemental Security Income, and those who meet certain income and resources limits as well as other eligibility criteria. *See* COMAR 10.09.24.

The other part of the Maryland program is referred to as Medical Assistance State Only ("MASO"). The State provides all funding for MASO and is its sole architect. MASO provides health care benefits to individuals who meet the income and resource limits for Medicaid but do not otherwise meet its eligibility requirements. *See* COMAR 10.09.25.

For example, able-bodied men under age 65 are not eligible for Medicaid but could, depending on their income and resources, qualify for MASO. As a consequence, most prisoners who had been eligible for medical assistance prior to detention were covered under MASO. Nonetheless, we discuss below the authority to restrict coverage to prisoners under both the Medicaid and MASO programs.

In Part II, we discuss whether federal and State medical assistance legislation itself authorizes the exclusion of prisoners from Medical Assistance Program coverage. Then, in Part III, we discuss whether a recent amendment to Article 87, §46 of the Maryland Code, relating to medical care of prisoners, requires Medical Assistance Program coverage of prisoners. Finally, in Part IV, we examine the equal protection implications of excluding inmates from coverage.

II

Federal and State Medical Assistance Authorizing Legislation

A. *The Federal/State Program — Medicaid*

As indicated in Part I above, many Medicaid requirements are set by federal law. The amendments to the Social Security Act establishing Medicaid in 1965 defined "medical assistance" so as to

---

[2] The term "Medicaid" correctly applies only to the federal/State program and will be used accordingly in this opinion. In common parlance, however, "Medicaid" is often used to refer to the entire Maryland Medical Assistance Program.

exclude Medicaid payments to "any individual who is an inmate of a public institution." 42 U.S.C. 1396d(a)(22)(A).

Federal regulations interpret this statutory exclusion. "Inmate of a public institution" is defined as a "person who is living in a public institution," unless either of two exceptions applies:

> (1) [The individual] is in a public educational or vocational training institution for purposes of securing education or vocational training; or
>
> (2) [The individual] is in a public institution for a temporary period pending other arrangements appropriate to his needs.

42 C.F.R. §435.1009. The regulations go on to define "public institution" as "an institution that is the responsibility of a governmental unit or over which a governmental unit exercises administrative control." *Id.*[3]

A person incarcerated in a detention center meets the definition of an "inmate of a public institution." A prisoner is a person "living in ... an institution that is the responsibility of a governmental unit ...."

In addition, neither exception to the definition is applicable here. The first exception, for educational or vocational training institutions, is inapplicable because even in those cases where a prison provides educational or vocational training, the primary reason or purpose of the incarceration is not such training. The second exception, for those temporarily awaiting appropriate arrangements, also does not describe prisoners, even those incarcerated while awaiting trial. Instead, it appears directed at persons who would not have been housed in a public institution had a more appropriate placement been available earlier. This description does not fit persons imprisoned in detention centers while awaiting trial. Under State law, there is nothing "inappropriate" in detaining those for whom no bail has been set or who cannot meet bail. *See* Article 27, §616 1/2; Maryland Rule 4-

---

[3] We have found no case law further interpreting this definition, and our examination of the history of 42 C.F.R. §435.1009 back to its original proposal in 1970 sheds no further light on the scope of the exceptions. *See* 35 Fed. Reg. 8780 (June 5, 1970) (proposed); 36 Fed. Reg. 3872 (February 27, 1971) (final).

216(a). Thus, federal law excludes incarcerated persons from Medicaid coverage.

Nevertheless, until 1985 federal regulations permitted coverage for such persons for the first and last months of incarceration, apparently for the administrative convenience of the states. *See* 50 Fed. Reg. 13196 (April 3, 1985). In 1985, the federal Health Care Financing Administration adopted a regulation eliminating even that coverage, citing the absolute exclusion required by statute. 50 Fed. Reg. at 13196. Thus, since 1985, federal law has completely excluded such coverage from the Medicaid program.

State law has conformed to this exclusion. In 1980 the General Assembly enacted the original version of §15-113 of the Health-General Article ("HG" Article), which required the State to provide Medicaid coverage for the first month of inmate status for inmates of public institutions if the inmate was eligible for federally funded Medicaid benefits. Former Article 43, §42-O. This section was recodified without substantive change at HG §15-113. *See* Chapter 21, Laws of Maryland 1982, §2.

HG §15-113(b)(1) provides as follows: "If an inmate of a public institution is eligible for federally funded Medicaid benefits, [DHMH] shall pay the custodial authority for any medical care that is provided to the inmate during the month when the individual became an inmate." DHMH is then to be reimbursed by the authority responsible for the inmate. HG §15-113(c). Thus, Maryland law requires the State to pay for medical assistance to inmates only when a condition that is currently prohibited under federal law is met.

Furthermore, Maryland's Medicaid eligibility regulations do not permit any coverage of such persons. They closely follow the words of the federal statutory exclusion, stating: "In order to be eligible, a person may not be an inmate of a public institution." COMAR 10.09.24.05G. Thus, the exclusion of prisoners from coverage under the Medicaid program is required by federal law and consistent with State law.

B. Medical Assistance State Only — MASO

MASO regulations also bar coverage to inmates in detention centers. COMAR 10.09.25.05C(2) states:

> A person may not be eligible for the ... period ... during which he [is] ... [i]ncarcerated under the penal system. For purposes of this section, a person who is incarcerated under the penal system retains this status even if he is a patient in a medical institution or a resident of an intermediate or skilled care facility until he is released from custody or parole, probation, outright, or otherwise.[4]

DHMH interprets this regulation to deny eligibility to inmates both before and after conviction. The Maryland Medical Assistance Program Eligibility Manual states: "An inmate of a penal institution, whether during the period before trial or other disposition of charges or after conviction, is totally excluded from Medical Assistance State Only coverage." Manual ¶500-5.

The MASO program, by definition, is not governed by federal restrictions. The issue is thus whether pertinent State statutes authorize the MASO program to exclude prisoners from its coverage. You have specifically questioned whether such restrictions are consistent with language governing the scope of the program and eligibility for it at HG §§15-102, 15-103 and 15-109.

In pertinent part, HG §15-102(a) provides that the Maryland Medical Assistance Program "[s]hall provide preventive and home care services for indigent and medically indigent individuals," and HG §15-103(a)(2)(i) provides that the Program "[s]hall provide comprehensive medical and other health care for indigent individuals or medically indigent individuals or both." The terms "indigent individuals" and "medically indigent individuals" are not defined by statute. Hence, the General Assembly effectively delegated to the administrative agency, DHMH, the responsibility for establishing eligibility criteria. *See* HG §2-104(b)(1) (DHMH's substantive rulemaking power).

Moreover, HG §§15-102 and 15-103 both refer to the Maryland Medical Assistance Program as a whole, thus including both Medicaid and MASO.[5] Insofar as federal law expressly excludes coverage of

---

[4] Although worded differently than the Medicaid exclusion, both provisions exclude persons incarcerated in detention centers.

[5] In fact, HG §15-103 explicitly refers to federal funds for the program. In addition, in *Kindley v. Governor of Maryland*, 289 Md. 620, 624, 426 A.2d 908, 911 (1981), the Court of Appeals pointed out that a prior version (continued...)

incarcerated persons, we cannot construe provisions governing a program designed to comply with federal law to compel inclusion of that very class of persons.

The eligibility standards of HG §15-109 also do not mandate inclusion of prisoners who would otherwise meet these standards. HG §15-109 establishes eligibility standards linked to income for the entire Maryland Medical Assistance Program, both Medicaid and MASO. On its face, it is applicable to Medicaid because it contains the qualification that "[t]his section is effective only to the extent that its provisions do not conflict with federal requirements for administration of the Program in this State." HG §15-109(c). Again, because federal Medicaid legislation bars coverage of incarcerated persons, we cannot read a provision expressly designed "not to conflict with federal requirements" as requiring coverage of such persons under the Medicaid program. Moreover, since HG §15-109 does not distinguish between the Medicaid and MASO programs, the provision likewise cannot sustain a construction that would both authorize the exclusion of prisoners who would be eligible for Medicaid and yet also require the inclusion of prisoners who are potential MASO recipients.

In short, we conclude that the Medical Assistance Program authorizing legislation does not prohibit regulatory exclusion of prisoners from coverage under MASO.

III

Amendments to Article 87, §46

In assessing whether the Medical Assistance Program's exclusion of prison inmates from coverage is consistent with State law, we must also consider recent amendments to Article 87, §46 of the Maryland Code, which deals with the care of prisoners in the custody of a sheriff.

---

[5](...continued)
of HG §15-103(a)(2)(i) was designed to be "consistent with the scope of the [Medicaid] Program."

Article 87, §46 is of ancient origins. *See* Chapter 41, Laws of Maryland 1825. Originally, the law imposed on the sheriff the responsibility of providing for the care of sick prisoners at county expense.[6] In 1987, the General Assembly added language requiring sick, injured, or disabled prisoners in four counties to reimburse the sheriff for the cost of medical care and to furnish the sheriff with information about any health insurance coverage. Chapter 628, Laws of Maryland 1987.

The next year, Chapter 591 (Senate Bill 427) of the Laws of Maryland 1988 expanded the reimbursement requirement to all jurisdictions. Section 46(c) now provides that prisoners confined to detention centers "shall be responsible for reimbursing the county or Baltimore City for the payment of all medical care" and must furnish the sheriff with information not only on their health insurance coverage but also "[t]he eligibility for benefits under the Maryland Medical Assistance Program to which the prisoner is entitled." Article 87, §46(c)(2). Subsection (d) goes on to limit liability for a prisoner's medical care to "a prisoner personally or through coverage or benefits described under subsection (c) of this section." Thus, the amendments established that when a prisoner is insured or entitled to medical assistance, that coverage will be used to reimburse the cost of the prisoner's care.

At the time that the General Assembly enacted these amendments, DHMH regulations excluded inmates of detention centers from Medical Assistance Program coverage, as is currently the case. The question is thus whether Chapter 591 overrode these exclusions and indirectly established medical assistance eligibility for prisoners.

The language added by Chapter 591, taken at face value, does not extend Medical Assistance Program eligibility to persons who have been incarcerated. Rather, Article 87, §46(c)(2) only requires notification of such eligibility *if it exists*. As the Court of Appeals recently reiterated, "In construing a statute, we look first to its language ...; in so doing, we assume that the words of the statute are intended to have their natural, ordinary, and generally understood meaning in the absence of evidence to the contrary." *Brodsky v. Brodsky*, 319 Md. 92, 98, 570 A.2d 1235 (1990).

---

[6] Current §46(a), essentially the original version of the statute, requires the sheriff to "provide food and board for all prisoners committed to the sheriff's charge and such food and other articles for the comfort of sick prisoners as the physician attending the prisoners may deem necessary, the expense of which shall be paid by the county or Baltimore City."

This construction creates something of an anomaly, however, for notification is required of an eligibility status that, under current law, cannot exist.[7] Yet the existence of this anomaly does not, in light of the legislative history, convince us that the General Assembly intended the new language added by Chapter 591 to bring about drastic changes in Medical Assistance Program policy in so indirect a way.

During the 1988 Session, several bills were introduced that addressed the payment of medical care for prisoners. The bill amending Article 87, §46, Senate Bill 427, was "requested" by the Maryland Association of Counties ("MACO"). *See* Senate Judicial Proceedings Committee, Floor Report on Senate Bill 427. Another bill supported by MACO, House Bill 539, expressly directed DHMH to provide medical assistance benefits to incarcerated persons. House Bill 539 proposed to amend HG §15-109 to require DHMH to continue MASO benefits to an incarcerated person during the *first thirty days of incarceration*. It is evident from MACO's bill analysis that MACO understood that House Bill 539, and not Senate Bill 427, was to be the vehicle for expanding — but not beyond the first thirty days — medical assistance benefits to prisoners. *See* Maryland Association of Counties, Analysis of Prisoner Medical Care Legislation (February 3, 1988). The General Assembly, however, failed to enact House Bill 539.

That the unenacted House Bill 539 and not Senate Bill 427 was intended to extend medical assistance benefits, at least for a limited period of incarceration, is further supported by the two bills' treatment of HG §15-113. As discussed above, HG §15-113 requires Medical Assistance Program eligibility for a prisoner during the first month of incarceration, if the inmate is eligible for federally funded Medicaid benefits, and mandates State or local authorities responsible for the inmate to reimburse DHMH for its medical assistance expenditures made on behalf of the inmate. HG §15-113(b) and (c). House Bill 539, which expressly provided State medical assistance under the MASO program, would have repealed this provision.

---

[7] The notification requirement is not inherently without potential value. Although under current law it has no implications for reimbursing local authorities for prisoner medical care, should State law change to permit, for example, 30 days coverage, as was true in the past, the notification requirements of Article 87, §46(c)(2) would provide a mechanism for helping to facilitate reimbursement from the Medical Assistance Program for prisoner medical care.

This proposed repeal is what one would expect. To let HG §15-113 remain in effect would be confusing, if not inconsistent with the intent of House Bill 539 to require State coverage. But Senate Bill 427, which enacted the amendments to Article 87, §46 did *not* repeal HG §15-113. Thus, although the Legislature was aware of how to provide expressly for an extension of medical assistance benefits to prisoners — and how to repeal potentially inconsistent law — it rejected the bill that would have done so and enacted the bill that did not.

The Judicial Proceedings Committee's statements on Senate Bill 427, moreover, reveal no intention to expand medical assistance benefits through that bill. The only mention of medical assistance in either the Committee's bill analysis or floor report is in reference to the provision requiring prisoners to disclose information about medical assistance eligibility to the local authorities.

The final element of the legislative history that might bear on the legislative objective is the fiscal note, which states that the fiscal impact on the Medical Assistance Program's budget is "unknown, but could approximate $50,000." If Senate Bill 427 was not intended to expand medical assistance coverage, one would expect it to have no fiscal impact on the Program. However, while this estimate is inconsistent with interpreting Senate Bill 427 as having no impact on the Medical Assistance Program, it is also inconsistent with reading the legislation to expand medical assistance coverage to prisoners.

The $50,000 estimate is less than one percent of the cost of annual prisoner medical care in 1986/1987. *See* Maryland Association of Counties, Prisoner Medical Care Workgroup (December 22, 1987) (attached to MACO bill analysis). The fiscal note therefore sets out an estimate far below the fiscal impact of expanding medical assistance coverage to the eligible prisoner population. Although probably still quite low, the $50,000 estimate is closer to the impact of a policy that would expand coverage to the first thirty days of incarceration — the effect of Senate Bill 427 *had House Bill 539 also been enacted.* In any case, we do not believe that the fiscal note projection affords sufficient evidence to read Senate Bill 427 as requiring an expansion of medical assistance coverage to prisoners, because the fiscal note estimate is so grossly inconsistent with the actual impact of such an expansion of coverage.

Based on the language of Senate Bill 427 and its legislative history, we conclude that the bill's amendments to Article 87, §46 did not extend medical assistance eligibility to the prisoner population.

IV

Equal Protection Analysis

The second major issue is whether the State's policy of excluding incarcerated persons from Medical Assistance Program coverage violates those persons' equal protection rights.[8] The Fourteenth Amendment to the United States Constitution provides: "No State shall deny to any person within its jurisdiction the equal protection of the laws." Although the Maryland Constitution does not contain an explicit equal protection clause, the due process requirement of Article 24 of the Declaration of Rights has been interpreted to embody like protections. *See Attorney General v. Waldron*, 289 Md. 683, 705, 426 A.2d 929 (1981); *Hornbeck v. Somerset Co. Bd. of Ed.*, 295 Md. 597, 640, 458 A.2d 758 (1983).

In equal protection analysis, the general test is whether the classification is rationally related to a legitimate governmental interest. *Cleburne v. Cleburne Living Centers*, 473 U.S. 432 (1985); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Callahan v. DHMH*, 69 Md. App. 316, 517 A.2d 781 (1986). Although more rigorous scrutiny is called for when a classification is based on factors such as race or alienage, here, because the legal distinction is based on inmate status, mere rationality is required.

The rational basis test is highly deferential to the public officials who construct such distinctions. "[Regulatory classifications] will be sustained if any state of facts reasonably may be conceived to sustain them." *Department of Transportation v. Armacost*, 299 Md. 392, 411, 474 A.2d 191 (1984). In the social welfare arena, the courts have been particularly unwilling "to second guess" the wisdom of officials "who are responsible for the allocation of limited public funds among the myriad of potential recipients." *Dandridge*, 397 U.S. at 487. "[A] State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." 397 U.S. at 485.

---

[8] As discussed in Part III above, prisoners in a detention center are obligated to reimburse the local jurisdiction for the cost of medical care. Thus, a prisoner denied coverage might be able to claim a deprivation of a legally protected interest sufficient to invoke equal protection analysis. A local jurisdiction, however, would not.

In this case, the decision by Congress to exclude prison inmates from Medicaid coverage was apparently based on the judgment that medical care for such persons is more appropriately funded by the state and local authorities that have had historical responsibility for providing that care. The preamble to the final regulation that entirely excluded such persons from Medicaid coverage by eliminating any federal financial subsidy for their medical care explained: "The intent of this provision is to insure that Medicaid funds are not used to finance care which traditionally has been the responsibility of State and local governments." 50 Fed. Reg. 13196 (April 3, 1985).

HG §15-113(c) implies a similar rationale. It states that if DHMH pays the custodial authority for an inmate's care (where there is federal funding, as discussed above), DHMH "shall be reimbursed for the nonfederal cost of medical care by either *the State or local authority that is responsible for the inmate of a public institution.*" (Emphasis added.)

While we are not aware of any courts that have analyzed the constitutionality of the policy distinction based upon this rationale, courts have reviewed a related issue directly relevant to this analysis. Under federal Medicaid law, the term "medical assistance" is defined to exclude both care to inmates of public institutions, at issue here, and "care of services for any individual who has not attained 65 years of age and who is a patient in an institution for tuberculosis or mental diseases." 42 U.S.C. §1396d(a)(22)(B). This second federal exclusion, denying coverage for those under 65 obtaining medical care in mental institutions, has been challenged on equal protection grounds. In upholding this exclusion, the courts have been unwilling to second-guess the congressional judgment that "care of the mentally ill in state hospitals was the responsibility of the states." *Legion v. Richardson*, 354 F. Supp. 456, 459 (S.D.N.Y.), *aff'd mem. sub nom. Legion v. Weinberger*, 414 U.S. 1058 (1974)

So, too, we conclude that the decision to continue to rely on public bodies historically responsible for inmate medical care cannot be judged irrational and therefore would withstand constitutional review.

IV

Conclusion

In summary, it is our opinion that the State's policy of excluding persons incarcerated in detention centers from Medical Assistance

Program coverage is authorized under federal and State law and is not a violation of the prisoners' equal protection rights.

J. Joseph Curran, Jr.
Attorney General

D. Michal Freedman
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

HEALTH CARE

MEDICAL TREATMENT — INFORMED CONSENT — LIFE-SUSTAINING PROCEDURES — *CRUZAN V. DIRECTOR, MISSOURI DEP'T OF HEALTH* — LIVING WILL LAW — DURABLE POWER OF ATTORNEY — GUARDIANSHIP

September 24, 1990

The Honorable Joan B. Pitkin
Maryland House of Delegate

The Honorable Rosalie S. Abrams
Director, Office on Aging

You have each requested our opinion on the effect in Maryland of the Supreme Court's recent "right to die" decision, *Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2841 (1990).

As you know, in 1988 this office issued a comprehensive opinion concerning decisions to forgo life-sustaining treatment, including artificially administered food and water. 73 *Opinions of the Attorney General* 162 (1988). Most broadly, both of you have asked us to consider whether any of our conclusions in that opinion must be changed in light of *Cruzan*. In addition, you have posed more specific questions about decisionmaking on this subject.

1. Our overall response to your inquiries is that *Cruzan* does not require any change in our basic conclusions: that a competent person has a right to decide whether to accept life-sustaining treatment, including artificially administered sustenance; that a competent person can use an advance directive to plan for decisionmaking even if the person later becomes disabled; and that a disabled person who has not prepared an advance directive nonetheless has a right to have a surrogate—a family member in certain circumstances, a guardian with court approval in others—make the decision on the person's behalf. In fact, *Cruzan* strengthens several of our conclusions.

2. Senator Abrams asked whether we could identify the standard of proof that would be applied in determining whether the decision to forgo artificially administered food and water on behalf of a disabled person reflects the choice that the person would have made. This question presupposes that the disabled person had neither stated a decision in an advance directive nor designated an agent with power to make such decisions.

In our opinion, Maryland courts would most likely require clear and convincing evidence that a decision to forgo life-sustaining treatment on behalf of a disabled person is what the disabled person would have decided under the circumstances.

In addition, Delegate Pitkin posed a series of specific questions concerning the Living Will Law and other methods of advance decisionmaking about life-sustaining treatment:

3. Does Maryland's Living Will Law prescribe language to be used if a person wishes to forgo artificially administered food and water?

No. In the 1988 opinion, we concluded that the Living Will Law permits a person to insert in a living will a statement that the person does not want the use of artificially administered food and water when the person is terminally ill. We reiterate that conclusion. However, the law does not specify any language for such a statement. Any phrasing that clearly reflects the person's intention would be legally sufficient.

4. Does Maryland's Living Will Law apply to all situations in which a person might decide to forgo artificially administered food and water?

No. The Living Will Law applies only when death is imminent as a result of a terminal illness. Should a person wish to make decisions in advance about the use of life-sustaining treatment, including artificially administered sustenance, in other circumstances — for example, if the person were to become permanently unconscious and yet able to live in that condition indefinitely — we recommend that the person state those decisions in a durable power of attorney for health care.

5. Does Maryland permit a person to delegate decisionmaking authority about life-sustaining treatment to a trusted friend or relative?

Yes. As explained in our 1988 opinion, a person may execute a durable power of attorney for health care that designates someone to serve as decisionmaker should the person become disabled. A durable power is typically written to give the agent general decisionmaking authority, together with several more specific grants of authority—for example, to forgo life-sustaining treatment. But a durable power of attorney for health care can do more; it can also reflect the person's own decisions. The agent's inevitably difficult task can be made easier if the durable power gives the agent guidance about the use of life-sustaining treatment.

6. In lieu of a living will or a durable power of attorney for health care, "would a simple statement of a wish to die under [specified] circumstances be legally sufficient?"

As our 1988 opinion pointed out, patients may make decisions about life-sustaining treatment in discussions with their physicians. A writing reflecting the patient's decisions, prepared by either the patient or the physician and embodied in the patient's medical records, would be legally sufficient. However, other kinds of written statements, not executed with the formalities of a living will or a durable power of attorney for health care, are of uncertain legal status and not likely to be viewed by health care providers as sufficient. Such statements undoubtedly would be regarded as significant and perhaps dispositive evidence of the person's intent should the question be litigated, but they may well not avoid litigation, as more formal documents would.

7. If a person has not executed a living will, who has final decisionmaking power should a question of life-sustaining treatment be raised?

(i) If the person has executed a durable power of attorney for health care, the agent named in that document would have decisionmaking authority, guided by whatever decisions were set out by the now-disabled person in the durable power itself. (ii) If the person is terminally ill and not under guardianship, close family members may decide to forgo life-sustaining treatment on behalf of the person, under the circumstances identified in our 1988 opinion. (iii) In other situations, specified in more detail in response to the next question, the court must approve decision to forgo life-sustaining treatment.

8. Under *Cruzan*, in what circumstances may the State "substitute [its] values for the individual's?"

As we read *Cruzan*, a majority of the Supreme Court has accorded constitutionally protected status to a competent individual's decision to decline life-sustaining treatment when the individual is terminally ill or permanently unconscious, whether made at the time or previously in a formal writing. A majority of the Justices also would recognize the constitutional right of an individual to delegate decisionmaking power to an agent by means of a durable power of attorney for health care. In these cases, a state may not substitute its decision for that of the individual or the agent. Maryland law, as construed in our 1988 opinion, is fully consistent with this aspect of *Cruzan*.

If a person has neither decided the question personally in an advance directive nor designated an agent with authority to do so, a state has extensive power to weight the decision toward the maintenance of life-sustaining treatment. *Cruzan* holds that a state may require the decision to be made by a court, instead of the patient's family, and may require treatment to be maintained unless clear and convincing evidence of the patient's wish to forgo treatment is available.

In Maryland as elsewhere, most people have not prepared an advance directive of any kind. When a person without an advance directive becomes disabled, our 1988 opinion advised, court approval of a decision to forgo life-sustaining treatment is required in the following situations: if the person is under guardianship; if the person is not terminally ill; if no close family member is available to act as surrogate decisionmaker for a terminally ill patient; or if participants in the decisionmaking about life-sustaining treatment for a terminally ill patient disagree about the proper course. This advice is consistent with *Cruzan* and we reaffirm it.

As indicated in our answer to the second question above, a court will likely require clear and convincing evidence in support of a petition to forgo life-sustaining treatment. Although *Cruzan* does not require this standard of proof, it is the one that we believe is most likely to be adopted by the Maryland courts.

9. What role does a physician play in decisionmaking about life-sustaining treatment?

Decisionmaking about life-sustaining treatment, like other treatment choices, is collaborative. The physician's role is to identify the treatment alternatives, including forgoing treatment, that are medically reasonable in light of the patient's condition; explain the consequences of each alternative; and offer a medically appropriate recommendation. The final decision, however, is to be made by the patient or the patient's surrogate, not by the physician.

I

Cruzan

A. *Introduction*

The *Cruzan* case involved a young woman who, as a result of an automobile accident, was left in a persistent vegetative state. Nancy Cruzan "is not dead. She is not terminally ill. Medical experts testified that she could live another 30 years." *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1989).

Less than a month after her accident, and therefore at a time when hope of recovery still existed, Nancy Cruzan's doctors, with family consent, implanted a gastrostomy feeding tube. Years later, after any possibility of recovery was ruled out, Nancy's co-guardians, her parents, sought to have the feeding tube removed.[1]

The trial court approved the request of Nancy's parents to withdraw the feeding tube. Pointing to a "somewhat serious conversation with a housemate friend that if she were sick or injured she would not wish to continue her life unless she could live at least halfway normally," together with other evidence of her views, the trial court found that "given her present condition she would not wish to continue on with her nutrition and hydration." *See* 760 S.W.2d at 433 (trial court judgment reprinted in dissenting opinion).

The Missouri Supreme Court reversed: "Given the fact that Nancy is alive and the burdens of her treatment are not excessive for her, we do not believe her right to refuse treatment, whether that right proceeds from a constitutional right of privacy or a common law right to refuse treatment, outweighs the immense, clear fact of life in which the state

---

[1] Having been in a persistent vegetative state for seven years, Nancy Cruzan will never regain cognitive functioning. "The longest any person has ever been in a persistent vegetative state and recovered was 22 months." 110 S.Ct. at 2868 n.8 (Brennan, J., dissenting).

maintains a vital interest." 760 S.W.2d at 424. When a person is not able to make treatment decisions directly, no person may forgo life-sustaining treatment on the person's behalf without "clear and convincing, inherently reliable evidence" that the person would have made the same decision. 760 S.W.2d at 425.

The Missouri court held that the evidence offered at trial about Nancy's wishes was "inherently unreliable and thus insufficient to support the co-guardians [*sic*] claim to exercise substituted judgment on Nancy's behalf." 760 S.W.2d at 426. As the Missouri court observed:

> The state's interest is in the preservation of life, not only Nancy's life, but also the lives of persons similarly situated yet without the support of a loving family. This interest outweighs any rights invoked on Nancy's behalf to terminate treatment in the face of the uncertainty of Nancy's wishes and her own right to life.

767 S.W.2d at 426.

B. The Supreme Court's Decision

The United States Supreme Court, by a five-to-four vote, affirmed the decision of the Missouri Supreme Court. Writing for himself and Justices White, O'Connor, Scalia, and Kennedy, Chief Justice Rehnquist stated that the question before the Court "is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did." 110 S.Ct. at 2851. The Constitution did not do so, the Court held: "In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state." 110 S.Ct. at 2854.

As is true in many constitutional controversies, the Court invoked a balancing test—the individual's interest against the state's interest. The Court acknowledged that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment ...." 110 S.Ct. at 2851. The Court further "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." 110 S.Ct. at 2852.

On the other side of the balance, a state may "assert an unqualified interest in the preservation of human life ...." 110 S.Ct. at 2853. More particularly, because "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality," a state "may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." 110 S.Ct. at 2852-53. Missouri's clear and convincing evidence standard of proof guards against potential abuse by surrogate decisionmakers and, given the finality of a decision to forgo life-sustaining treatment, "may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment." 110 S.Ct. at 2854. The Court recognized that "Missouri's requirement of proof in this case may have frustrated the effectuation of the not-fully-expressed desires of Nancy Cruzan. But the Constitution does not require general rules to work faultlessly; no general rule can." *Id.*

The Court declined to rule on whether the Constitution would forbid a state from overriding the decisions of a surrogate designated by the disabled person while competent: "We are not faced in this case with the question of whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual." 110 S.Ct. at 2856.

C. Justice O'Connor's Concurrence

Justice O'Connor wrote a significant concurring opinion focused on the point not decided by the Court — the constitutional status of a person's designation of a surrogate decisionmaker.

Justice O'Connor began by pointing out why "state incursions into the body [are] repugnant to the interests protected by the Due Process Clause":

> The State's imposition of medical treatment on an unwilling competent adult necessarily involves some form of restraint and intrusion. A seriously ill or dying patient whose wishes are not honored may feel a captive of the machinery required for life-sustaining measures or other medical interventions.

> Such forced treatment may burden that individual's liberty interest as much as any state coercion.

110 S.Ct. at 2856. Moreover, Justice O'Connor continued, "[t]he State's artificial provision of nutrition and hydration implicates identical concerns. Artificial feeding cannot readily be distinguished from other forms of medical treatment." 110 S.Ct. at 2857. "Accordingly," Justice O'Connor wrote, "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water." *Id.*

Justice O'Connor then went on to express her view that, although "the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker, ... such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment." Observing that "[f]ew individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent," she wrote that "[s]tates which decline to consider any evidence other than such instructions may frequently fail to honor a patient's intent." *Id.*

"Delegating the authority to make medical decisions to a family member or friend," Justice O'Connor pointed out, "is becoming a common method of planning for the future." *Id.* Justice O'Connor lauded the states that "have recognized the practical wisdom of such a procedure by enacting durable power of attorney statutes that specifically authorize an individual to appoint a surrogate to make medical treatment decisions." *Id.* She also pointed to those states, including Maryland, whose general durable power of attorney statutes have been construed to authorize durable powers of attorney for health care. 110 S.Ct. at 2858.[2] The Court's decision in *Cruzan*, "holding only that the Constitution permits a state to require clear and convincing evidence of Nancy Cruzan's desire to have artificial hydration and nutrition withdrawn, does not preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate." *Id.*

---

[2] In this passage, Justice O'Connor cited with approval our 1988 opinion.

D. *Justice Scalia's Concurrence*

Justice Scalia also wrote a separate concurrence, spelling out his preference that the Court "announce clearly and promptly, that the federal courts have no business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide—including suicide by refusing to take appropriate measures necessary to preserve one's life; ... and hence, that even when it *is* demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve her life, it is up to the citizens of Missouri to decide through their elected representatives whether that wish will be honored." 110 S.Ct. at 2859 (emphasis in original).

E. *Dissenting Opinions*

Justice Brennan, writing in dissent for himself and Justices Marshall and Blackman, would have held "that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interest of the State, and ... that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right ...." 110 S.Ct. at 2864. Although the right to reject medical treatment may not be absolute, Justice Brennan wrote, "no state interest could outweigh the rights of an individual in Nancy Cruzan's position. Whatever a State's possible interests in mandating life-support treatment in other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so." 110 S.Ct. at 2869.

In his view, Missouri may constitutionally impose "only those procedural requirements that serve to enhance the accuracy of a determination of Nancy Cruzan's wishes or are at least consistent with an accurate determination .... Just as a state may not override Nancy's choice directly, it may not do so indirectly through the imposition of a procedural rule." 110 S.Ct. at 2871-72. Missouri's clear and convincing evidence standard is so stringent, Justice Brennan thought, "that only a living will or equivalent formal directive from the patient when competent would meet this standard." 110 S.Ct. at 2875.

Moreover, Justice Brennan would have held that a state is constitutionally required to honor the decisions of a surrogate decisionmaker:

> A State may ensure that a person who makes the decision on the patient's behalf is the one whom the patient himself would have selected to make that choice for him. And a State may exclude from consideration anyone having improper motives. But a State generally must either repose the choice with the person whom the patient himself would most likely have chosen as proxy or leave the decision to the patient's family.

110 S.Ct. at 2877.

Justice Stevens, in a separate dissent, objected to the majority's allowing Missouri's "abstract, undifferentiated interest in the preservation of life to overwhelm the best interests of Nancy Beth Cruzan, interests which would, according to an undisputed finding, be served by allowing her guardians to exercise her constitutional right to discontinue medical treatment." 110 S.Ct. at 2879. Although he did not discuss the point in detail, Justice Stevens, like the other dissenters, suggested that he likewise views a state as constitutionally required to recognize surrogate decisionmaking on behalf of a disabled person. *See* 110 S.Ct. at 2892.

II

Effect Of *Cruzan* On 1988 Attorney General's Opinion—Underlying Principles

In 1988 we concluded that a competent person "has a constitutional and common law right" to instruct that artificially administered sustenance not be used when the person is terminally ill or permanently unconscious. 73 *Opinions of the Attorney General* at 163 (1988). We believe that this conclusion is strengthened by the Supreme Court's decision in *Cruzan*.

The opinion of the Court recognized the common law basis of the doctrine of informed consent and its corollary, the right to refuse unwanted treatment: "The informed consent doctrine has become firmly entrenched in American tort law.... The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." 110 S.Ct. at 2847.

Moreover, the Court held, this right has constitutional stature. 110 S.Ct. at 2851. In our 1988 opinion, we cited several courts that had identified the right to refuse medical treatment within the constitutional right to privacy. 73 *Opinions of the Attorney General* at 172. The Court in *Cruzan* declined to so hold, concluding instead that "this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." 110 S.Ct. at 2851 n.7. Nevertheless, the Court's constitutional holding was clear: Competent persons have "a general liberty interest in refusing medical treatment." 110 S.Ct. at 2851.

Although the Court stopped short of so holding, it implied that the right to refuse medical treatment generally encompasses the right to refuse artificially administered food and water. 110 S.Ct. at 2852. Justice O'Connor, in her concurrence, stated explicitly her view "that the refusal of artificially delivered food and water is encompassed within that liberty interest." 110 S.Ct. at 2856. And all four dissenting Justices took that view. Hence, at least five, and possibly as many as eight, Justices accept the proposition that a competent person has a constitutional right to forgo the medical intervention necessary to supply food and water through tubes.

The Court pointed out, as we did in our 1988 opinion, that the right to refuse treatment is not an absolute one and must be balanced against "the relevant" state interests. 110 S.Ct. at 2852. In our 1988 opinion, we identified four such interests: "the preservation of life; the prevention of suicide; the protection of the interests of innocent third parties; and the maintenance of the ethical integrity of the medical profession." 73 *Opinions of the Attorney General* at 173.

Given the facts of the case before it, the Supreme Court did not have occasion to consider the circumstances under which any of these state interests might outweigh the competent individual's right.[3] Nothing in the Court's opinion or that of Justice O'Connor, however, calls into question our conclusion that "[t]he right of a competent, terminally ill patient to refuse life-sustaining treatment outweighs these state interests, individually and cumulatively." 73 *Opinions of the Attorney General* 174. We continued: "The only state interest that conceivably might be given controlling weight in a particular case is the protection of dependents." 73 *Opinions of the Attorney General* at 175. *Accord, State v. McAfee*, 259 Ga. 579, 385 S.E.2d 651 (1989).

Our 1988 opinion also discussed the ways in which a competent person might act to assure that future decisions about life-sustaining treatment would reflect the person's own views, should the person later become unable to make those decisions. In the next part of this opinion, we shall consider the current status of these methods of advance decisionmaking about life-sustaining treatment.

III

Direct, Advance Decisionmaking

A. *Living Wills*

In our 1988 opinion, we construed the Living Will Law, Subtitle 6 of Title 5 of the Health-General Article ("HG" Article), to allow a person to state explicitly in a living will the person's decision about the artificial administration of food and water: "If a declaration

[3] In his concurrence, Justice Scalia alone suggested that the state's interest in preventing suicide left it entirely free to negate a competent individual's choice to refuse life-sustaining treatment. 110 S.Ct. at 2860-61. No other Justice expressed this view, and the overwhelming majority of courts agree with the Connecticut Supreme Court that "[i]n exercising her right of self-determination, [the patient] merely seeks to be free of extraordinary mechanical devices and to allow nature to take its course. Thus, death will be by natural causes underlying the disease, not by self-inflicted injury." *McConnell v. Beverly Enterprises*, 209 Conn. 692, 553 A.2d 596, 605 (1989) (citing cases).

specifically refers to artificially administered sustenance and states the declarant's instruction that this form of treatment not be initiated or be discontinued if already initiated, those providing care should carry out this instruction." 73 *Opinions of the Attorney General* at 182.

Part of our reasoning in construing the statute in this way was to avoid a potential constitutional problem: "If the provisions on food and water in the Living Will Law were construed to prohibit a person's exercise of the right to refuse artificially administered sustenance, those provisions would likely be found unconstitutional." *Id.* As discussed in Part II above, at least five Justices of the Supreme Court hold the view that a competent person has a constitutional right to refuse artificially administered sustenance. *Cruzan* thus strengthens our construction of the Living Will Law. *See also McConnell v. Beverly Enterprises*, 209 Conn. 692, 553 A.2d 596 (1989) (Connecticut's Removal of Life Support Systems Act reflects legislative policy allowing terminally ill patient to forgo tube feeding).

However, the Living Will Law addresses only a narrowly defined—albeit very important—medical circumstance: when a patient is in "terminal condition," defined as "an incurable condition" that "makes death imminent ...." HG §§5-601(f) and (g).[4] Because of this statutory limit on its scope, a living will cannot itself be an instrument of advance decisionmaking about life-sustaining treatment in any other circumstance—for example, a case of persistent vegetative state, as in *Cruzan*. *But see In re Greenspan*, 558 N.E. 2d 1194 1990 (Ill. 1990).[5] If a person modified a living will to expand its scope to

---

[4] "Terminal condition" is defined in full as "an incurable condition of a patient caused by injury, disease, or illness which, to a reasonable degree of medical certainty, makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery." HG §5-601(g). *See also* HG §5-601(e) (definition of "life-sustaining procedure").

[5] In *Greenspan*, the Illinois Supreme Court concluded that the death of a person in a persistent vegetative state was "imminent," within the meaning of the Illinois Living Will Act, because the person's death would occur quickly if artificially administered sustenance were withdrawn: "Imminence must be judged as if the death-delaying procedures were absent ...." 558 N.E. 2d at 1204.

(continued...)

conditions other than terminal illness as defined in the statute, those changes would surely be viewed as probative evidence of the person's intent. However, that portion of the living will would not be legally self-executing, as a living will otherwise is.

B. Durable Powers of Attorney For Health Care

In the 1988 opinion, we concluded that "a medical durable power of attorney is a legally effective instrument" for advance decisionmaking. 73 *Opinions of the Attorney General* at 184. The heart of a durable power of attorney for health care is the naming of an agent to make health care decisions on behalf of the principal, typically in the event of the principal's disability.[6]

A durable power of attorney for health care is a very flexible instrument and can be tailored to the individual's wishes. It can be used to empower the agent to make decisions in any medical circumstance covered by the durable power. That is, it is not necessarily limited to terminal illness or permanent unconsciousness. It can delegate authority about any treatment choice that the principal could make personally. *See In re Conroy*, 98 N.J. 321, 486 A.2d 1209, 1230-31 (1985).

Although a principal may choose simply to make a delegation of decisionmaking power to the agent, the principal can also assist the agent by including in the durable power instructions outlining the circumstances under which life-sustaining treatment is to be used or

---

[5](...continued)

This reading of the Illinois law is at best questionable. *See* 1990 Ill. LEXIS 82, at 37-38 (Ward, J., dissenting). A comparable construction of Maryland's law would be untenable, for the law expressly limits the applicability of a living will to conditions that lead to imminent death "despite the application of life-sustaining procedures ...." HG §5-601(g).

[6] Although a durable power of attorney that immediately vests decisionmaking power in the agent is legally effective, most durable powers of attorney for health care are drafted so that the power becomes effective only upon the principal's disability (a so-called "springing" power of attorney). The durable power form drafted by the Health Law Section of the Maryland State Bar Association and available from this office is of this type.

forgone. If a durable power merely delegates decisionmaking authority, a leading commentator has pointed out, the agent "lacks any formal guidance from the [principal] as to the [principal's] actual wishes about treatment." If the principal includes instructions, however, the agent's "discretion can be guided in such a way that it is the [principal's] will that is being applied ...." A. Meisel, *The Right to Die* §10.5 at 322 (1989) ("*Right to Die*"). *See In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987).

The concurring opinion of Justice O'Connor and the dissenting opinions in *Cruzan* together indicate the view of a majority of Justices that the use of a durable power of attorney for health care, either as a general delegation of authority to an agent alone or in combination with a statement of the principal's decisions, is constitutionally protected. *See* Part IC and E above.

C. *Prior Instructions to Physician*

In the 1988 opinion, we advised that "[t]he right of self-determination about medical treatment means that a competent person may engage in direct decisionmaking when the person and the physician are discussing a future course of treatment. That discussion might well deal with questions of the person's consent to treatment if various contingencies were to arise." 73 *Opinions of the Attorney General* at 185. Apart from the *Cruzan* decision's recognition of the constitutional right to refuse life-sustaining treatment, *Cruzan* does not affect our conclusion in this regard.

In our prior discussion of this method of decisionmaking, we supposed that it would ordinarily occur in a discussion between doctor and patient, with the patient's oral decisions recorded by the doctor in the patient's chart. Nothing in the 1988 opinion was meant to suggest that the patient might not state his or her decisions about future treatment options in a writing that the doctor would incorporate into the medical records.[7]

---

[7] Persons who execute a living will or durable power of attorney for health care should consider forwarding a copy of that document for inclusion in their medical records.

D. Informal Writings

Delegate Pitkin asked whether a simple written statement of a person's decision to forgo life-sustaining treatment is the legal equivalent of a statutory living will or durable power of attorney for health care. We are doubtful whether an informal writing (apart from those incorporated into the patient's medical record, discussed in Part IIIC above) would achieve the same result as these more formal documents.

One out-of-state case has held that an individually drafted "mercy will and last testament" could be given effect without court approval to permit the removal of a respirator from a comatose and terminally ill patient. *John F. Kennedy Hospital v. Bludworth*, 452 So. 2d 921, 922 (Fla. 1984). The *Bludworth* case has little bearing on the present situation in Maryland, however, for the Maryland General Assembly has specifically addressed the matter of written advance decisionmaking, by enacting the Living Will Law and by giving express recognition to the validity of durable powers of attorney for health care. *See* 73 *Opinions of the Attorney General* at 180-85. Under these circumstances, we doubt whether a writing not executed with the formalities of these documents would be given equivalent legal effect. *See Saunders v. State*, 492 N.Y.S.2d 510, 516 (Sup. Ct. 1985).

At the same time, an informal writing undoubtedly is "relevant evidence of the patient's intent." *In re Conroy*, 486 A.2d at 1229 n.5. The "existence of a writing suggests the author's seriousness of purpose." *In re O'Connor*, 72 N.Y.2d 517, 531 N.E. 2d 607, 613 (1988). Thus, when a court or the patient's family considers a decision about life-sustaining treatment, the decisionmaker would certainly take any writing into account in applying the "substituted judgment" standard for surrogate decisionmaking — that is, when the decisionmaker endeavors to make the decision that the disabled person would make if able to do so. *See* 73 *Opinions of the Attorney General* at 186-87.[8]

---

[8] The two principles of surrogate decisionmaking discussed in our 1988 opinion were "substituted judgment" and "best interest," nicely summarized by a commentator as follows: "The essential distinction between the two is (continued...)

IV

Surrogate Decisionmaking

A. Family Decisionmaking

Our 1988 opinion considered the standards and procedures for decisionmaking when a person had not engaged in any form of direct decisionmaking (including the naming of an attorney in fact under a durable power of attorney for health care), was unable to make treatment decisions when a decision about life sustaining treatment needed to be made, and was terminally ill. In brief, we identified a form of family decisionmaking recognized in many cases from outside Maryland that we believed the courts of this State would also recognize.

We advised that "a close family member may decide that artificially administered sustenance [or any other form of life-sustaining treatment] is to be withheld or withdrawn, without court proceedings, if all of the following conditions are met":

> (i) The person is both disabled and terminally ill;
>
> (ii) The attending physicians agree that forgoing treatment is medically proper;
>
> (iii) The family member determines that forgoing treatment is what the disabled person would want done or, if that is unknown, is in the person's best interest;
>
> (iv) No other family member disagrees with the decision; and

---

[8](...continued)
that under the best interests standard the surrogate is to do what is best for the patient in the surrogate's own judgment, whereas under the substituted judgment standard the surrogate is to attempt to replicate what the patient would have decided if competent to do so." *Right to Die* §9-10, at 270.

(v) When applicable, the hospital's patient care advisory committee has not advised against forgoing treatment.

73 *Opinions of the Attorney General* at 164, 165 and 196-99.

Because *Cruzan* did *not* involve a terminally ill person, neither the holding nor the reasoning of that case calls this conclusion into question. *Cruzan* held that the Constitution does not require a state to vest decisionmaking power in the family of a permanently unconscious patient who is not terminally ill. *Cruzan* is not inconsistent with our conclusion that, if treatment would merely prolong the dying process of a terminally ill patient, Maryland courts would recognize the common law right of family members to decline treatment on the patient's behalf. "Our common human experience teaches us that family members ... care most and best for a patient ... [and] have the best interests of the patient at heart. The importance of the family in medical treatment decisions is axiomatic." *In re Farrell*, 108 N.J. 335, 529 A.2d 404, 414 (1987).

At the same time, our 1988 opinion declined to extend this conclusion about family decisionmaking beyond those who were terminally ill. We expressed "serious reservations about the reasoning of decisions that allowed families to decide, without court approval, to end artificially administered sustenance for a patient whose death might otherwise be averted indefinitely." 73 *Opinions of the Attorney General* at 200.[9] At bottom, our concern was that the state's interest in the preservation of life mandated greater procedural safeguards when the patient was "neither on the verge of death nor suffering ...." 73 *Opinions of the Attorney General* at 201. As we put it, "[u]ndoubtedly, in most cases involving the permanently unconscious, family members are sincerely trying to do what the patient would want. Yet we must also recognize the possibility that a family's decision to refuse substituted consent for artificially administered sustenance might be the product of selfish or other wrong motives." 73 *Opinions of the Attorney General* at 200.

---

[9] We were not referring "to a family member who is empowered to act under the patient's medical durable power of attorney." 73 *Opinions of the Attorney General at 200* n.59.

In *Cruzan*, the Supreme Court expressed a similar concern in rejecting the argument that the family had a constitutional right to assert its "'substituted judgment' ... even in the absence of substantial proof that their views reflect the views of the patient." 110 S.Ct. at 2855. The Court wrote: "Close family members may have a strong feeling—a feeling not at all ignoble or unworthy, but not entirely disinterested, either—that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. But there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent." 110 S.Ct. at 2855-56.

Thus, we reaffirm our conclusion that, until the Court of Appeals or the General Assembly determines otherwise, "a family who wishes to end life-sustaining treatment of a permanently unconscious patient must seek court approval through a guardianship proceeding (unless the family member has power to decide under the patient's medical durable power of attorney)." 73 *Opinions of the Attorney General* at 201.

B. Guardianship

One noteworthy change in the law regarding guardianship occurred not as a result of *Cruzan* but in recently enacted legislation. In our 1988 opinion, we concluded that a guardian of the person who sought to direct the withholding or withdrawal of artificially administered sustenance or any other life-sustaining treatment was required to petition the guardianship court for authorization. 73 *Opinions of the Attorney General* at 192. The opinion reflected the view that the court had the power, applying the "substituted judgment" and "best interest" decisional standards discussed at length in that opinion, to approve such a request.

This conclusion was called into question in litigation culminating in a decision by the Court of Appeals, *In re Riddlemoser*, 317 Md. 496, 564 A.2d 812 (1989). In this case, the guardianship court had declined to approve a guardian's request that a "do not resuscitate" order be entered for an unconscious, terminally ill patient.[10] The trial judge "indicat[ed] his belief that he lacked authority to issue the order." 317 Md. at 501. Because the patient had died before the appeal could be heard, the Court of Appeals dismissed the appeal on mootness grounds. In so doing, the Court left open the question of whether §13-708(b)(8) of the Estates and Trust Article ("ET" Article) "should be interpreted to invest the [guardianship] court with authority to order the cessation of life-sustaining treatment ...." 317 Md. at 505. The Court described this question as "one of interpretation which, arguably, may not be free of conflicting views." 317 Md. at 504. The Court by implication, and Judge Adkins expressly, invited "the legislature to eliminate the ambiguity ...." 317 Md. at 506 (Adkins, J., concurring).

The General Assembly did so at its next session by enacting Chapter 709 (Senate Bill 735) of the Laws of Maryland 1990, "Guardians—Disabled Persons—Medical Treatment." As amended by this statute, ET §13-708(b)(8) now expressly empowers a guardian to approve the "withholding" or "withdrawing" of "medical or other professional care, counsel, treatment or service." However, "where a medical procedure involves, or would involve, a substantial risk to the life of disabled person," the guardianship court must itself "authorize a guardian's consent or approval for" a procedure, the withholding of a procedure, or the withdrawing of a procedure. ET §13-708(c).

The language "authorize a guardian's consent or approval for" the forgoing of life-sustaining treatment is somewhat ambiguous in one respect. Arguably it could be taken to mean that the court could in advance generally "authorize" a guardian to make this kind of decision without further court approval when the need for an actual decision later arose.

Given the background of the legislation, however, we do not believe that such a construction comports with the legislative objective. The General Assembly was seeking to confirm the guardianship court's authority as it had been previously construed, not to broaden the guardian's authority to decide about life-sustaining treatment

[10] A "do not resuscitate" order or "no-code" is an instruction that cardipulmonary resuscitation not be undertaken if a patient suffers cardiac arrest. *See* 317 Md. at 501 n.2.

independently. Hence, we conclude that the authorization called for by ET §13-708(c) is an authorization of a specific recommendation by the guardian, enabling the court to assess the circumstances at the time that the decision needs to be made.

V

Standard of Proof

A. Introduction

The "burden" or "standard of proof," in the sense relevant here, is "the burden of persuading the trier of fact that the alleged fact is true." Cleary, *McCormick on Evidence* §336, at 947 (3d ed. 1984). The "alleged fact" that a surrogate acting under the "substituted judgment" standard advances is that the now-disabled patient would choose to forgo life-sustaining treatment if he or she were able to make a decision. *See* 73 *Opinions of the Attorney General* at 186, 187.[11]

As the reference to "trier of fact" implies, the very concept of "burden of proof" applies only in a judicial or quasi-judicial forum, when a party is attempting to persuade a judge or juror to reach a desired decision. A formal standard of proof is not applicable to nonjudicial decisionmakers—an agent acting under a durable power of attorney for health care or a family member acting on behalf of a terminally ill patient, for whom a standard of proof would not be meaningful. Decisionmaking of this kind, although subject to the substantive standards of "substituted judgment" and (if applicable) "best interest," does not usually require identification of a standard of proof: "When [decisionmaking] occurs in the health care institution, [the standard of proof] is likely to be a latent issue because nonlegal decisionmakers are less accustomed to thinking in such terms." *Right to Die* §8.38, at 254. To be sure, the decisionmaker must be convinced that the decision is what the patient would want or, for a

---

[11] Other facts — related to the patient's diagnosis and capacity, for example — are also decided in relation to a standard of proof. *See, e.g. In re Jobes*, 108 N.J. 394, 529 A.2d 434, 441 (1987) (requiring "clear and convincing medical evidence" of persistent vegetative state).

terminally ill patient, is in the patient's best interest; but outside a judicial forum, there is no need for the decisionmaker to use the rubric of a standard of proof in coming to a decision. *See In re Peter*, 529 A.2d at 425.

B. Choice of Standard

"According to the customary formulas a party who has the burden of persuasion of a fact must prove it in criminal prosecutions 'beyond a reasonable doubt," in certain exceptional controversies in civil cases, 'by clear, strong and convincing evidence,' but on the general run of issues in civil cases 'by a preponderance of the evidence.'" *McCormick on Evidence* §339, at 956 (citations omitted). These three levels of stringency are said to be "equivalent to statements that the trier must find that the fact is (a) almost certainly true, (b) highly probably true, and (c) probably true." *Id.* at 956 n.4.

The 1990 amendment to the guardianship statute did not set out any evidentiary standard for decisionmaking by the court. In our 1988 opinion, we observed that "[t]he best proof of a patient's wishes [is] the patient's own previous expressions." 73 *Opinions of the Attorney General* at 187. We then gave an example, drawn from the cases, of the factors to be considered, but we wrote that "[t]he caselaw does not permit us to generalize about an evidentiary standard." 73 *Opinions of the Attorney General* at 187 n.34.

In *Cruzan*, the determinative question involved the burden of proof. As discussed in Part I above, the Missouri Supreme Court required clear and convincing evidence of Nancy Cruzan's wish to forgo artificially supplied food and water and held that the conversations offered as evidence of her wishes failed to meet this standard. The Supreme Court, in turn, held that Missouri did not violate Nancy Cruzan's constitutional right by imposing this standard of proof, more stringent than that in most civil proceedings.

To be sure, the Supreme Court did not *require* the clear and convincing evidence standard; the Court merely held that Missouri was constitutionally permitted to adopt that standard. Other states are free to choose this or a different standard, or indeed to fashion procedures that do not invoke traditional legal formalities like an identified standard of proof.[12]

However, the Missouri court's choice of an evidentiary standard in *Cruzan* does reflect a growing body of caselaw recognizing clear and convincing evidence as the standard for determining what the now-disabled person would want done under the circumstances. In *In re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607 (1988), for instance, the New York Court of Appeals approved an order to insert a feeding tube into a severely debilitated 77 year old stroke victim over the objection of the patient's family. Clear and convincing evidence of the patient's intent to decline treatment was required, the New York court wrote, "because if an error occurs it should be made on the side of life." 531 N.E.2d at 613. "Viewed in that light," the court continued, "the 'clear and convincing' evidence standard requires proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented." *Id.*[13] The New York court found the patient's statements to have been too general and casual to "demonstrate a seriousness of purpose necessary to satisfy the 'clear and convincing evidence' standard." 531 N.E.2d at 614.

Two other recent cases, involving withdrawal of artificially administered sustenance from permanently unconscious patients, also

[12] As Justice O'Connor observed, the Court's decision does not "prevent States from developing other approaches for protecting an incompetent individual's liberty interest in refusing medical treatment.... [N]o national consensus has emerged on the best solution for this difficult and sensitive problem. Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States ... in the first instance." 110 S.Ct. at 2858-59 (citation omitted).

[13] The court pointed out, however, that it did not mean to suggest "that, to be effective, a patient's expressed desire to decline treatment must specify a precise condition and a particular treatment. We recognize that human beings are not capable of foreseeing either their own medical condition or advances in medical technology." The relevant question is "whether the infirmities [that the patient] was concerned with and the procedures she eschewed are qualitatively different than those now presented." 531 N.E.2d at 614. *See also In re Conroy*, 98 N.J. 321, 486 A.2d 1209, 1230 (1985).

invoked the "clear and convincing evidence" standard. *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E.2d 292, 300 (1989); *McConnell v. Beverly Enterprises*, 559 A.2d at 605. So have a number of earlier cases. *See, e.g., Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674, 691 (1987); *In re Gardner*, 534 A.2d 947, 953 (Me. 1987); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809, 815 (1980); *In re Colyer*, 99 Wash. 2d 114, 660 P.2d 738, 750 (1983). Professor Meisel concluded last year: "The predominant standard is clear and convincing evidence." *Right to Die* §8.38, at 254. *See also* N. Rhoden, *Litigating Life and Death*, 102 Harv. L. Rev. 375, 376 (1988) (clear and convincing evidence is "the typical legal requirement").

We think it likely that the Maryland Court of Appeals would also choose the clear and convincing evidence standard. As the Supreme Court observed, "An erroneous decision to withdraw life-sustaining treatment ... is not susceptible of correction." 100 S.Ct. at 2854. Moreover, the Court of Appeals' decision in *Riddlemoser*, while not directly on point, does reflect an overall cautiousness in this area. *See* J. C. Byrnes, *A "Macro" View of the Law of Life Support Withdrawal*, The Barrister, Summer 1990, at 9, 12. In short, we have no reason to think that the Court of Appeals would not adopt the predominant clear and convincing evidence test for judicial decisions approving the withholding or withdrawal of life-sustaining treatment.

C. Nature of "Clear and Convincing Evidence"

The Court of Appeals has characterized the clear and convincing evidence test in comparative terms: more than a preponderance of the evidence and less than evidence beyond a reasonable doubt. *Berkey v. Delia*, 287 Md. 302, 319-20, 413 A.2d 170 (1980). More descriptively, Maryland Civil Pattern Jury Instruction 1:8(b) (2d ed. 1984) states that "[t]o be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause you to believe it."

Applied to the question of substituted judgment when a decision about life-sustaining treatment must be made, this standard calls for a careful assessment of the quality of the evidence. "The probative value of prior statements will vary, depending on the age and maturity of the incompetent patient, the context of the statements, and the connection of the statements to the debilitating event." *In re Grant*, 109 Wash. 2d 945, 747 P.2d 445, 457 (1987).

The clear and convincing evidence standard seeks to assure that a decision will not be made if "'the evidence is loose, equivocal or contradictory' ...." *In re Storar and Eichner*, 52 N.Y. 2d 363, 420 N.E.2d 64, 72 (1981). As the New Jersey Supreme Court wrote, "an offhand remark about not wanting to live under certain circumstances made by a person when young and in the peak of health would not in itself constitute clear proof twenty years later that he would want life-sustaining treatment withheld under those circumstances." *In re Conroy*, 98 N.J. 321, 486 A.2d 1209, 1230 (1985).

On the other hand, the clear and convincing evidence standard can be satisfied through testimony that a mature person had thought about the issue of life-sustaining treatment and had expressed his or her desires "forcefully and without wavering," corroborated by testimony that the decision to forgo treatment reflected that person's values. *McConnell v. Beverly Enterprises*, 553 A.2d at 604-05. *See also, e.g., In re Severns*, 425 A.2d 156, 158 (Del. Ch. 1980); *In re Gardner*, 534 A.2d at 953; *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 497 N.E.2d 626, 631-32 (1986); *In re Peter*, 108 N.J. 365, 529 A.2d 419, 426-27 (1987); *In re Conroy*, 486 A.2d at 1230; *In re Storar and Eichner*, 420 N.E.2d at 72.

A writing is not required. "Despite the obvious evidentiary advantages of written advance directives, courts have only infrequently been reluctant to enforce oral directives because to require 'a written expression in every case would be unrealistic ... [and] would unfairly penalize those who lack the skills to place their feelings in writing.'" *Right to Die* §10.11, at 328-29 (quoting *In re O'Connor*, 531 N.E.2d at 614). As another commentator points out, "The best evidence available may consist of conversations with family, friends, and physicians." K. Rothenberg, *[Forgoing] Life-Sustaining Treatment: What Are the Legal Limits in an Aging Society?*, 33 St. Louis U. L.J. 575, 589 (1989).

VI

Physician's Role in Decisionmaking

Delegate Pitkin also asked about the decisionmaking role of physicians when a decision about life-sustaining treatment must be made.

As in other situations invoking principles of informed consent, the physician's main responsibility is "to provide [the] patien[t] with sufficient information to permit the patient himself to make an informed and intelligent decision ...." W. Keeton, D. Cobbs, R. Keeton, & D. Owen, *Prosser & Keeton on the Law of Torts* §32, at 190 (1984). *See generally Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). As a presidential commission summarized:

> The extent of the obligation of providers to inform patients so that they can make sound choices is no different for life-sustaining treatment than for any other .... [H]ealth professionals should ensure that patients understand (1) their current medical status, including its likely course if no treatment is pursued; (2) the interventions that might be helpful to the patient, including a description of the procedures involved and the likelihood and effect of associated risks and benefits; and (3) in most cases, a professional opinion as to the best alternative.

President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to [Forgo] Life-Sustaining Treatment* 51-52 (1983).

Except in an emergency, a physician may not impose unconsented treatment on a patient. *Sard v. Hardy*, 281 Md. at 439. Medical treatment imposed without any consent whatever traditionally has been viewed as battery. F. Rozovsky, *Consent to Treatment* §1.2, at 7 (2d ed. 1990). If treatment is performed with consent, but the consent was given on the basis of inadequate information, the cause of action is for negligence. D. Meyers, *Medico-Legal Implications of Death and Dying* §5:2, at 63 (1980).

Under the modern doctrine of informed consent, approved by the Court of Appeals in *Sard v. Hardy*, the physician explains the range of medically reasonable choices and usually provides a recommendation, but "[m]edical choice increasingly depends on factors that transcend professional training and knowledge. As medicine has become able to extend life [and] delay and redefine death, ... questions about values have come to the fore in medical decisionmaking. Health care choices involve profound questions that are not finally referable to professional expertise." M. Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 Yale L.J. 219, 222 (1985).

If a competent patient makes an informed and voluntary decision to forgo life-sustaining treatment, ordinarily the physician would have no legal basis on which to impose the treatment in the face of the patient's decision. *See In re Farrell*, 108 N.J. 335, 529 A.2d 404, 413 (1987); 73 *Opinions of the Attorney General* at 170.[14] *See also State v. McAfee*, 259 Ga. 579, 385 S.E.2d 652 (1989).

As a commentator summarized the point: "[W]ithin broad limits it is the patient's right to make 'mistakes' about what is best. Indeed, what is best for a patient, both ethically and legally, is defined as what the patient subjectively believes is best and therefore, by definition, is not a 'mistake.' Thus, ... physicians must tolerate patients' decisions that the physicians believe are not best for the patient from a medical perspective." *Right to Die* §2.3, at 20.

The physician's role is the same if the decision in question was made in advance by the patient in a living will or durable power of attorney for health care or is made by the agent whom the patient has designated in a durable power of attorney. Assuming that the decision about life-sustaining treatment falls within the range of medically reasonable alternatives, as determined by the physician, the decision of which alternative to choose is the patient's, as expressed in an advance directive or as delegated to the patient's agent. The Living Will Law provides that the physician is to "implement the declaration" of a qualified patient. *See* HG §5-604(a)(2). Even in other situations not

---

[14] If the physician believes that a countervailing interest like the protection of dependents should cause the patient's choice to be overridden, the physician should take steps to bring the matter to court.

so specifically addressed, we see no legal basis on which a physician may impose a decision contrary to that of the legally recognized decisionmaker.[15]

If a patient is disabled and has neither decided about the use of life-sustaining measures in an advance directive nor designated an agent to do so, a decision to forgo treatment may be made either by a guardian with court approval or by the patient's family if the patient is terminally ill. 73 *Opinions of the Attorney General at* 190-92 and 196-201. The physician's role is to identify the medically reasonable alternatives and the consequences of each and to offer a recommendation, but again final decisionmaking authority does not reside with the physician.

---

[15] If the physician's own values preclude his or her carrying out the patient's (or agent's) decision, the physician must transfer the patient to another physician. HG §5-604(b). *See In re Grant*, 747 P.2d at 456 n.6. *Cf. Doe v. Mundy*, 378 F. Supp. 731, 736 (E.D. Wis. 1974).

We note that the General Assembly recently enacted a provision specifying that a hospital or nursing home may not be held liable for "failing to carry out the advice of [a patient care] advisory committee concerning a patient's medical care if the advice given is inconsistent with the [institution's] written policies ...." HG §19-374(f), enacted in Chapter 545 (House Bill 191) of the Laws of Maryland 1990. This provision eliminates the institution's risk of liability premised on the theory that failure to adhere to the advisory committee's recommendation manifests a lack of due care. *See Right to Die* §15.22, at 505. However, given the narrow language of the provision; the narrow wording of the pertinent portion of the bill's title; and the General Assembly's failure to amend HG §19-344(f)(1)(ii), which grants to each resident of a nursing home the right to "refuse medication or treatment," we do not regard this immunity provision as diminishing the informed consent rights of patients in hospitals and nursing homes. *See* 73 *Opinions of the Attorney General* at 202-06.

VII

Conclusion

In summary, the Supreme Court's decision in *Cruzan* has not changed the basic conclusions that we reached in our 1988 opinion about the forgoing of life-sustaining treatment, including artificially administered food and water.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

Maryland law on the topics addressed by this opinion has been clarified significantly in the Health Care Decisions Act, Chapter 372 (House Bill 1243) of the Laws of Maryland 1993.

HEALTH OCCUPATIONS

NURSING HOME ADMINISTRATORS — STATUTORY CONSTRUCTION — RENEWAL APPLICATIONS OF LICENSEES "GRANDFATHERED" UNDER REGULATION SHOULD BE HELD IN ABEYANCE PENDING LEGISLATIVE CLARIFICATION OF EDUCATION REQUIREMENT ADDED TO STATUTE

December 12, 1990

Mr. Howard E. White
Executive Secretary
Board of Examiners of Nursing Home Administrators

You have requested our opinion on whether a newly enacted statute, incorporating education and experience requirements for licensure of nursing home administrators, is to be applied to persons currently holding valid licenses when they seek to renew those licenses.

For the reasons stated below, we conclude that these newly enacted requirements, set out in §8-302(d) of the Health Occupations Article ("HO" Article), were likely not intended to apply to a person seeking to renew a current nursing home administrator license if the person was properly licensed under then-applicable requirements and seeks a renewal of that license. Inexplicably, however, neither the statute itself nor its legislative history addresses the status of these "grandfathered" licensees.

Under the circumstances, we advise the Board of Examiners of Nursing Home Administrators to hold, without taking final action, renewal applications from this category of licensees. Under §10-404 of the State Government Article, the old licenses would remain effective. Then the issue should be presented to the General Assembly. If, as we expect, the General Assembly authorizes these licensees to renew their licenses without meeting the new requirements, the Board should then approve otherwise sufficient applications. If the General

Assembly declines to enact a statutory "grandfather" provision, the Board should then deny these applications.

I

Regulatory Background

On December 15, 1986, the Board of Examiners of Nursing Home Administrators adopted a set of regulations governing the activities of the Board and its licensees. *See* 13:25 Md. Reg. 2660 (December 5, 1986), *codified at* COMAR 10.33.01. Included among those regulations was COMAR 10.33.01.06, titled "Minimum Requirements for Licensure of Nursing Home Administrators."

That regulation contained eight prerequisites, A through H, that a prospective licensee was required to meet prior to being licensed. Regulations .06B, C, D, and F set forth education, training, and experience requirements. Regulation .06B required applicants to have a high school diploma or its equivalent, plus 60 hours of college studies.[1] Regulation .06C stated that the educational prerequisites outlined in Regulation .06B would be upgraded two years from the date of adoption of the regulations to require successful completion of a baccalaureate degree. Thus, persons applying for licensure prior to December 15, 1988 would need to meet the requirements of Regulation .06B; persons applying after that date would need to have completed a college degree program pursuant to Regulation .06C.[2]

---

[1] Prior to the effective date of COMAR 10.33.01.06B, license applicants had only been required to have a high school diploma.

[2] Regulation .06D required that an applicant who did not have a baccalaureate or master's degree in health care administration had to complete a 100-hour course of study in health care administration. Regulation .06F required completion of an administrator-in-training program or its equivalent. The remaining sections of COMAR 10.33.01.06 (Regulations .06A, .06E, .06G, and .06H) merely reiterated age, examination, and character requirements set forth in the statute.

By the terms of the regulation imposing the baccalaureate degree requirement, the prospective upgrade in educational prerequisites announced in Regulation .06C "[did] not apply to persons who are in possession of a valid nursing home administrator's license on the effective date of [the] regulations," December 15, 1986. Regulation .06C thus intended to exempt or "grandfather" then-valid licensees from having to meet the upgraded standards.

Further, the "grandfathering" effect of the regulation was perpetuated for those licensees by virtue of the statute's license renewal provisions. HO §8-311(c) then provided (and still provides) that a nursing home administrator licensee may renew the license for a two-year term, if, in addition to paying the renewal fee, submitting a renewal application, and completing continuing education requirements, the licensee "[o]therwise is entitled to be licensed"—that is, if the licensee meets the current requirements for licensure. When the new baccalaureate degree requirement became effective in December 1988, the grandfathering provision of Regulation 10.33.01.06C permitted licensees as of December 1986 to renew by continuing to exempt them from the new requirement. Because of the express exemption in Regulation .06C, each of these licensees could meet the test that he or she "[o]therwise is entitled to be licensed."

For persons who applied between December 15, 1986, the effective date of the regulations, and December 15, 1988, the effective date of the baccalaureate degree requirement, the Board looked to Regulation .06B (high school diploma plus 60 college credits) as the source of the educational requirements for initial licensure. It further determined that the waiver provisions outlined in Regulation .06C ought to apply to this group of applicants upon renewal of their licenses. This group would not be required to meet the baccalaureate degree requirement even though their renewal occurred subsequent to December 15, 1988, and even though they were not licensed two years earlier, on the effective date of the regulations.

Although the waiver provision in Regulation .06C did not, by its precise terms, apply to this group, the failure to "grandfather" them as well would have created an absurd result. Had the pre-December 1988 licensees not been grandfathered in along with the pre-December 1986 licensees, the Board would have been in the position of requiring persons who became licensed by possessing a high school diploma plus 60 hours of college credit to have completed their college degree (another two years of credits) within a two-year period or less after their original licensure, while at the same time functioning as nursing home administrators. Certainly, the Board's upgrade in its educational requirement was not meant to create an impossible situation or to unfairly burden, at renewal time, those licensees who obtained licensure when the baccaulaureate degree requirement had not yet taken effect.

The Board's interpretation of COMAR 10.33.01.06C is entitled to deference. *Commission on Human Relations v. Bethlehem Steel Corporation*, 295 Md. 586, 593, 457 A.2d 1146 (1983); *Dorsey v. Beals*, 288 Md. 161, 176, 416 A.2d 739, 747 (1980); *Messitte v. Colonial Mortgage Service Co. Assoc., Inc.*, 287 Md. 289, 293, 411 A.2d 1051, 1053 (1980). The Board is best able to discern its intent in proposing the regulation, which was designed to serve the specific needs of the agency. *Bethlehem Steel*, 295 Md. at 593. And its intent was clear: in adopting new regulations with the stated purpose of upgrading educational requirements, the Board was looking to a prospective upgrade, with no intent to disturb those already licensed under less stringent requirements.

II

Statutory Enactment of Licensing Requirements

Prior to 1990, HO §8-302(d) simply delegated to the Board the power to set certain licensure requirements: "The applicant shall meet the education, training, and experience standards set by the Board." The regulations discussed in Part I above were adopted by the Board under this grant of authority.

In Chapter 656 (House Bill 1157) of the Laws of Maryland 1990, the General Assembly withdrew this delegation of authority. Instead, the General Assembly itself has established the requisite levels of education, training, and experience.[3] These standards mirror those previously adopted by the Board in COMAR 10.33.01.07.06.

The statutory educational requirement is a baccalaureate degree, just as the Board required in Regulation .06C. Unfortunately, Chapter 656 contains no language comparable to the grandfather provision in the regulation. The only waiver provision in the statute authorizes the Board to waive the education requirements "for an individual who, prior to January 1, 1990, was licensed as a nursing home administrator for at least 1 year in another state." HO §8-302(e).

This omission has created concern among the group grandfathered under the regulation about their ability to obtain renewal of their licenses. The license of a nursing home administrator must be renewed every two years. HO §8-311(a). Under HO §8-311(c)(1), a licensed nursing home administrator may renew the license only if the licensee "[o]therwise is entitled to be licensed." The new statutory requirements for licensure include possession of at least a baccaulaureate degree, with no exceptions stated for current Maryland licensees. A literal application of the statute would mean that administrators without a baccalaureate degree who were licensed prior to December 1988 under the regulatory "grandfather" provision would not be eligible to renew their licenses.

---

[3] HO §8-302(d) now provides that each applicant must:

> (1) (i) Have a baccalaureate or masters degree in health care administration from an accredited college or university; or
>
> (ii) 1. Have a baccalaureate or masters degree in a field other than health care administration from an accredited college or university; and
>
> 2. Have satisfactorily completed a minimum of 100 hours in a course of study in health care administration, or its equivalent, approved by the Board; and
>
> (iii) 1. Have completed an administrator-in-training program approved by the Board; or
>
> 2. Have completed 1 year of full-time nursing home administration in a nursing home.

For example, suppose someone with 60 college credits obtained a license on July 1, 1988, six months prior to the effective date of the regulatory requirement of a baccaulaureate degree. Chapter 656 was signed into law on May 29, 1990, to be effective July 1, 1990. That licensee patently could not act to acquire another 60 college credits by the renewal date of the license (in this example, the very same day Chapter 656 became effective).

Given so harsh a result, we are extremely reluctant to attribute this objective to the General Assembly, especially since the General Assembly appears not to have considered the problem of the now-grandfathered licensees. "Results that are unreasonable, illogical, or that are at odds with the legislative purpose should be avoided." *Harford County v. Edgewater*, 316 Md. 389, 397, 558 A.2d 1219 (1989).

In attempting "to seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment ..., we are not limited to study of the statutory language .... [W]e are always free to look at the context within which statutory language appears." *Morris v. Prince George's County*, 319 Md. 597, 603-04, 573 A.2d 1346 (1990). *See also Taxiera v. Malkus*, 320 Md. 471, 480, 578 A.2d 761 (1990).

The underlying legislative purpose of Chapter 656 was to "set in statute the education requirements for nursing home administrators rather than leaving the requirements to the discretion of the Board." Bill Analysis of House Bill 1157. However, there is no hint of dissatisfaction with the way in which the Board had exercised its discretion in the past. Indeed, the requirements of the newly enacted HO §8-302(d) do not differ from or conflict with the Board's regulatory requirements. Each requires that license applicants must (1) have a baccalaureate degree in health care administration or its equivalent and (2) have completed an administrator-in-training program or its equivalent.

That Chapter 656 is silent on the question of renewal applicants who were qualified under the Board's previous, less exacting educational and experience requirements does not imply a legislative intent to oust those licensees from the profession when, upon the expiration of their current licenses, they have not met (and, in many instances, could not possibly meet) the upgraded education requirements. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 517, 525 A.2d 628 (1987) (unintended omission of language not to be given effect if result is "illogical or absurd" and not in furtherance of legislative purpose).

To be sure, newly enacted HO §8-302(e) expressly grants the Board the discretion to waive the education requirement for out-of-state applicants licensed as nursing home administrators for at least one year prior to January 1, 1990 in another state. But it is extremely unlikely that the General Assembly intended to grant more favorable treatment to out-of-state applicants than in-state licensees. Thus, the fact that no similar discretion to waive educational requirements was provided for similarly situated Maryland licensees implies, if anything, the General Assembly's assumption that Maryland licensees had no need for such a waiver, because they were "grandfathered" in by virtue of COMAR 10.33.01.06C.[4]

At the same time, we would be pushing the principle of *Kaczorowski* to an extreme if, absent supporting legislative history, we were to treat the statute as if it contained a grandfather clause when in fact it does not. Nor do we wish to convey the impression that administrative agencies generally may grant exceptions to statutory requirements. To the contrary, agency regulations at variance with a statute, whether long in existence or newly enacted, are invalid. If we thought that the General Assembly meant to apply the baccalaureate degree requirement to all licensees, we would view the grandfather provision in COMAR 10.33.01.06C as a nullity.

---

[4] COMAR 10.33.01.06C provides that completion of a baccalaureate degree as a prerequisite to licensure will take effect "at any time after two years from the date of adoption of these regulations." The newly enacted HO §8-302(d) requires possession of a baccalaureate degree without reference to any "grace period," but because its effective date (July 1, 1990) is more than two years after the effective date of the COMAR provisions, its lack of a grace period is entirely consistent with COMAR 10.33.01.06C.

But under these circumstances, where we strongly suspect that the General Assembly did not intend so draconian a result, we seek to achieve an equitable result pending legislative clarification. We can do so by relying on §10-404 of the State Government Article ("SG" Article), which provides that if a licensee files a timely application for renewal, "the license does not expire until ... the unit takes final action on the application ...." In our view, the Board would act well within its discretion if it withheld final action on the renewal applications of now-grandfathered licensees until the General Assembly can resolve the problem. *See* 67 *Opinions of the Attorney General* 393, 408 (1982).[5] SG §10-404 would keep the old licenses effective, so the licensees would not be harmed in the interim. If, as we assume, the General Assembly will resolve the problem by enacting a grandfather clause, the Board would then approve the applications. If, on the other hand, the General Assembly declines to enact such a provision once the problem is pointed out to it, the inescapable inference would be that the now-grandfathered licensees would have to meet the new educational requirements.

---

[5] That opinion suggested a similar approach to certain improperly licensed vehicle salesmen, when the particular circumstances "would [make it] inequitable to require them to immediately cease doing business without at least some opportunity to seek legislative relief." 67 *Opinions of the Attorney General* at 408.

III

Conclusion

In summary, it is our opinion that the Board of Examiners of Nursing Home Administrators should hold in abeyance, pending legislative clarification of HO §8-302(d), an application for the renewal of a license properly issued under the Board's regulations when the licensee does not meet the new statutory requirements.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Jane Pilliod
Assistant Attorney General

Editor's Note:

Legislation of the kind suggested in this opinion was enacted in Chapter 17 (House Bill 318) of the Laws of Maryland 1991.

HOUSING

Handicapped — Fair Housing Act — Applicability to Hearings Under Developmental Disabilities Law and Mental Hygiene Law

March 7, 1990

Ms. Catherine A. Raggio
Executive Director
Maryland State Planning Council
on Developmental Disabilities

You have requested our opinion on whether the federal Fair Housing Amendments Act of 1988 allows the State to continue to hold public hearings as part of the process by which it considers applications for licensure of group homes for people with mental disabilities.

For the reasons given below, we conclude that the public hearing process established under Title 7 of the Health-General Article ("HG" Article), the Developmental Disabilities Law, may be maintained because it does not contravene the federal law. The public hearing process established under HG Title 10, the Mental Hygiene Law, may also be maintained but must be modified somewhat to assure compliance with the federal act.

I

Fair Housing Amendments Act

A. *Introduction*

The Fair Housing Amendments Act of 1988, Pub. L. No. 400-430, 102 Stat. 1619, codified at 42 U.S.C. §3601 *et seq.*, generally prohibits discriminatory practices against individuals with handicaps.

It extends to people with disabilities the broad remedial provisions of the 1968 Fair Housing Act, which prohibits discrimination on the basis of race, color, religion, national origin, or sex in both public and private housing.

42 U.S.C. §3604(f)(1) makes it unlawful for any individual or government:

> To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of —
>
> (A) that buyer or renter;
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
>
> (C) any person associated with that buyer or renter.

42 U.S.C. §3604(f)(2) further makes it unlawful for any individual or government to discriminate:

> Against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap or —
>
> (A) that person; or
>
> (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
>
> (C) any person associated with that person.

The term "handicap" in the Act is defined very broadly to mean "with respect to a person — (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment ...." 42 U.S.C. §3602(h). Under regulations adopted by the Department of Housing and Urban Development, "physical or mental impairment" includes mental retardation and mental illness. *See* 24 C.F.R. §100.201(a)(2).

In an opinion issued last year, we discussed in detail the legislative history and purpose of the 1988 amendments. 74 *Opinions of the Attorney General* 164 (1989).[1] We shall not repeat that detailed discussion here. In brief, the Fair Housing Amendment Act's purposes include ending segregation of the housing available to people with disabilities and giving people with disabilities the right to choose where they wish to live.

The Fair Housing Amendments Act prohibits practices with discriminatory effects, not solely intentional acts of discrimination. H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 23 at 24-25, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2184 ("House Report"). *See generally* Aoki, *Fair Housing Amendments Act of 1988*, 24 Harv. Civ. Rts.-Civ. Lib. L. Rev. 249 (1989). Thus, if the procedures in HG Titles 7 and 10 have the effect of limiting housing opportunities for people with disabilities, they would contravene the federal act. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982). *See also Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *review declined in part and judgment aff'd*, 109 S.Ct. 276 (1988); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). *But see Familystyle of St. Paul, Inc. v. City of St. Paul*, 1990 U.S. Dist. LEXIS 746 (D. Minn. Jan. 18, 1990) (upholding siting limitation on group homes despite discriminatory effect).

---

[1] We advised that certain distance and density requirements imposed by State law on housing for special populations violated the federal law.

B. Application to Group Home Licensing Laws Generally

We are not aware of any court decision applying the federal act to the kind of licensing procedures in question here. The premise of our analysis, however, is that no court would invalidate the underlying requirement that group homes be licensed.

To be sure, the very requirement itself treats people with mental disabilities differently than other people who seek to live congregately. It is unimaginable that the State could require a group of co-religionists, for example, to obtain a license as a prerequisite to establishing a group residence.

But the legislative history of the 1988 amendments makes clear that states are not precluded from imposing reasonable requirements intended to protect the welfare of their citizens: States retain their "authority to protect safety and health, and to regulate use of land," so long as these powers are not "used to restrict the ability of individuals with handicaps to live in communities." House Report at 24. Laws like HG Titles 7 and 10 seek to protect persons with mental disabilities against exploitation or improper care. In our view, federal law does not rule out special protections of this kind.

Nor can we conclude that the mere holding of a public hearing necessarily violates the federal act. A decision on whether to grant a license is best made after a decisionmaker has as much pertinent information as possible. A public hearing is a reasonable means of acquiring information. We know of no Fair Housing Act case suggesting that hearings are *per se* impermissible.

What is impermissible, we believe, is the *misuse* of public hearings, either by allowing the consideration of improper decisional factors or by imposing undue delay on those seeking the housing.

The Fair Housing Amendments Act prevents the State from giving *any* effect to community opposition based, even in part, on the fact that the occupants of a group home will have a mental disability. Under federal law, whether a community "accepts" residents who have disabilities simply cannot be taken into account by the State.

In *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd* 837 F.2d 1181 (2d Cir. 1987), a case in part involving racial discrimination in the siting of public housing, the court acknowledged that opponents to public housing had used a variety of arguments, some of which did not run afoul of the law. 624 F. Supp. at 1308. But the legal standard is that race "is impermissible even as a secondary motive for action ...." 624 F. Supp. at 1293. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1976). In Yonkers, city officials had allowed "community opposition [that] was based, at least in part, upon the race of the potential occupants of public housing" to influence their decisions about where to locate the housing. 624 F. Supp. at 1310. The city thereby violated the Fair Housing Act.

Similarly, in *Smith v. Town of Clarkton*, 682 F.2d 1055 (4th Cir. 1982), the town withdrew its support of a public housing project because of public opposition. Significantly, the court pointed out that nonracial objections to the project—fears about the overburdening of schools, sanitary services, and public safety services—had already been addressed. 682 F.2d at 1062. In reality, the town had bowed to public opposition, "a significant portion of [which] was racially inspired ...." 682 F.2d at 1066.[2] *See also United States v. City of Birmingham*, 538 F. Supp. 819, 830 (E.D. Mich. 1982) (city violates Fair Housing Act if it acts partly in response to those who fear "that an influx of black people into a community decreases property values").[3]

---

[2] Some of the opposition took the form of "'camouflaged' racial expressions" — talk of "an influx of 'undesirables,'" concern about "personal safety due to the influx of 'new' people." *Id.*

[3] In what is said to be the first suit brought by the Justice Department to enforce the Fair Housing Amendments Act, the town of Chicago Heights, Illinois, agreed to a settlement of charges of discrimination in the application of its zoning laws. The Justice Department charged that Chicago Heights had denied a permit for a group home "because of opposition arising from 'fears and prejudices concerning the mentally retarded.'" Washington Post, Jan. 17, 1990, at A3. The town agreed to issue the permit and pay $45,000 in damages.

Further, the Fair Housing Amendments Act does more than rule out "community acceptance" as a decisional factor. It also disallows any procedure that "discourage[s] or obstruct[s] choices" about housing by persons with disabilities. 24 C.F.R. §100.70(a).

The House Report at 24 explains that even neutral procedures may not be applied if the effect is discriminatory:

> Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities .... These and similar practices would be prohibited.

In our view, federal law does not permit a procedure that, through significant delay, "obstructs" the opportunity of persons with disabilities to obtain the housing of their choice. Delay is itself a device by which, in the statutory language, a dwelling is "otherwise [made] unavailable" to a person with a disability.

In sum, when we consider the legality of the hearing procedures under HG Titles 7 and 10, we examine whether those procedures either allow the consideration of improper decisional factors or cause undue delay.

II

Application of Federal Act to HG Title 7, Developmental Disabilities Law

A. Decisional Factors

A person seeking to establish a private group home for the developmentally disabled must apply for a certificate of approval from the Department of Health and Mental Hygiene ("DHMH").[4] HG §§7-608 and 7-610. DHMH then conducts an investigation of the applicant. HG §7-611(a).

The criteria for establishment of a group home are set forth in HG §7-609:

> To qualify for a certificate of approval, an applicant shall satisfy the Secretary that:
>
> (1) The proposed private group home is consistent with the State plan;
>
> (2) The applicant is a proper person to receive a certificate of approval;
>
> (3) The proposed private group home is appropriate for the stated purpose;
>
> (4) The proposed private group home meets or, on completion, will meet the licensing requirements of Subtitle 9 of this title;
>
> (5) The proposed private group home meets or, on completion, will meet all of the general zoning requirements that apply to the site and that relate to:
>
> (i) The height and size of any buildings that are involved;

---

[4] HG §7-101(h) defines "group home" as a residence that:

> (1) Provides residential services for individuals who, because of developmental disability, require specialized living arrangements;
> (2) Admits at least 4 but not more than 8 individuals; and
> (3) Provides 10 or more hours of supervision, per home, per week.

(ii) The land that may be covered or occupied;

(iii) The open space requirements;

(iv) The density requirements; and
(v) The use of any land or buildings.

(6) The applicant's facilities meet the federal regulation requirements on program accessibility (45 C.F.R. §§84.21 through 84.23).

These criteria are reasonable in themselves and are plainly linked to legitimate State concerns.

The hearing officer may only take account of testimony at the public hearing that touches on the legitimate factors set out in HG §7-609.[5] Community acceptance is not identified as a permissible decisional factor in the statute. Therefore, the hearing officer may not take account of community acceptance.

B. Delay

DHMH "shall hold a public hearing on the application" after publication of notice. HG §7-611(b) and (c)(1)(i). Notice is to be provided to the local government (and, upon request, to the local delegation to the General Assembly) and published in various newspapers within 60 days of the filing of the application. HG §7-611(c)(1) and (d). The hearing occurs between seven and 15 days after publication. HG §7-611(c)(2)(iv).

The hearing is legislative in character. There are no rules of procedure, right to cross-examination, or requirement for written findings of fact. The hearing serves as a forum in which interested

---

[5] There are indications in the legislative history of HG Title 7 that some proponents of the public hearing requirement might have intended it as a means by which community opposition could veto a proposed group home. *See, e.g.*, bill file on Senate Bills 359 and 893 (1978 Session). Whatever the original intention, however, the statute has not been — and, in light of the federal act, may not be — administered that way.

persons may express their views on whether the applicant has met all the relevant criteria. Under HG §7-612, the Secretary, within 30 days of the hearing, must issue a certificate of approval to any applicant who meets the statutory requirements; if the Secretary does not act, the application is deemed approved.

If the Secretary denies an application, the applicant may take an appeal pursuant to HG §7-407: "Any person aggrieved by a final decision of the Secretary in a contested case, as defined in §10-201 of the State Government Article, may take an appeal as allowed in §§10-215 and 10-216 of the State Government Article." In addition, a "person aggrieved by [the Secretary's] decision" is entitled, under HG §2-207(a), to appeal to the Department's Board of Review from "[a] decision of the Secretary or any unit in the Department in a contested case that is subject to judicial review under §10-215 of the State Government Article." HG §2-206(c)(1). Section 10-215 of the State Government Article ("SG" Article), in turn, affords judicial review to "[a] party who is aggrieved by the final decision in a contested case ...."

Thus, both HG §7-407 and HG §2-206(c)(1) require that there be a contested case as an element of the right to appeal. SG §10-201(c) defines "contested case" as a proceeding before an agency to determine:

> (1) a right, duty, statutory entitlement, or privilege of a person that is required by law to be determined only after an opportunity for an agency hearing; or
>
> (2) the grant, denial, renewal, revocation suspension or amendment of a license that is required by law to be determined only after an opportunity for an agency hearing.[6]

The "aggrieved person" or "party aggrieved" in a proceeding to determine whether to issue a certificate of approval for a group home

---

[6] A license includes an approval, a certificate, a charter, a permit, or a registration. SG §10-201(d)(3).

under Title 7 is the applicant, since the applicant seeking the certificate is the only over who is subject to the Secretary's determination. The "entitlement ... required by law to be determined after an ... agency hearing" is the qualified applicant's entitlement to a certificate. Similarly, under SG §10-201(c)(2), only the applicant's "license" is at issue.

These provisions mean that community residents are not entitled to party status at the hearing. They do not become "aggrieved persons" if the application is approved. Therefore, community residents do not have a right to appeal the issuance of certificates of approval to group homes for persons with developmental disabilities.[7] Because they do not have that right, residents do not have the power to force a significant delay in the opening of a group home that the Secretary has determined to license.

To be sure, the public hearing requirement causes some delay. But it is minimal: The hearing must occur within 75 days of the application, and the decision must be made within 30 days of the hearing. We do not believe that this degree of delay, necessitated by a public hearing limited to proper purposes, is significant enough to violate federal law.

C. Conclusion

In sum, we conclude that the existing hearing procedures under HG Title 7 do not violate the Fair Housing Amendments Act.

---

[7] HG §2-206(c)(2) gives the Board of Review jurisdiction over an appeal from "[a]ny decision of the Secretary or any unit in the Department that is subject to judicial review under any provision of law other than §§10-125, 10-128 and 10-215 of the State Government Article." Because HG §7-407 speaks of "an appeal as allowed in [SG §]10-215," we doubt that HG §7-407 is a "provision of law other than ... [SG §]10-215" triggering review under HG §2-206(c)(2). In any event, a person seeking to appeal under HG §2-206(c)(2) must be "aggrieved." HG §2-207(a).

III

Application of Federal Act to Title 10, Mental Hygiene Law

A. *Decisional Factors*

A person seeking to establish a private group home must apply for a license from DHMH.[8] DHMH then conducts an investigation of the application.

The criteria for establishment of a group home are set forth in HG §10-518(a):

> To qualify for a license, an applicant shall satisfy the Secretary that the proposed private group home:
>
> (1) Is needed;
>
> (2) Is compatible with the nature and character of the area involved;
>
> (3) Is not within 1,000 feet of another private group home, a jail, a detention center, a correctional camp, or a group home for special populations, such as parolees, mentally retarded individuals, juveniles, alcoholics, or drug addicts;
>
> (4) Is near transportation facilities;

---

[8] HG §10-514(d)(1) defines "Private group home" as "a residence in which individuals who have been or are under treatment for a mental disorder may be provided care or treatment in a homelike environment." *See also* HG §10-514(b) ("large private group home") and 10-514(e) ("small private group home").

(5) Meets or, on completion, will meet the requirements of this subtitle and the rules and regulations that the Secretary adopts under this subtitle; and

(6) Meets or, on completion, will meet all general zoning requirements that apply to the site and that relate to:

(i) The height and size of any buildings that are involved;

(ii) The land that may be covered or occupied;

(iii) The size of yards that require open space;

(iv) The density of population; and

(v) The use of the land and buildings.

DHMH holds a public hearing within 60 days of the application, after publishing notice of the hearing. HG §10-520(a), (b), and (c).[9] Pursuant to HG §10-521, the Secretary must issue a license to any applicant who meets the requirements of the subtitle.[10] These provisions are generally consistent with federal law.

However, HG §10-515 states the following legislative policy:

It is the policy of this State that:

---

[9] HG §10-520(a)(2) requires that notice of the application be given to the local governing body. The hearing must be held "in the county where the private group home is to be located and as close as possible to the proposed location." HG §10-520(b)(2). The statute also spells out the particulars of public notice. HG §10-520(c).

[10] HG §10-518(a)(3), the distance limitation, is not enforceable, for the reasons discussed in 74 *Opinions of the Attorney General* at 164.

(1) An individual who has a mental disorder and who is placed in a private group home have, as far as possible, an opportunity for placement in a residence in the community of origin of the individual; and

(2) *To assure, as far as possible, that a community will accept a private group home*, the private group home should be located:

(i) After consultation with the local government; and

(ii) In a manner consistent with the principles of normalization and statewide standards.

(Emphasis added.)

The predecessor statute to HG §10-520(d), former Article 59, §64 went further: It made community acceptance the major purpose of the public hearing.[11] Moreover, a DHMH regulation, reflecting the "community acceptance" concept, provides that the public hearing is "to assure that the home is accepted in the community for which it is proposed." COMAR 10.21.04.03C(1)(c). *See* also COMAR 10.21.07.03C(1) (application procedures for therapeutic group homes).

To summarize, no provision in HG Title 10 expressly incorporates "community acceptance" as a factor that must be considered by the Secretary in deciding whether to grant a license for a group home. Community acceptance is not included in HG §10-518, which itemizes the criteria that an applicant must meet. The regulation, however, in its expansion on the purpose of the hearing, seems to suggest that "community acceptance" is a relevant issue.

---

[11] As a result of amendments in Chapter 21 of the Laws of Maryland 1982, community acceptance was qualified by the phrase "as far as possible" and made a statement of legislative policy under HG §10-515(2) rather than a qualification of licensure.

We understand that, in practice, the Secretary has not allowed community opposition to control a group home licensing determination under Title 10. No application for a group home is denied on this basis.[12]

Nevertheless, in our view, the hearing procedure under HG Title 10 is legally vulnerable because it allows community acceptance to be taken into account by the decisionmaker. As we explained in Part I above, the Fair Housing Amendments Act and its regulations seek to make irrelevant any contention by neighborhood residents that people with disabilities are incompatible with other residents of the neighborhood. *See* 24 C.F.R. §100.70(c)(3).

B. Delay

The appeal process under Title 10 is largely similar to that under Title 7, with the applicant — that is, the "aggrieved person" in a "contested case" — having the right to further administrative and judicial review.[13] HG §10-524 provides as follows:

---

[12] In the case of *Guide, Inc.*, Hearing Office Docket No. 86-M-207 (June 25, 1987), the Secretary determined that community rejection of a proposed private group home cannot "defeat an otherwise validly applied-for permit for a private group home." In the matter of *Revisions, Inc.*, Hearing Office Docket No. 87-M-142 (May 2, 1989), the Secretary determined that "while the statute and adopted regulations embrace the local community, and its acceptance of the proposed facility, as a meaningful part of the application, . . . 'community acceptance,' as used in the statute and carried forward in the regulations, is not tantamount to a 'veto power'." Thus, the Secretary has recognized that while community acceptance is a relevant consideration, community opposition is not a factor on which a licensing decision is to be based. *See City of Baltimore v. State Department of Health and Mental Hygiene*, 38 Md. App. 570, 574 (1978); *Sullivan v. City of Pittsburgh*, 620 F. Supp. 935, 944-946 (W.D. Pa. 1985), *aff'd* 811 F.2d 171 (3d Cir. 1987).

[13] Under Title 10, the Secretary considers an exceptions stage prior to the formal decision. SG §10-212; COMAR 10.01.02.11.

> Any person aggrieved by a final decision of the Secretary in a contested case ... may:
>
> (1) Appeal that decision to the Board of Review of the Department; and
>
> (2) Take any further appeal allowed by the Administrative Procedure Act to the circuit court for the county where the private group home is located or planned.

Because both statute and regulation refer to community acceptance as a desirable goal (see Part IIIA above), community residents who participate in the hearings by expressing their views about the establishment of a group home have been considered by DHMH to be parties to the licensure hearing. Further support for this practice derives from HG §10-520(d)(2), which provides that the author of the investigatory report on an applicant "is available for cross-examination by *any party* at the hearing."[14] Residents have also been recognized as "aggrieved" persons if a license is granted despite community opposition and thereby have been treated as parties for the purpose of pursuing administrative and judicial appeals of the Secretary's determination.

---

[14] DHMH has submitted legislation to change this language so that it would read "is available to answer questions from any person at the hearing." House Bills 212 and 903 (1990 Session).

By affording party status to community opponents of a group home applicant, the procedure allows those opponents to use their procedural status as a way of delaying significantly the opening of a group home, sometimes for more than a year.[15] We believe that a court would likely find this to be a prohibited discriminatory effect.

C. Conclusion

We recommend that DHMH (i) repeal COMAR 10.21.04.03C(1)(c) and 10.21.07.03C(1) and take no further cognizance of "community acceptance" in its decisionmaking; and (ii) alter its practices so that, while community residents may participate in a public hearing to comment on whether the applicant meets the statutory criteria, they no longer will be afforded the procedural rights of an "aggrieved person."

If this change in practice amounts to a reinterpretation of HG §§10-515 and 10-520(d)(2), the reinterpretation is necessary to avoid a conflict with the federal act. A statute is to be construed, whenever reasonably possible, "to avoid casting serious doubt upon its constitutionality." *Yangming Transport v. Revon Products*, 311 Md. 496, 509, 536 A.2d 633 (1988). *See also, e.g., NLRB v. Bishop of Chicago*, 440 U.S. 490, 500 (1979).[16]

---

[15] For example, the *Revisions* proceeding, referenced in footnote 12 above, took from October 13, 1987 (application for licensure) until November 6, 1989, when the Circuit Court for Baltimore County affirmed the DHMH decision to grant the license. DHMH partially ameliorated the consequences of the delay by granting the license on January 30, 1989 upon the determination of the Secretary, prior to the eventual decisions of the DHMH Board of Review and of the Circuit Court.

Similarly, Threshold Services (Montgomery County) applied for its group home license in May, 1986 and received it in April, 1987. More recently, Bless (Charles County) applied in March, 1989 and was licensed in November, 1989.

[16] The supremacy clauses of the United States Constitution, Article VI, cl. 2, and the Maryland Declaration of Rights, Article 3, render unenforceable any state law that conflicts with a federal law. Moreover, the Fair Housing Act expressly invalidates any state law "that purports to require or permit any action that would be a discriminatory housing practice" under the act. 42 U.S.C. §3615.

IV

Conclusion

In summary, it is our opinion that the hearing process under HG Title 7, the Developmental Disabilities Law, does not violate the Fair Housing Amendments Act. The hearing process under HG Title 10, the Mental Hygiene Law, should be revised to assure that opposition to a group home does not result in the kind of discriminatory effects prohibited by federal law.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
*Opinions & Advice**

* Former Assistant Attorney General Larry J. Goldberg contributed substantially to the drafting of this opinion, but left the office prior to preparation of the final version of it.

Editor's Note:

This opinion was overruled by 78 *Opinions of the Attorney General* ___ (1993) [Opinion No. 93-030 (July 30, 1993)].

HOUSING AND COMMUNITY DEVELOPMENT — INDUSTRIALIZED BUILDINGS — PREEMPTION — DECLARTORY JUDGMENTS — SCOPE OF PREEMPTION OF LOCAL ORDINANCES — AVAILABILITY OF DECLARATORY RELIEF IN ENFORCEMENT OF STATUTE

April 4, 1990

The Honorable Jacqueline H. Rogers
Secretary of Housing and
Community Development

You have requested our opinion on two questions related to the Industrialized Building and Mobile Homes Act (the "Act"), which is administered and enforced by the Department of Housing and Community Development ("DHCD").[1] Specifically, you ask:

1. What is the scope of the Act's preemption of local ordinances relating to fire protection or other matters that regulate the materials, structure, or design of industrialized buildings?

2. In the event of an actual controversy with a local jurisdiction over the existence or scope of preemption, would judicial resolution of the controversy under the Maryland Uniform Declaratory Judgments Act be available?

For the reasons stated below, we conclude as follows:

1. The Act preempts any local ordinance relating to fire protection or other matters that seek to regulate the materials, structure, or design of industrialized buildings. The Act does not preempt ordinances relating to matters like land use, site placement, and certain

---

[1] The Act is codified at Article 83B, §§6-201 through 6-208 of the Maryland Code. All further statutory references in this opinion will be to Article 83B, unless otherwise indicated.

aspects of fire safety that do not affect the structure or structural design of an industrialized building.

2. In an actual controversy between DHCD and a local jurisdiction that goes to the heart of DHCD's ability to carry out the powers and functions granted to it by the Act, a declaratory judgment action would be available to DHCD.

I

Background

The Act, Subtitle 2, Title 6 of Article 83B of the Maryland Code, establishes a program for statewide regulation and certification of industrialized buildings or parts of buildings that are to be used anywhere in the State.[2]

It was enacted in 1971 to fill the "need for a statewide building regulatory system" brought about by "the acceleration in development of new materials, processes and assemblies of building components, manufactured buildings, and subassemblies ...." §6-201. The General Assembly recognized that the new demand for industrial construction

---

[2] Article 83B, §6-202(d) defines an industrialized building as follows:

> (1) "Industrialized building" means a building assembly or system of building subassemblies manufactured in its entirety, or in substantial part, offsite and transported to the point of use for installation or erection, with or without other specified components, as a finished building or as a part of a finished building comprising two or more industrialized building units. An industrialized building need not have electrical, plumbing, heating, ventilating, insulation or other service systems; but when such systems are installed at the offsite manufacture or assembly point they shall be deemed a part of such building assembly or system of building assemblies. Industrialized building does not include open frame construction which can be completely inspected onsite.
>
> (2) "Industrialized building" does not include a mobile home.

techniques "calls for more in depth performance evaluations ..., [which] usually involve going beyond the boundaries of local units of government and require the assistance of the State." *Id.*

The cornerstone of this statewide program is that a prefabricated unit must comply with only a single set of building regulations and is not to be subject to additional, diverse, or contradictory local building codes. To that end, §6-204(c)(2) provides:

> Any industrialized building bearing an insignia [certifying its compliance with State regulations] shall be acceptable in all localities as complying with the requirements of this subtitle and *shall be acceptable as meeting the requirements of safety to life, health, and property* imposed by any ordinance or law of any local governing body of this State *without further investigation or inspection* if the units are erected or installed in accordance with all conditions of the certification.

(Emphasis added.) Thus, the certification of an industrialized building by the State, indicating it has met the State standards for materials, structure, and design, is intended to supersede any conflicting local building code requirements.

Although the Act preempts local building code requirements as to structural safety, §6-204(c)(4) provides that industrialized buildings remain subject to certain local ordinances and requirements:

> Notwithstanding any other provision of this subtitle, local land use requirements, building setback requirements, side and rear yard requirements, site development and property line requirements, zoning requirements and *uniform fire control regulations*, regardless of where requirements, ordinances, regulations or statutes are set forth, remain reserved to city and county government.

(Emphasis added.)

During a recent public meeting, DHCD's Advisory Commission on Industrialized Buildings and Mobile Homes (the "Advisory Commission") heard complaints from manufacturers of industrialized buildings concerning ordinances adopted in jurisdictions throughout the State with requirements for the materials, structure, and design of industrialized buildings that are inconsistent with those adopted under the Act. For example, a local ordinance might require masonry exterior walls for certain industrialized buildings, while State regulations permit wood frame construction. These local requirements are most often characterized by local governments as uniform fire control regulations exempt from the Act.

The manufacturers complained that the requirements undermine their ability to manufacture and market a uniform industrialized building within the State; circumvent the Act's underlying purpose to establish and enforce a statewide industrialized building regulatory system; are difficult and costly to comply with; and are applied in contradiction to the preemption provisions of the Act, as consistently interpreted by DHCD over the past 18 years. The manufacturers also voiced concern that the State, in particular the Secretary of DHCD as the Act's enforcing authority, has not initiated legal proceedings against local jurisdictions to clarify and enforce the preemption provisions of the Act.

II

Scope of Preemption

A. Statutory Construction and Legislative Intent

"Pre-emption may be accomplished ... expressly by statutory language prohibiting local legislation ...." *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 324, 513 A.2d 893 (1986). When a statute contains express preemptive language, local legislation is precluded concerning all matters within the scope of that language. *Mongtomery County v. Atlantic Guns, Inc.*, 302 Md. 540, 543, 489 A.2d 1114 (1985).

In *Kaczorowski v. City of Baltimore,* 309 Md. 505, 525 A.2d 628 (1987), the Maryland Court of Appeals explained that the plain-meaning rule is not a rigid, all-sufficient rule for ascertaining legislative intention. Rather, the meaning of language is controlled by the context in which it appears:

> When we pursue the context of statutory language, we are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other "external manifestations" or "persuasive evidence," ... that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case.

309 Md. at 514-15.

This approach avoids the fiction that legislative intent can be discerned by the rote application of canons of construction, which often "'obscure the factors actually at work in the construction of statutes.'" 309 Md. at 512 (quoting Sykes, *A Modest Proposal for a Change in Maryland's Statutes Quo*, 43 Md. L. Rev. 647, 666 (1984)). Thus, the Court of Appeals has made it quite clear that legislative purpose, not literal meaning, is critical; that the legislative purpose must be discerned in light of the statute's overall context; and that statutes are to be construed reasonably with reference to the purpose to be accomplished. *See also Potter v. Bethesda Fire Department*, 309 Md. 347, 353, 524 A.2d 61 (1987). *Accord, Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 74-75, 617 A.2d 730 (1986) (broad definition of word is consistent with discerned legislative intent even though arguably contrary to the literal meaning of the word). In order to understand statutory language, then, "[t]he purpose, in short, determined in light of the statute's context, is the key." *Kaczorowski*, 309 Md. at 516.

B. "Uniform Fire Control Regulations"

The meaning of the phrase "uniform fire control regulations" has been a recurring source of disagreement between manufacturers and local governments throughout DHCD's application and enforcement of the Act. The phrase is not defined in the Act, and local jurisdictions have, from time to time, tried to impose various structural requirements on manufacturers in reliance on their interpretation that the phrase "uniform fire control regulations" means any local regulation, ordinance, or requirement that serves a fire prevention or fire suppression purpose. We believe that this interpretation of the phrase is overly broad and therefore incorrect, for several reasons.

The legislative findings and declarations set forth in §6-201, read in conjunction with the Act's substantive provisions, portray a comprehensive legislative scheme intended to achieve two goals: to make uniform the standards manufacturers of industrialized buildings or building parts must meet, thereby facilitating the production and marketing of those innovative methods of building construction; and to ensure that industrialized buildings have been adequately tested and examined for compliance with appropriate performance standards. Mandating that local governments accept State certification as sufficient to meet all local building codes serves both these goals.

Without that requirement, a manufacturer might be required to conform each unit to any of 24 or more different sets of standards, according to the jurisdiction in which the unit is to be sold. Moreover, local officials may be unable to inspect these units at the manufacturing site, and inspection at the site of erection may not be possible without destroying or otherwise dismantling the unit, particularly with regard to internal parts like wiring or plumbing sealed in a wall.

Most building code provisions related to design, structure, and materials have at least some minimal corresponding fire suppression or fire prevention function. Consequently, to allow a locality to enforce more stringent or diverse building code requirements than those adopted by the State whenever there is an underlying fire safety rationale for the local code would surely undermine the purposes and utility of the Act. The General Assembly could not have intended that the phrase "uniform fire control regulations" be so broadly interpreted.

In addition, the Act mandates State adoption of the Building Officials and Codes Administrators International, Inc., basic code (the

"BOCA Code"), which is in part a fire protection code.[3] This suggests that the General Assembly intended the BOCA Code fire protection requirements pertaining to the industrialized building itself to be part of the uniform State code for industrialized buildings that supersedes local requirements.

Further, the other local ordinances and regulations reserved to the local governments in §6-204(c)(4) — land use requirements, building setback requirements, site development and property line requirements, and zoning requirements — do not affect the structure or the structural design of an industrialized building. All of these address only the use of the building and its placement on the site. Hence, they are peripheral and ancillary to the actual construction of industrialized buildings and would not require any modification of the basic industrialized building structure. These other exemptions from the preemptive authority of the Act provide the context within which the phrase "uniform fire control regulations" appears and must be interpreted. Thus, they indicate that "uniform fire control regulations" are also nonstructural regulations like habitation density restrictions and requirements for the provision of portable fire extinguishers, the placement of buildings in relation to fire hydrants, and rights of way for fire equipment.

This is the view of the Act's preemption provision that has been consistently taken by DHCD. Acting on the advice of its counsel, DHCD's Codes Administration has taken the position from the time of the Act's enactment that "uniform fire control regulations" are only

---

[3] Article 83B, §6-203 (a) provides:

> The Department shall adopt rules and regulations prescribing standards to which industrialized buildings must comply for protection against the hazards of industrialized buildings to safety, health and property and may adopt rules and regulations governing all aspects of the enforcement, inspection and certification programs authorized by this subtitle. With respect to industrialized buildings, the Department shall adopt the Building Officials Conference of America basic code with such exceptions or modifications which, after adequate public notice and public hearing, it deems appropriate to meet the needs and judgments of Maryland.

those that relate to the location of buildings on a site, the relationship of the building to fire hydrants, access for fire-fighting equipment, the overall density of habitation, the provision of portable fire equipment, or the special uses of a building. In the Administration's view, the State-adopted BOCA Code supersedes any local regulations controlling construction, including design, materials, and methods, whether or not the regulations serve a fire control function. *See* Letter from Assistant Attorneys General Sandra J. Cohen and Kathleen E. Kunzer to David M. Hammerman, Director of Codes Administration (September 30, 1985). This consistent administrative interpretation of the Act since its inception is persuasive evidence of its meaning. *See Board of Education of Garrett County v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185 (1982).[4]

It is our conclusion, then, that the Act preempts any local ordinances or regulations relating to fire protection and other matters that regulate the materials, structure, or design of industrialized buildings. Local jurisdictions may only impose requirements that do not affect the structure or structural design of a State certified industrialized building, like site placement or land use requirements.

III

Enforcement and Declaratory Relief

Enforcement of the Act and the rules and regulations adopted under it is vested exclusively in the Secretary of DHCD. §6-206(a).[5] The Advisory Commission was created to assist the Secretary in carrying out the Secretary's duties under the Act. §6-205.[6] The

---

[4] *Kaczorowski* does not abandon the canons of construction, but objects only to their use without "forthright explanations" for the result reached by their application. 309 Md. at 512.

[5] The rules and regulations adopted by the Department under the Act are codified in COMAR 05.02.04.01 through .18.

[6] Interestingly, the Act is the only code administered by the Department that does not vest enforcement responsibility in the local jurisdictions. *See,* (continued...)

Advisory Commission must include, among others, representatives of local building code enforcement agencies and legislative bodies of local government. §6-205(a).

The Act contemplates that problems may arise concerning the grant or denial of a certification for an industrialized building, both generally under the rules and regulations adopted under the Act and specifically in situations limited to a particular locality in the State. Two distinct remedies for these potential problems are provided by the Act. First, when a local jurisdiction deems that changes to the Act's rules and regulations are necessary or desirable, that local jurisdiction may seek an Advisory Commission recommendation that the Secretary implement those changes. Second, if local enforcement representatives determine that the Department should review the grounds upon which it has granted or denied a certification of an industrialized building for reasons limited to that particular locality, they are entitled to that review by a public hearing held, if practicable, in that locality.

The Maryland Uniform Declaratory Judgments Act, §§3-401 through 3-415 of the Courts and Judicial Proceedings Article ("CJ" Article), empowers courts of record to enter declaratory judgments to "settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." CJ §3-402.

To invoke the jurisdiction of the courts for declaratory relief, however, a party must present a justiciable issue or actual controversy. CJ §3-409(a). In other words, courts will not decide purely theoretical questions or questions that may never arise. *Hatt v. Anderson*, 297 Md. 42, 46 464 A.2d 1076 (1983). *See also Hamilton v. McAuliffe*, 277 Md. 336, 353 A.2d 634 (1976); *Prince George's County v. Maryland-National Capital Parks & Planning Comm'n*, 269 Md. 202, 306 A.2d 223 (1972), *cert. denied*, 414 U.S. 1068 (1973); *Liss v. Goodman*, 224 Md. 173, 167 A.2d 123 (1961); *Patuxent Oil Co. v. County Comm'rs*, 212 Md. 543, 129 A.2d 847 (1957). Moreover, except when someone challenges the constitutionality of an enactment as a whole, ordinarily a party must exhaust all available administrative

---

[6](...continued)
e.g., §6-102(b) (Maryland Building Code for the Handicapped) and §6-103(c) (Minimum Livability Code).

remedies before resort may be had to a declaratory judgment action. *See Harbor Island Marina v. Calvert County*, 286 Md. 303, 306, 407 A.2d 738 (1979); *State Dep't. of Assess. & Tax. v. Clark*, 281 Md. 385, 404, 380 A.2d 28 (1977).

The Court of Appeals has held that declaratory relief is especially appropriate "'where public agencies are at loggerheads.'" *Prince George's County*, 269 Md. at 209 (quoting *Liss v. Goodman*, 224 Md. at 178). In *Prince George's County*, the appropriateness of declaratory relief was indicated by the existence of controversies between the two public agencies that went to the heart of the ability of one of the agencies to carry out the powers and functions granted to it by statute. 269 Md. at 208. *Id.*

We think that, under the Act, the ability of either the Secretary or a local jurisdiction to carry out their respective powers and functions granted by statute could not be said to be wholly frustrated until the Act's provisions for review, recommendation, and Advisory Commission assistance have been utilized to no avail. Thus, the Secretary and a local jurisdiction are not truly "at loggerheads" sufficient to give rise to a justiciable controversy ripe for declaratory relief unless and until the administrative mechanism set forth in the Act for identifying and resolving problems has run its course.

In the event, then, that a local jurisdiction attempts to enforce more stringent or different building code requirements than the State-adopted BOCA Code for an industrialized building bearing the State certification insignia, we would advise you to seek the assistance of the Advisory Commission if practicable under the circumstances. Otherwise, you should promptly notify the appropriate local officials of the Act's preemptive authority and certification review procedures. If, after this notification, the local jurisdiction refuses to seek your review of the matter or, after any review hearing, the local jurisdiction refuses to permit the implementation of your final decision, so that the controversy goes to the heart of your ability to carry out your powers and functions under the Act, you may appropriately bring a declaratory judgment action.[7]

IV

Conclusion

In summary, it is our opinion that:

1. The Act preempts any local ordinance relating to fire protection or other matters that seek to regulate the materials, structure, or design of industrialized buildings. The Act does not preempt ordinances relating to matters like land use, site placement, and certain aspects of fire safety that do not affect the structure or structural design of an industrialized building.

2. In an actual controversy between DHCD and a local jurisdiction that goes to the heart of DHCD's ability to carry out the powers and functions granted to it by the Act, a declaratory judgment action would be available to DHCD.

J. Joseph Curran, Jr.
Attorney General

Roger Lee Fink
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[7] This opinion, of course, does not discourage or prevent you from attempting to exhaust any additional non-judicial avenues that may be available to you to resolve the controversy prior to litigation.

INSURANCE

JURISDICTION OF INSURANCE COMMISSIONER — HEALTH BENEFITS PROGRAM

June 19, 1990

Mr. John A. Donaho
Insurance Commissioner

You have requested our opinion on whether a health benefits program known as "Healthnet" is subject, in whole or in part, to the jurisdiction of the Insurance Commission. Although Healthnet, which is currently being marketed, prompted your inquiry, other similar programs have been proposed.

For the reasons stated below, we conclude that the providers of health care under Healthnet and other similar programs are engaged in the business of insurance and are thus subject to the jurisdiction of the Insurance Commission. As insurers, the providers are subject to the licensure, minimum capital, reserve, rate-setting, and other applicable requirements of the Insurance Code. The intermediary administrative entity, however, is not engaged in the business of insurance.[1]

---

[1] These conclusions apply only to the Healthnet program and others that might be structured similarly. An assessment of whether an entity is engaged in the provision of "insurance" can only be made case-by-case, after close analysis of the particular facts.

We also note that if a program were to be structured so as to be a "preferred provider insurance policy," it would be subject to regulation under newly enacted Chapter 578 (House Bill 558), Laws of Maryland 1990 (effective July 1, 1990).

I

The Healthnet Plan

The Healthnet plan is a means through which health benefits are provided to employer groups. The plan is marketed and advertised by Willse & Associates ("Willse"), an unlicensed third-party administrator, to employer groups known as sponsors. The sponsors enter into a contract with Willse, pursuant to which Willse undertakes to purchase medical services for the sponsors' employees and their dependents (called "covered persons" in the contract).

Sponsors pay Willse a predetermined fee, called a "capitation fee," that is set at X dollars per covered person per month. A portion of this fee is retained by Willse as compensation for purchasing the medical services and for administering the payment of medical bills during the life of the contract. Willse's administrative fee is fixed by this contract. While the total amount paid to Willse may vary depending upon plan utilization, the capitation fee does not.

In order to have medical services available for covered persons, Willse also enters into contracts with various "health plans," some of which are licensed health maintenance organizations ("HMOs") and some of which are not. Indeed, we understand that at least one and possibly more of the health plans participating in Healthnet do not provide health care benefits at all. Rather, these plans themselves enter into contracts with physicians or physician groups, and sometimes with HMOs, to render the necessary care.

You have informed us that, while payment to these health plans is made in a variety of ways, in all contracts Willse first deducts its administrative fees from the capitation payment and then forwards the remainder of that payment to the health plan.[2] In exchange, the health plan agrees to provide the medical services enumerated in its contract

---

[2] The capitation payment is determined by including Willse's negotiated administrative fee into the health plan's negotiated payment. In other words, Willse negotiates a "per-member per-month" contract with the health plan, adds its own "per-member per-month" administrative charge, and then uses that figure as its total cost to the sponsor.

with Willse to the covered persons.[3] Some contracts require copayments for certain services; others do not. No plan provides hospitalization for covered persons. The cost of hospitalization is borne solely by the sponsor, although Willse undertakes to oversee bill payments. Nor does any contract provide benefits for emergency services.

At this point in the compensation scheme, the contracts fall into two differing types:

Under the first type of contract, there is an annual "adjustment" to the capitation fees paid by Willse on the sponsor's behalf. You described this adjustment formula as follows: The sum of each sponsor's capitation fees and the copayments made by the covered persons are compared to the actual costs to the health plan of providing the services. If the cost of services is less than the sum of fees paid to the health plan, the health plan refunds 50% of the difference to Willse, which forwards this amount to the sponsor. The health plan retains the other 50%. If the cost of services is more than the sum of the fees paid the health plan, the sponsor is not required to pay any further fee. The loss is absorbed by the health plan.

In addition, under this type of contract, the health plan receives a bonus or incurs a penalty based on the services *outside* the contract with the health plan. That is, the health plan either receives or pays 50% of the difference between projected costs of these out-of-plan services and the actual costs.[4]

---

[3] Typically, the health plan agrees at a minimum to provide physician services, diagnostic services, chemotherapy, ambulance services, physical examinations, maternity care, and well-baby care.

[4] In this respect the plan differs from a plan in which the employer, through an administrative services-only ("ASO") contract, undertakes the provision of health care benefits. An ASO contract, in which the employer pays dollar-for-dollar the actual amount of the cost of the benefits, does not contain the bonus or penalty provisions of the plans at issue here. The plan also differs from a typical HMO. *See* §19-701(e) of the Health-General Article.

The Healthnet program in some respects resembles a traditional preferred provider organization ("PPO"), in which insureds are offered panels of

(continued...)

The second group of contracts contains a different approach to annual adjustments. First, an annual projected cost per-employee per-month is developed for each sponsor. The annual projected cost includes not only the capitation fees paid the health plan, but also the projected amount that will be spent for each sponsor's covered persons for the year for hospital fees, emergency care, and other out-of-health-plan benefits. At the end of the year, a comparison is made between the annual projected cost and the actual cost of services. The actual cost of services equals the cost of services provided by the health plan plus the cost of hospital, emergency, and other out-of-health-plan benefits actually paid. If the actual cost of services exceeds the annual projected cost, a penalty is assessed against the health plan equal to 50% of the difference, with an overall dollar limit. Willse administers the penalty for the sponsor against the health plan by reducing the capitation payments made to the health plan. The sponsor is responsible for the remainder of the loss. If the actual cost of services is less than the annual projected cost, a bonus equal to 50% of the difference is paid to the health plan.

II

Applicability of Insurance Code

A. *Introduction*

The legal question is whether the Healthnet program, in whole or in part, is "insurance" and thus subject to regulation.[5]

---

[4](...continued)
physicians from which to choose their care. In both types of programs, these panels of physicians work under contract to the plan administrator or insurer. However, it is our understanding that the PPO structure does not contain certain provisions, such as the hospitalization bonus or penalty, contained in the Healthnet contracts. We find this distinction to be significant.

[5] It is almost universally held that "the insurance industry is affected with a public interest and may be regulated by the states within constitutional limits." *Maryland Medical Services v. Carver*, 238 Md. 466, 484, 209 A.2d 582 (1965). *See also, e.g., Saffore v. Atlantic Casualty Insurance Co.*, 21 N.J. 300, 121 A.2d 543 (1956); *Insurance Department v. City of*
(continued...)

"Insurance" is defined in Article 48A, §2 of the Maryland Code as "a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies." This definition "includes not only promises of strict indemnity but also promises to pay or provide a specific or determinable amount or benefit upon determinable contingencies. By using the term 'provide' the statute includes contracts for the rendition of service." 63 *Opinions of the Attorney General* 422, 424 (1978).[6]

The following five elements of an insurance contract have long been applied in determining whether a particular plan falls within the definition of "insurance":

> (a) The insured possesses an interest of some kind susceptible of pecuniary estimation, known as an insurable interest.
>
> (b) The insured is subject to a risk of loss through the destruction or impairment of that interest by the happening of designated perils.
>
> (c) The insurer assumes that risk of loss.

---

[5](...continued)
Philadelphia, 196 Pa. Super. 221, 173 A.2d 811 (1961); *Brown v. Bernard*, 376 So.2d 1034 (La. App. 1979).

[6] The "insurance business" is defined as follows in §8:

> (a) The "insurance business" includes the transaction of all matters pertaining to a contract of insurance, both prior to and subsequent to the effectuation of such a contract, and all matters arising out of such a contract or any claim thereunder.
>
> (b) The "insurance business" does not include the pooling together by public entities for the purpose of self-insuring casualty risks.

> (d) Such assumption is part of a general scheme to distribute actual losses among a large group of persons bearing somewhat similar risks.
>
> (e) As consideration for the insurer's promise, the insured makes a ratable contribution, called a premium, to a general insurance fund.

42 *Opinions of the Attorney General* 254, 256-57 (1957) (quoting Vance, *Law of Insurance* §1 (3d ed. 1951)). *See also* 72 *Opinions of the Attorney General* 167 (1987); 55 *Opinions of the Attorney General* 196 (1970). As this office also noted, "[d]istribution of risk of loss among a large group of persons bearing somewhat similar risks lies at the heart of the concept of insurance." 63 *Opinions of the Attorney General* at 425.

B. Status of Intermediaries

In our view, no contract of insurance exists between Willse and the sponsors. Willse assumes no risk of loss, and the fees that it receives from the sponsors pay for administration, not for the actuarial cost of spreading that risk. It carries out its contractual obligation by entering into contracts, either directly with the providers of medical services or with entities that then contract with the providers.

In acting as a conduit and not accepting the contractual responsibility to provide the medical care in exchange for premiums, Willse is not an insurer. Its role is merely that of administrator.

We have been informed that in certain instances an entity, Healthcare 2000, contracts with Willse to provide health care services and, in turn, enters into its own contracts with providers. Much as does Willse, Healthcare 2000 receives an administrative fee and passes the premium along to the actual providers. Again, the entity accepts no financial risk, receives no premiums, and provides only administrative services. It is not an insurer.

C. Status of Providers

When Willse contracts directly with providers, we understand that Willse pays them for services at reduced rates. The theory behind this arrangement is that the volume of business generated for the providers will offset the income forgone through the reductions. Under both the contract types described in Part I above, the providers assume the risk of loss, which, we have been informed, can be quite substantial. Here we reach the insurance component of the plan.

It is true that assumption of risk of loss does not automatically convert a contractual obligation into one of insurance. Were that true, all contracts of warranty would automatically become insurance contracts. This office has opined to the contrary. *See* 42 *Opinions of the Attorney General* 254 (1957).

Here, however, all five elements necessary to find an "insurance" arrangement are present:

> (1) The insureds, the "covered persons," possess an insurable interest in their health.
>
> (2) The covered persons face substantial risk of loss through the occurrence of designated perils, such as disease or accident.
>
> (3) The health care provider assumes the risk of loss by accepting capitation payments under the contracts described above.
>
> (4) The health care provider spreads the cost over a large group of covered persons.
>
> (5) The provider accepts a "premium" — the capitation payment.

Our conclusion is in accord with pertinent decisions from other jurisdictions. For example, *Manasen v. California Dental Services*, 424 F.Supp. 657 (N.D. Cal. 1976), *rev'd on other grounds* 638 F.2d 1152 (9th Cir. 1979), involved a plan under which employers paid fixed, per capita premiums to a provider in exchange for dental services to the plan's beneficiaries. The provider assumed the risk that these premiums would be enough to cover the costs of the services. This plan was the "business of insurance," the court held. *See also, e.g., Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1286 (9th Cir. 1983) (health care provider's policies with insureds are the business of insurance "insofar as they shift the risks of medical costs" to the provider); *State v. Blue Crest Plans, Inc.*, 421 N.Y.S. 2d 579, 580, 72 A.D.2d 713 (1979) (legal services plan constitutes insurance when contract contains prepayment; distributes loss among large group; has insurable interest; and contains legally binding promise, premium payments and profit motive for service providers). *Cf. Professional Lens Plan v. Department of Insurance*, 387 So. 2d 548 (Fla. App. 1980) (contract to furnish replacement lenses is not insurance where there exists neither premium payments, assumptions of a risk, or a risk-spreading mechanism).

Our conclusion is not changed by the fact that Willse enters into the contract with the provider on behalf of the employer. Willse, in entering into these contracts, is expressly acting as agent for the employer. The ultimate beneficiary of the services remains the employees. Moreover, we do not believe that merely interjecting a claims payment administrator into the relationship alters the provider's underlying obligation to provide care to those employees who participate in the benefits plan. Simply placing a conduit between insured and provider does not render the provider's obligation to employees anything other than "insurance."[7]

Finally, we do not believe that the employer's creation of a self-funded employee benefits package, protected from state regulation by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.A. §1001 *et seq.*, exempts the *providers* of those services from state regulation as well. "While ERISA supersedes state law regulation of employee benefit plans, the Act allows the States to continue to regulate the sale of insurance." *Taggert Corp. v. Efros*, 475 F. Supp. 124, 125 (S.D. Tex. 1979). *See Matthew 25 Ministries, Inc. v.*

---

[7] Nor does it matter if Willse contracts with Healthcare 2000 or some other additional administrative intermediary.

Corcoran, 771 F.2d 21 (2d Cir. 1985); *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382 (D. Kan. 1977).

Insurers and those acting as insurers are not released from state statutory obligations merely because those to whom they sell their products and services fall under the protection of ERISA. ERISA was intended to permit employers to craft creative methods of providing benefits to employees. But ERISA was not intended to exempt sellers of insurance from applicable state laws. H. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5162.

IV

Conclusion

In summary, it is our opinion that the Healthnet program is partially subject to the jurisdiction of the Insurance Commissioner. Willse, acting as agent of the employer, does not fall within that jurisdiction. However, we believe that the providers of health care services themselves are engaging in the business of insurance by insuring the provision of health care benefits on the occurrence of certain determinable contingencies, for the payment of a premium in the form of a capitation payment.

J. Joseph Curran, Jr.
Attorney General

Randi F. Reichel
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

INSURANCE — HEALTH — INTERDEPARTMENTAL COMMITTEE ON MANDATED HEALTH INSURANCE BENEFITS MAY REVIEW PROPOSED EXPANSION OF 'ALL-PROVIDERS' LAW IF REQUESTED TO DO SO BY GOVERNOR OR LEGISLATIVE POLICY COMMITTEE

December 12, 1990

The Honorable Charles L. Benton
Chairman, Interdepartmental Committee on Mandated Health Insurance Benefits

You have requested our opinion on whether the Interdepartmental Committee on Mandated Health Insurance Benefits has jurisdiction to review the request of dietitians and nutritionists for inclusion in the "all-provider" reimbursement provisions of the Insurance Code, Article 48A, §§354Z, 470U, and 477AA of the Maryland Code. Secondly, if this request is within the Interdepartmental Committee's jurisdiction, you have asked whether the proposed change in the law should be labeled a "mandated benefit" or a "nondiscrimination provision."

For reasons detailed below, it is our opinion that:

(1) The Interdepartmental Committee's jurisdiction to review proposals or statutes is invoked only by a request of the Governor or the Legislative Policy Committee. The Interdepartmental Committee is not empowered to review a proposal merely at the request of provider group like dietitians and nutritionists.

(2) If either the Governor or the Legislative Policy Committee requested the Interdepartmental Committee to undertake a review of the proposed amendments to Article 48A, §§354Z, 470U, and 477AA, the request would not be outside the latter committee's jurisdiction.

(3) Although in the abstract it is frequently difficult to distinguish between a "mandated benefit" and a "nondiscrimination provision," the Interdepartmental Committee has jurisdiction over both, with the

exception of provisions specified in Section 3 of Chapter 417 of the Laws of Maryland 1990.

(4) The proposed changes to §§354Z, 470U, and 477AA would remove or modify an exception to what the General Assembly has labeled a "nondiscrimination provision" in Section 3 of Chapter 417, and they are not excluded from review by that uncodified section. In addition, by seeking to remove a "limitation or condition not imposed on other subcategories" of providers, the proposed changes would fit the definition of "nondiscrimination provision" contained in new §490M(a)(3) of Article 48A. However, because proposed expansion of nondiscrimination provisions are subject to the same review as mandated benefits, the label accorded a change by the Interdepartmental Committee would not require a different analysis.

I

Background of 1990 Legislation

As a result of increasing concern with the escalating cost of health insurance, the Committee on Mandated Health Benefits of the Governor's Commission on Health Care Policy and Financing recommended establishment of an "administrative and statutory structure" for analyzing "mandated health benefits." *See* Committee on Mandated Health Benefits, *Final Report* at 2 and 6 (September 1989). While recognizing the existence of "nondiscrimination provisions," the committee drew no distinction between such legislation and mandated benefits for purposes of government and consumer concern. *Final Report* at 1.[1] Rather, the committee noted that:

[1] The committee's final report noted that there were four basic categories of "mandated benefit laws," including "nondiscriminatory provider mandates," "service mandates," "mandated benefits laws," and "mandated length of coverage law." *Final Report* at 1. "Nondiscriminatory provider mandates" were described as "expand[ing] the classes of providers whose services are covered by insurance" so that "[s]ervices are covered by a licensed provider despite the fact that a policy's own terms might appear to exclude coverage by that particular class of provider." *Id.*

> The structure is not intended to be limited in its application. It should be applicable to any provisions of law which have cost implications to the health care delivery system — including mandated service proposals, mandated provider reimbursement requirements, non-discrimination statutes, beneficiary laws and length of coverage proposals.

Final Report at 6.

This committee's recommendations were embodied in an Administration measure, House Bill 499, which expressly defined the terms "mandated health insurance benefit" and "nondiscrimination provision" but authorized review of both under certain circumstances by an Interdepartmental Committee on Mandated Health Insurance Benefits. Despite amendments by the House Economic Matters Committee narrowing the Interdepartmental Committee's jurisdiction over certain specified "nondiscrimination provisions," this basic structure remained unchanged.

Enacted as Chapter 417 of the Laws of Maryland 1990, the legislation added a new §490M to Article 48A. The mission of the Interdepartmental Committee is described in §490M(c)(1):

> At the request of the Governor or the Legislative Policy Committee, the Interdepartmental Committee shall evaluate legislative proposals or statutes that establish, expand, or repeal mandated health insurance benefits or, except as otherwise provided by law, nondiscrimination provisions, and beneficiary or length of coverage provisions.[2]

Article 48A, §490M(a)(2) defines "mandated health insurance benefit" as "a legislative proposal or statute that requires a particular

---

[2] The legislation sets certain time frames for an evaluation, *e.g.* May 31 for notification by the Governor or Legislative Policy Committee of which evaluations are to be made and November 10 for reporting the results of the review. §490M(c)(2) and (e)(4). Section 6 of Chapter 417 slightly modifies the dates for 1990 action, but the deadlines for this year have already passed.

health care service, benefit, coverage, or reimbursement for covered health care services to be provided or offered in a health insurance policy or contract issued or delivered in the State by a nonprofit health service plan or by a commercial insurer." Section 490M(a)(3) defines a "nondiscrimination provision" as "a legislative proposal or statute that prohibits a nonprofit health service plan or commercial insurer who provides or offers a particular service, benefit, coverage, or reimbursement for covered health care services from excluding a subcategory from coverage or subjects the subcategory to limitations or conditions not imposed on other subcategories."[3] Finally, an uncodified Section 3 of Chapter 417 provides that:

> [T]he Interdepartmental Committee on Mandated Health Insurance Benefits may not conduct a review, under Article 48A, §490M of the Code, of any proposed full or partial repeal that limits the effect of the nondiscrimination provisions contaned in Article 48A, §§ 354L, 354N, 354Y, 354Z, 354EE(b)(3), 470A, 470-I, 470J, 470K, 470M, 470T, 470U(a), 470X(b)(3), 477F, 477J, 477-O, 477Z, 477AA(a) 477FF(b)(3), 490, 490-1/2, 490A, 490A-1, 490A-2, 490K, and 490L of the Code or any proposed full or partial repeal of §§ 354S, 470-O, 477T, and 489 of the Code.

II

Dietitian and Nutritionist Legislation

The State's "all-provider" law generally specifies that whenever the policies, contracts, or certificates of nonprofit health service plans, health insurers, and group and blanket health insurers provide for reimbursement for any services within the lawful scope of practice of a licensed health care provider, "the insured, or any other person

---

[3] The word "subjects" in §490M(a)(3), added by House Committee amendment, was probably intended to be "subjecting." Any other reading would convert the clause beginning with "subjects" to a definition of "discrimination" rather than one of "nondiscrimination."

covered, or entitled to reimbursement under the policy, contract, or certificate, shall be entitled to reimbursement for such services." Article 48A, §§354Z(a), 470U(a), and 477AA(a). When licensing schemes were established for dietitians in 1985 (Chapter 773 of the Laws of Maryland 1985) and for nutritionists in 1986 (Chapter 703 of the Laws of Maryland 1986), these providers were excluded from the all-provider law unless a policy, contract, or certificate expressly provided for reimbursement for services within the scope of their practice. *See* §§354Z(c), 470U(c), and 477AA(c).

In 1988, legislation was introduced in the House to delete this exception to the all-provider law but failed to clear committee. *See* House Bill 158 (1988). In 1989, a bill passed the House that would have modified the exception to generally require dietitian or nutritionist reimbursement "if a licensed physician determines that treatment is medically necessary for the intervention of cardiovascular disease, diabetes, malnutrition, cancer, or cerebral vascular disease." *See* House Bill 1418 (1989). However, the measure died in the Senate. Similar bills were introduced in the General Assembly in 1990, but both failed. *See* Senate Bill 614 and House Bill 866 (1990).

In response to a request for advice, the Attorney General's Office concluded that the 1989 legislation "would not mandate coverage of these services but would simply require that where they are covered, reimbursement must be provided when the services are performed by a licensed dietitian or nutritionist." Letter to Delegate Donald E. Lamb from Assistant Attorney General Kathryn M. Rowe (April 7, 1989). A letter on the 1990 legislation also noted "it would appear that, in the abstract, Senate Bill 614 does not mandate a benefit." Letter to Senator Thomas L. Bromwell from Assistant Attorney General Robert A. Zarnoch (February 21, 1990). But this advice letter went on to state that:

> However, a word of caution is in order. Our prior letters have assumed the question of whether a particular provision is a mandated benefit or a nondiscrimination requirement to be a *legal* issue capable of definitive resolution in accordance with legal standards. It is becoming apparent that this is not the case.

> As far as I am aware, there is no case anywhere that attempts to distinguish a mandated benefit from a nondiscrimination requirement, and no existing statute that draws such a distinction for any purpose. More importantly, there is no *legal* consequence that follows from labeling a particular benefit a mandate as opposed to a nondiscrimination requirement and no articulated legal standards for making such a determination.

Letter at 2 (emphasis in original).

With this history and background in mind, we turn to the questions you have raised.

III

Analysis

Before focusing on the "mandated benefit" versus "nondiscrimination provision" issue and its relevance to the duties of the Interdepartmental Committee, we note another significant limitation on the jurisdiction of the committee. It cannot evaluate either a proposed mandated benefit or a nondiscrimination provision *unless* requested by the Governor or the Legislative Policy Committee. Article 48A, §490M(c)(1). Under the law it is obligated to report its findings to the Governor and the Legislative Policy Committee or affected State agency. §490M(d)(4) and (5). And, according to the Committee on Mandated Health Benefits, "the entire purpose of the [statutory] process is to assist the General Assembly and the Governor." *Final Report* at 8.

In light of these clear expressions of legislative intent and the Interdepartmental Committee's otherwise carefully circumscribed jurisdiction, we believe that the committee lacks jurisdiction to evaluate a proposed change merely at the request of a provider. It may act only if it receives a request from the Governor or the Legislative Policy Committee. Thus, the Inter-departmental Committee is not empowered to review the legislative proposals of the dietitians and nutritionists.

Because the issue is likely to be a recurring one, however, we have also decided to address your question on the appropriate characterization of the proposed changes. In our opinion, should the Governor or the Legislative Policy Committee request an evaluation of the dietitian and nutritionist legislation, the Interdepartmental Committee would have jurisdiction to conduct the review.

If a label had to be attached to the proposed amendments to §§354Z, 470U and 477AA, we would conclude that the legislation is more appropriately characterized as a "nondiscrimination provision" on the basis of §490M(a)(3) and (c)(1) and Section 3 of Chapter 417. The latter uncodified section itself describes §§354Z, 470U(a), and 477AA(a) — which the dietitian and nutritionist legislation seeks to expand — as "nondiscrimination provisions." Section 490M(a)(3) authorizes evaluation of proposals that prohibit the subjecting of a subcategory of service, benefit coverage, or reimbursement to limitations or conditions not imposed on other subcategories. And the proposed changes seek to modify or delete a limitation or condition not imposed on other providers and, thus, "expand" a nondiscrimination provision within the meaning of §490M(c)(1). Finally, evaluation would not be prevented by Section 3 of Chapter 417, which bars review only of a "full or partial repeal that limits the effect of the nondiscrimination provision" contained in §§354Z, 470U(a), and 477AA(a). The proposed changes neither repeal nor limit the effect of the nondiscrimination provision. Rather, they seek to expand the requirements of these sections.

Although we can draw this characterization from the 1990 legislation, we should emphasize that §490M nevertheless does not require different treatment of mandated benefits and nondiscrimination provisions (other than those named in Section 3 of Chapter 419). Both are subject to the same standards of scrutiny and justification. *See* §490M(f). In short, even though §490M(a) defines a "nondiscrimination provision" and distinguishes it from a "mandated health insurance benefit," no legal consequence follows from such a characterization or label. Both are subject to the same review and analysis by the Interdepartmental Committee.

IV

Conclusion

In summary, it is our opinion that:

(1) The Interdepartmental Committee may not review proposed changes to §§354Z, 470U and 477AA of Article 48 without a request from the Governor or the Legislative Policy Committee.

(2) If such a request were received, the Interdepartmental Committee would have jurisdiction to evaluate the proposal.

(3) Although the proposed changes would constitute a "nondiscrimination provision" under §490M and Chapter 419 of the Laws of Maryland 1990, this label does not affect the Interdepartmental Committee's jurisdiction or analysis of the proposed changes.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

LEGAL SERVICES CORPORATION

LEGAL ASSISTANCE GRANTS — SCOPE OF GRANT-MAKING AUTHORITY — CORPORATION MAY MAKE GRANTS FOR PROVISIONS OF LEGAL ASSISTANCE TO ORGANIZATIONS PRIMARILY COMPOSED OF ELIGIBLE CLIENTS, BUT NOT FOR PROVISION OF LEGAL ASSISTANCE TO OTHER ORGANIZATIONS

February 27, 1990

The Honorable Benjamin L. Cardin
Chairman
Maryland Legal Services Corporation

You have requested our opinion on whether the Maryland Legal Services Corporation ("MLSC") may make grants for the provision of legal services to organizations of either of two types: (i) organizations composed primarily of individuals who are themselves eligible to receive MLSC-funded legal assistance; or (ii) organizations that provide services such as housing, day care, health care, or employment assistance to the poor but that are not themselves composed of eligible individuals. For the reasons given below, we conclude that MLSC may make grants for the provision of legal services to organizations of the first type. However, MLSC may not make grants for the provision of legal services to organizations of the second type.

I

Background

MLSC does not provide direct legal services. Indeed, it is expressly prohibited from participating in litigation unless it or one of its grantees is a party or unless the interpretation of MLSC's enabling act or guidelines is an issue. Article 10, §45H(b)(1). Rather, MLSC provides financial assistance to nonprofit organizations "for the purpose of furnishing legal assistance to eligible clients." Article 10, §45G(b). *See also* §45C(e). "Legal assistance" is defined to mean legal representation, including "training, research, coordination with private attorneys and other activities necessary to insure the delivery of quality legal services." §45C(g). An "eligible client" is a person determined, on the basis of income, assets, and obligations, to be unable to afford legal assistance. §§45C(c) and 45G(e).

Nonprofit organizations that receive grants from MLSC are required, in using those moneys, to "take into account the relative need for service of clients, particularly the needs of eligible clients with special difficulties of access to legal services or with special legal problems, including elderly and handicapped individuals." §45J(a). In addition, grantees are expressly prohibited from using grant moneys in certain ways. One of those is a prohibition against "provid[ing] representation in a class action suit." §45J(b)(6).

II

Legal Assistance to Groups of Indigent Individuals

The central thrust of the Maryland Legal Services Corporation Act (the "Act") undeniably is the provision of legal services to impoverished *individuals*. Indeed, the Act is expressly premised on legislative recognition of the "need to provide equal access to the system of justice for individuals who seek redress of grievances." §45B(a).

The provisions regarding client eligibility for legal assistance under an MLSC grant reinforce this legislative focus on the individual. Under those provisions, MLSC is required to set maximum income levels for client eligibility, which may not exceed 50 percent of the median family income for the State. In setting those eligibility standards, MLSC must consider the size of the client's family, cost of living variations among areas of the State, and a client's "fixed debts and medical expenses" — matters that generally have no application to organizations. §45G(e).

Moreover, testimony offered during the General Assembly's consideration of the Act by the then-Attorney General, a major proponent of the Act, likewise indicates that the focus of concern was for legal representation of individuals. In explaining the need for the Act, the Attorney General offered examples of "event[s] in a poor person's life" for which legal assistance is needed: "an eviction notice, a suit for non-payment of an account with a furniture store, non-receipt of a child support payment, denial of special education services for a mentally retarded grade schooler, termination of a disability pension or welfare grant, failure of an employer to pay minimum wage, [or] the involuntar[y] institutionalization of disturbed relatives ...." Statement of Steven H. Sachs, Attorney General of Maryland, before the Maryland Senate Judicial Proceedings Committee (March 2, 1982).

Despite this primary focus, however, we do not think that the General Assembly intended to flatly prohibit the use of MLSC funds for counseling or representation of any organizations. No such prohibition is expressed in Article 10; neither, in our view, is it implied.

To be sure, the use of MLSC funds for representation in class action suits is absolutely prohibited by §45J(b)(6). But a class action does not involve the representation of an "organization" in any genuine sense. A class action is simply a convenient means of addressing through a single lawsuit the closely similar claims of a large number of individuals, most of whom will likely never have any contact with each other. *See* Md. R. Proc. 2-231. When, therefore, a group of poor individuals form an organization through which to work toward common goals, the provision of legal assistance to the organization in conducting its affairs would not *per se* violate the prohibition against class action representation.[1]

Nor do we think that providing legal assistance to such an organization would otherwise contravene the legislative intent. The Act's evident aim was to make available, at least so far as resources would permit, legal assistance for the poor in general civil matters that would be roughly equivalent to the services available to the more affluent. Indeed, the General Assembly expressly stated its recognition of "a need to continue and expand legal assistance [then being provided] to those who would otherwise be unable to afford adequate legal counsel ...." §45B(c). Providing legal assistance to groups formed by impoverished individuals for the accomplishment of their common goals is consistent with this legislative aim.

Our view in this regard is bolstered by consideration of the antecedents of MLSC. The Maryland Legal Services Corporation was created in response to significant reductions in federal appropriations for the federal Legal Services Corporation. Article 10, §45B(b). Its enabling act was closely patterned on the federal act, and the State-level legal services program was designed to be much the same as that

---

[1] Of course, we should not be understood as suggesting that an organization plainly formed for the purpose of circumventing that prohibition may properly be represented with MLSC funds. By the same token, an MLSC grantee may not, in the course of representing an organization, violate any other restriction on the use of MLSC funds.

administered by the federal Legal Services Corporation. Hence, the powers, duties, and limitations on MLSC and its grantees contained in Article 10 are virtually identical in substance to those contained in the federal statute, insofar as the federal provisions are applicable on the State level. Indeed, the only instance in which a state provision differs from the federal provision on which it is modeled relates to class actions, which are restricted under 42 U.S.C. §2996e(d)(5) but prohibited under Article 10, §45J(b)(6).

One restriction in the federal law that does not appear in Article 10 is a prohibition against grantees' use of federal Legal Services Corporation funds "to initiate the formation, or act as an organizer, of any association, federation, or similar entity, except that this paragraph shall not be construed to prohibit the provision of legal assistance to eligible clients ...." 42 U.S.C. §2996f(b)(7). This provision was evidently included in response to earlier complaints that recipients of similar federal grants had urged the formation of political action organizations and had been the principal organizers of those groups. *See* 1967 *U.S. Code Cong. & Admin. News* 2428, (minority report on Economic Opportunity Amendments of 1967). The committee report on the bill enacting this provision explained it as follows:

> The Committee expects that pursuant to guidelines issued by the corporation, recipients [of the funds] shall provide appropriate legal assistance to eligible clients and organizations of eligible clients. Recipients and their employees are prohibited from organizing a group, but shall be permitted to prepare papers of incorporation and render other legal assistance as necessary.

1974 U.S. Code Cong. & Admin. News at 3882-83.

The regulation implementing 42 U.S.C. §2996F(b)(7) authorizes recipients of Legal Services Corporation grants to "provide legal assistance to a group, corporation, or association if it is primarily composed of persons eligible for assistance under the [Legal Services Corporation] Act and if it provides information showing that it lacks, and has no practical means of obtaining, funds to retain private counsel." 45 C.F.R. §1611.5(c). A substantially similar federal regulation was in effect when the MLSC was created in 1982.[2] Thus, the federal law on which Article 10 was modeled permitted the provision of legal services to organizations of eligible clients.

We think that the parallelism in structure and wording between the state and federal laws evidences a legislative intent that, except as expressly provided, the State legal services program is to be no more restrictive than the federal program. Article 10 is silent with regard to the activities of grant recipients in relation to organizations of eligible clients. Accordingly, we think that the Maryland law should be construed to permit the use of MLSC funds for legal assistance to those organizations.

Finally, we think that the provision of legal services to organizations composed primarily of eligible clients is consistent with the impetus for the initial creation of legal assistance programs. The original legal services programs arose as part of the community action programs funded under the Economic Opportunity Act of 1964, Pub. L. No. 88-452, §§201-211, 78 Stat. 508, *reprinted in* 1964 *U.S. Code Cong. & Admin. News* 585, 595-99. Those programs were intended to combat poverty by providing services "designed to aid the poor [to] achieve self-sufficiency." H.R. Rep. No. 866, 90th Cong., 1st Sess., *reprinted in* 1967 *U.S. Code Cong. & Admin. News* 2428, 2447.

In 1967 federally funded community action agencies were given express authorization to conduct legal services programs when necessary to accomplish the objectives of general community action programs. Economic Opportunity Amendments of 1967, Pub. L. No. 90-222, §222(a)(3), 81 Stat. 672, *reprinted in* 1967 *U.S. Code Cong. & Admin. News* 743, 776 (repealed 1974). Those objectives included assisting the poor "to remove obstacles and solve personal and family problems which block the achievement of self-sufficiency [and] to achieve greater participation in the affairs of the community ...." Pub. L. No. 90-222, 221(a)(8) and (9), *reprinted in* 1967 *U.S. Code Cong. & Admin. News* at 774 (repealed 1974). Providing legal assistance to organizations composed of eligible clients would further that underlying aim.

---

[2] The federal regulation as it existed in 1982 did not include the express requirement that an organization seeking legal assistance provide information regarding its own ability to afford private counsel. *See* 48 Fed. Reg. 54, 203 (1983) (amending 45 C.F.R. §1611.5(c) to add information requirement).

III

Legal Assistance to Groups Serving the Poor

We do not, however, reach the same conclusion with regard to organizations that provide services to low-income individuals and families but that are not themselves composed of low-income individuals.

The MLSC was created to ensure the availability of but one kind of assistance — legal counsel and representation. Therefore, we believe that the appropriateness of any contemplated use of MLSC funds must be judged by whether the use will provide the poor with services of a legal character.

When an organization that provides services like housing, day care, or employment assistance to the poor receives free legal services, that assistance undoubtedly enhances the organization's ability to serve its clients. At a minimum, more of the organization's resources are available to the poor than would otherwise be the case. The poor to that extent unquestionably benefit from the organization's receipt of legal assistance. Nonetheless, the poor themselves do not receive *legal* assistance in that situation. Hence, we think that the provision of legal services to an organization whose membership is not composed primarily of individuals who are themselves eligible for legal assistance would be beyond the scope of the authority of MLSC.

We note, moreover, that the federal statute has evidently been construed in the same way. Under 45 C.F.R. §1611.5(c), recipients of federal Legal Services Corporation grants may provide legal assistance to organizations primarily composed of eligible clients. No similar provision is made for legal assistance to other organizations. Indeed, 45 C.F.R. §1611.5(c) was amended in 1983 to eliminate an earlier authorization of legal assistance to groups engaged in "furtherance of the interests of" the poor. 48 Fed. Reg. 54,203 (1983). The Legal Services Corporation justified the revised regulation as more in keeping with the "fundamental premise of the Legal Services program ... to provide legal representation by which eligible clients can assert *their own* interests ...." *Id.* (emphasis in original).

IV

Conclusion

In sum, it is our opinion that MLSC may make grants for the provision of legal services to organizations composed primarily of individuals who are themselves eligible to receive MLSC-funded legal assistance. However, MLSC may not make grants for the provision of legal services to organizations that provide services such as housing, day care, health care, or employment assistance to the poor but that are not themselves composed of eligible individuals.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

LOCAL GOVERNMENT

PRINCE GEORGE'S COUNTY — ELECTIONS — CONTRIBUTIONS — PREEMPTION — COUNTY ORDINANCE REQUIRING DISCLOSURE OF CAMPAIGN CONTRIBUTIONS GENERALLY PREEMPTED

April 4, 1990

Michael P. Whalen, Esquire
County Attorney for
Prince George's County

You have requested our opinion on whether Prince George's County Council Bill 17-1990, "Disclosure of Campaign Contributions By Persons Doing Business With the County," is preempted by State law. For the reasons stated below, we conclude that the bill is preempted by State law, with the exception of §2-295.1(a)(1), which in our view is not preempted.[1]

I

Council Bill 17-1990

On March 20, 1990, the Prince George's County Council adopted an ordinance "requiring that all persons who do business with the County report campaign contributions made to elected officials in Prince George's County; providing for restriction upon the activities of persons registered as lobbyists; and providing that persons contracting with the County file required reports." County Bill 17-1990 (title).

---

[1] You also asked about the effect on Council Bill 17-1990 of the provisions of Section 3 of Senate Bill 832, which provides that the latter bill "supersedes any Prince George's County ordinance dealing with subjects covered by [the bill]" and provides that the "bill may not be supplemented by any Prince George's County ordinance." Senate Bill 832 has been given an unfavorable report by the House Constitutional and Administrative Law Committee. Accordingly, although we assume that the Senate's intent was to preempt Council Bill 17-1990 in its entirety, we need not analyze the provision's potential effect.

The heart of the bill is its Section 2, which would add three new sections to the Prince George's County Code. Code §2-295.1 restricts campaign contributions by lobbyists:

> A person required to be registered as a lobbyist shall not:
>
> (1) Attempt to influence the vote of any member of the County Council by the promise of financial support of the member's candidacy or by threat of financial opposition to the member's candidacy;
>
> (2) Make or promise to make any contributions to any candidate to the County Council or County Executive; or
>
> (3) Solicit or attempt to solicit contributions for any candidate for the County Council or County Executive.[2]

Code §2-298 requires every person who has done business with the county annually to file a sworn statement disclosing the names of all candidates or political committees to whom a campaign contribution is made, the amount of the contributions, and the nature and amount of business done with the county.[3] All candidacies for "elective office"

---

[2] Under §2-295(a) of the County Code, "any person who engages in lobbying members of the County Council" and who either expends or receives compensation in excess of stated dollar amounts must register. The term "lobbying" means:

> (1) Communicating in the presence of a County official or employee with the intent to influence any official action of that official or employee; or
>
> (2) Engaging in activities having the express purpose of soliciting others to communicate with a County Council Member with the intent to influence that official.

Code §2-291(h).

[3] The definition of "[d]oing business with" the county is amended to include "[b]ecoming a party of record in or lobbying in support of or in (continued...)

are included, and this term is broadly defined to include not only the offices of County Executive and County Council but also municipal offices and various State offices.[4]

Finally, Code §2-299 sets out certain attribution rules for contributions. Under specified circumstances, contributions made by officers, directors, partners, subsidiaries, employees, and agents of business entities are attributed to the entities.

II

Preemption Analysis

A. *Preempted Provisions*

Prior to the introduction of Council Bill 17-1990, Assistant Attorney General Robert A. Zarnoch, Counsel to the General Assembly, was asked the general question of "whether Prince George's County has the power to enact an ordinance requiring disclosure of political contributions [that] council members receive from zoning applicants ...." Mr. Zarnoch concluded that "these are areas of State not local concern and only the General Assembly may enact such legislation." Letter to Delegate Timothy F. Maloney (February 12, 1990). We agree with this conclusion, and, applying it to Council Bill 17-1990, are of the view that most of the bill is thus preempted.

As Mr. Zarnoch wrote:

> In *County Council v. Montgomery Association*, 274 Md. 52 (1975), the Court of Appeals invalidated a Montgomery County campaign finance ordinance that included reporting of campaign contributions made to members of the County Council and the County Executive. Specifically, the Court held that: "The matter of election campaign financing was

---

[3](...continued) opposition to a land development activity." Code §2-291(d)(4). *See also* Code §2-291(n) (definition of "land development activity").

[4] Code §2-291(m) provides as follows: "'Elective office' means the offices of County Executive, County Council, Board of Education, Mayor or City Council of a municipality, Sheriff, State's Attorney, Clerk of the Court, Registrar of Wills, Senator and Delegate."

> intended to be completely occupied by State law ... to the exclusion of local legislation on the subject." 274 Md. at 60.

With one exception, Council Bill 17-1990 deals with the "matter of election campaign financing." It prohibits certain contributions (§2-295.1(a)(2) and (3)), requires a statement of certain contributions (§2-298), and sets attribution rules for these contributions (§2-299). However, the State Election Code, Article 33, fully occupies the field of campaign finance regulation. Article 33 address both campaign contributions and disclosure of contributions by those doing public business. *See* Article 33, §§26-9 and 30-1 through 30-4.[5]

Accordingly, Prince George's County may not legislate on these matters. It does not matter whether the provisions of Council Bill 17-1990 actually conflict with their counterparts in the Election Code, because "the General Assembly, by enacting the comprehensive State Election Code, has completely occupied the field of regulation of campaign finances and thus made clear its intent to exclude local legislation on the subject." *Montgomery Association*, 274 Md. at 57. *See also Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 324, 513 A.2d 893 (1986) ("When properly invoked, the [preemption] doctrine precludes local legislative bodies from enacting any legislation whatsoever in the pre-empted field.").

B. Provision Not Preempted

The one provision of Section 2 of Council Bill 17-1990 that is not preempted, in our view, is proposed Code §2-295.1(a)(1), which prohibits a lobbyist from "[a]ttempt[ing] to influence the vote of any member of the County Council by the promise of financial support of the member's candidacy or by threat of financial opposition to the member's candidacy."

---

[5] Insofar as Council Bill 17-1990 seeks to impose certain disclosure requirements on persons who are seeking decisions from the County Council on planning and zoning matters, the basis of the Council's authority is not the county's home rule charter but rather the Regional District Act set out in Titles 7 and 8 of Article 28 of the Maryland Code. However, nothing in the Regional District Act authorizes the County Council to enact campaign finance legislation. Thus, as Mr. Zarnoch concluded, "Prince George's County lacks the power to enact ... a political contribution disclosure ordinance with respect to zoning applicants or council members ...."

Under Article 40A, §6-301, each local government is directed to "enact lobbyist regulation provisions substantially similar to the provisions of Title 5 of [Article 40A] which shall be modified to the extent necessary to make the provisions relevant to that jurisdiction and which may be further modified to the extent deemed necessary and appropriate by and for that jurisdiction." This provision does not authorize a local government to regulate campaign contributions by lobbyists, because the matter of campaign contributions is separately regulated by the Election Code. *See* 71 *Opinions of the Attorney General* 108, 109 (1986); 68 *Opinions of the Attorney General* 252, 261-63 (1983).

Nevertheless, in our view, a prohibition against "[a]ttempt[ing] to influence the vote of any member of the County Council" by promising future contributions, or threatening to withhold future contributions, is sufficiently distinct from the regulation of the contributions themselves to fall outside of the zone of preemption. The State Election Code does not regulate the nature of the discourse between lobbyists and officials. Thus, Code §2-295.1(a)(1) is a proper exercise of the County's power under Article 40A, §6-301.[6]

III

Conclusion

In summary, it is our opinion that, with the exception of §2-295.1(a)(1), all of the provisions to be added to the Prince George's County Code by Section 2 of County Bill 17-1990 would be preempted by State law.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[6] We were not asked to consider, and therefore do not address, any First Amendment issues raised by §2-295.1(a)(1).

LOCAL GOVERNMENT — MUNICIPAL CORPORATIONS — ANNEXATION — POWER TO ANNEX STATE-OWNED LAND — EFFECT OF ANNEXATION

May 17, 1990

Mr. John W. S. Foster, III
President
Town Commissioners of Queenstown

On behalf of the Town Commissioners of Queenstown, you have requested an opinion on whether the town may annex land underlying Queenstown Creek. For the reasons given below, it is our conclusion that the town may annex the land in question.[1]

I

Background

Municipal corporations like Queenstown have general power to impose zoning controls on lands within their corporate boundaries. Article 66B, §4.01 of the Maryland Code. Under Article 23A, §2(b)(23A), municipal corporations are also authorized to establish boards of port wardens to regulate the construction of structures like wharves and piers within their corporate limits.

The boundary of the town of Queenstown presently runs along the center of Queenstown Creek, and the town therefore currently has power under those provisions to regulate development on one side of the creek and the construction of improvements from the shore on that side to the center of the creek. However, the town wishes to regulate development throughout the width of the creek and on the fast land on

[1] Thus, this opinion confirms the advice previously provided by our office to the Town Commissioners. Letter to William A. Rada, Jr., President of Town Commissioners, from Assistant Attorney General Richard E. Israel (January 8, 1987). Although we address in detail only the question of a municipality's annexation of State-owned land, we agree with Mr. Israel's advice on other issues, including his analysis of whether territory separated from the existing municipality by navigable waters is "contiguous," within the meaning of Article 23A, §19 of the Maryland Code.

the opposite side of the creek, as well. Because that area lies outside the town's corporate boundaries, accomplishment of the town's goal requires that the area be annexed.

The waters of Queenstown Creek in the area that the town wishes to annex are navigable waters. That is, they are waters in which the tide ebbs and flows or which are in fact navigable, if only by small craft. *See Green v. Eldridge*, 230 Md. 441, 446-47, 187 A.2d 674 (1963).

With limited exceptions, all navigable waters and the land beneath them are owned by the State in trust for all of its citizens. *Smith v. Maryland*, 59 U.S. (18 How.) 71, 15 L. Ed. 269, 271 (1855). Because land under navigable water is State-owned, it is not subject to the regulatory control of political subdivisions. *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 314-15, 407 A.2d 738 (1979).[2] Thus, your question at bottom is whether a municipal corporation may annex State-owned land.

II

Annexation of State-Owned Land

Under Article 23A, §19, every municipal corporation has power to annex land, although there are certain express limits on the exercise of that power. The land to be annexed must be contiguous to the existing corporate area, and the annexation must not create a "pocket" of unincorporated land surrounded by property within the corporate limits of the municipality. §19(a). Moreover, the land to be annexed must not be within the corporate boundaries of any other municipal corporation. §19(m). There is no express prohibition, however, against the annexation of property owned by a governmental entity.

Annexation may be initiated by a resolution of the municipal corporation's legislative body. Before adopting the resolution, the legislative body must obtain the consent of 25 percent of the residents of the area to be annexed who are registered voters and of the owners

---

[2] However, a private landowner's riparian improvements — that is, piers, wharves, and the like — that are permitted by the State become, upon their completion, part of the dry land to which they are attached and, therefore, subject to local zoning regulations. *People's Counsel v. Maryland Marine Manufacturing Co.*, 316 Md. 491, 500, 560 A.2d 32 (1989).

of "25 percent of the assessed valuation of the real property located in the area to be annexed." §19(b)(1).[3]

In *City of Salisbury v. Banker's Life Co.*, 21 Md. App. 396, 404-05, 319 A.2d 865 (1974), the Court of Special Appeals held that a municipality may not include the consent of a governmental owner of tax-exempt property in determining whether it has obtained the requisite number of consents to an annexation resolution. Although §7-106 of the Tax-Property Article requires that tax-exempt property be assessed on the same basis as taxable property, the court concluded that only the owners of taxable property are qualified to give consent to annexation. This is so because the General Assembly intended "that only those who were to bear the financial burdens of a city government by the payment of real property taxes were to be allowed a voice in the annexation of real property to the municipal corporation." 21 Md. App. at 404.

The court did not indicate, however, that the property at issue, owned by a county board of education, was not subject to annexation at all. To the contrary, it seems to have been unquestioned that the property could be annexed. We believe that publicly owned land — including State-owned land — may indeed be annexed.

The foundation of the holding in *Banker's Life* was that the annexation of tax-exempt property does not negate the tax exemption and thus does not adversely affect the owner. In consequence, annexation is of no real concern to the tax-exempt entity.

State-owned land is exempt from land-use regulations enacted by political subdivisions, as well as property taxes. *Board of Child Care of Methodist Church v. Harker*, 316 Md. 683, 690-91, 561 A.2d 219 (1989). *See also* 73 *Opinions of the Attorney General* 238, 245 (1988) (municipal zoning ordinance is inapplicable to county property used for governmental purposes). Nothing in Article 23A, §19 indicates any intention that an exercise of the power of annexation may override the State's general exemption from local regulation.

Hence, just as the annexation of State-owned property does not burden the State with property taxes, so annexation does not burden the State with regulation. Nor does annexation have any effect on the

---

[3] Annexation may also be initiated by a petition signed by 25% of the residents of the area to be annexed who are registered voters and by the owners of 25% of the assessed valuation of the real property in the area to be annexed. §19(c).

nature or extent of the State's ownership interest in its land. *County Commissioners v. Maryland Hospital for Insane*, 62 Md. 127, 129 (1884) (political subdivision with power of eminent domain nonetheless may not condemn State-owned land).

In sum, annexation simply has no practical effect on State-owned land so long as the land remains in State ownership. Under these circumstances, we think the rationale of *Banker's Life Co.* indicates that annexation of State-owned land is permitted in the absence of an express prohibition.

To be sure, the general rule is that the State is not bound by its enactments "unless the enactment specifically names the state or manifests a clear and indisputable intention that the state is to be bound." *City of Baltimore v. State*, 281 Md. 217, 223, 378 A.2d 1326 (1977).

However, annexation is not itself a substantive regulation, but merely a mechanism for extending the territorial jurisdiction of a municipality. As we have noted, the State would not, by virtue of an annexation of its land, be subject to any substantive obligation or restriction to which it had not consented. Put another way, annexation of its land would not "bind" the State in any way. Hence, we believe that construing §19 to permit the annexation of State-owned land does not violate the general rule. Indeed, our conclusion accords with that of the leading commentator:

> Under the laws of most states, a city may extend its boundaries to include territory belonging to ... the state .... Of course, a city can exercise no control over state property that will interfere with the superior authority. The city laws may be enforced upon such territory as elsewhere so long as they do not encroach upon sovereign rights or powers, and such property frequently lies within the limits of municipalities.

2 *McQuillan Municipal Corporations* §7.18b, at 466-67 (3d ed. 1988).

Finally, construing the annexation provisions to prohibit municipalities from annexing State-owned land might in some instances put municipal corporations to an untenable choice between annexing less than all of the area necessary to the accomplishment of their purposes or violating the prohibition in §19(a)(2) against creating "pockets" of unincorporated land within the incorporated territory. We do not think that the General Assembly intended thus to unnecessarily interpose the State as a potential obstacle to the accomplishment of a municipal corporation's purposes.

III

Conclusion

In sum, it is our opinion that the Town of Queenstown may annex land underlying Queenstown Creek, notwithstanding that the land underlying the creek is owned by the State.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel,
Opinions & Advice

LOCAL GOVERNMENT — MUNICIPALITIES — COUNTIES — ROAD WITHIN INCORPORATED MUNICIPALITY MAY NOT BE OPENED BY COUNTY OVER OBJECTION OF MUNICIPALITY

May 31, 1990

David O. Godwin, Jr., Esquire

On behalf of the Town of New Market, your predecessor as Town Attorney requested an opinion on whether the County Commissioners of Frederick County have power to open a road within the corporate boundaries of the town without the town's consent.

For the reasons given below, we conclude that a road within the town's boundaries may be opened only with the town's consent.

I

Background

The developers of a subdivision located in Frederick County immediately outside the corporate boundaries of New Market wish to extend a dead-end street in the town to connect with a road that is presently under construction in the county, thereby creating a through road in the subdivision. The county has approved the subdivision plan. However, the Mayor and Council of the town refused to approve the proposed street extension within the town.

The developers then petitioned the County Commissioners for approval of the street extension. If the Commissioners approve, the developers propose to construct the extension and dedicate it to the county. This office's opinion was requested to resolve the question that arose between the county and the town regarding the county's power to override the town's decision not to permit the street construction.

II

Power Over Roads

Incorporated municipalities have certain home rule powers deriving from Article XI-E of the Maryland Constitution, including the power to legislate about their "affairs." Article XI-E, §3. *See generally* Moser, *County Home Rule — Sharing the State's Legislative Power with Maryland Counties*, 28 Md. L. Rev. 327, 335 (1968). *Cf.* 62 *Opinions of the Attorney General* 275, 310 n.26 (1977) (comparing legislative authority of municipalities and code home rule counties). As we discuss in more detail below, the decision whether to open a road is generally within the scope of a municipality's powers. 10A McQuillan, *Municipal Corporations* §30.21, at 243 (3d ed. 1990).

However, the General Assembly retains the power to legislate about municipal affairs, if it does so by legislation applicable to all municipalities. Article XI-E, §1.[1] Hence, we must consider whether the General Assembly, by public general law, has vested in counties like Frederick County power to open a road within a municipality, notwithstanding the municipality's decision not to open the road.

The general powers of counties without home rule, like Frederick County, are set out in Article 25 of the Maryland Code. That article includes a number of provisions relating to road construction and maintenance. Article 25, §2(a) provides:

> [County Commissioners] shall in their respective counties have control over all the public roads, streets and alleys, except in incorporated towns in their respective counties, and make such rules and regulations for repairing, cleaning, mending, and perfecting the same, and providing for the payment of the cost of the same, as they may deem necessary ....

---

[1] "[T]he General Assembly shall not pass any law relating to the ... affairs of ... municipal corporations ... which will be special or local in its terms or in its effect, but the General Assembly shall act in relation to the ... affairs of any such municipal corporation only by general laws which shall in their terms and in their effect apply alike to all municipal corporations in one or more of the classes provided for [by law]." The General Assembly has provided for only a single class of municipal corporations. Article 23A, §10 of the Maryland Code.

Article 25, §2A provides:

> Upon the adoption of a resolution stating that a county responsibility or purpose will be served, the county commissioners shall also in their respective counties have the power to expend from any highway funds under their control and jurisdiction such sums as they may deem necessary to pay all or a portion of the cost of highway projects within municipal corporations ....

Article 25, §3(o)(1) empowers county commissioners "[t]o provide for grading, paving, regrading, repaving, curbing, recurbing, or repairing any road or sidewalk now or hereafter condemned, ceded, opened, widened, extended or straightened as public property ...." Article 25, §15 in plain terms gives county commissioners jurisdiction over streets in some towns: "All the provisions of this Article relating to public roads or roads shall be applicable to streets, lanes, and alleys in unincorporated towns and villages." Article 25, §25(a) expressly gives county commissioners the "power to open, alter or close any public road or roads in their respective counties." Under Article 25, §135, "[a]ll applications for opening, altering or closing roads shall be by petition to the county commissioners," and §§136 through 152 establish the procedures for deciding those petitions.

The interplay of these various provisions is not altogether clear. Further, we are cognizant that, in a situation like the present one, whichever political subdivision has the ultimate decisionmaking power may, by its decision, affect the development plans of the other.

A reasonable argument can be made that the "control" over roads, streets, and alleys conferred by §2(a) must be read with reference to the rulemaking power also conferred by the same clause of that provision — that is, as control over "repairing, cleaning, mending and perfecting" the roads, streets, and alleys. Hence, that provision's exception for streets and alleys in incorporated towns prevents county commissioners from exercising in those towns only that limited form of control. Because none of the provisions that confer or refer to county commissioners' power to open roads contain a similar exception for roads in incorporated towns, those provisions could be thought to apply within as well as without municipal boundaries.

Indeed, it may be argued that §2A's authorization of the expenditure of county highway funds for projects inside municipalities is an affirmative grant to county commissioners of the authority to determine whether and where streets should be built. Thus, incorporated municipalities have power to clean, maintain, and improve their streets, but county commissioners would have "exclusive jurisdiction" to determine whether to open new streets in those municipalities. *See Greenland v. County Comm'rs of Harford Co.*, 68 Md. 59, 62, 11 A. 581 (1887); *Gaither v. Watkins*, 66 Md. 576, 580, 8 A. 464 (1887).[2]

In our view, however, the better view of the pertinent provisions, taken as a whole, is that county commissioners are not authorized to compel a road opening within a municipal corporation. First, §15's express extension of all the powers of county commissioners with respect to roads to include streets in "unincorporated towns and villages" evidences the legislative intent that county commissioners do not have those powers with respect to streets in incorporated municipalities. That provision was originally enacted by Chapter 230 of the Laws of Maryland 1914 to follow immediately after and evidently to clarify §2. Had the General Assembly intended county commissioners to have the same powers with respect to streets in incorporated municipalities, which have the power of self-government, as they have in unincorporated settlements that have no formal legal existence, the General Assembly would not have expressly limited the reach of §15 as it did. Hence, §25's grant of authority to county commissioners to open, alter, and close roads and the provisions regarding the procedure for acting on petitions to open roads set out in §§135 through 152 are best read as applicable only outside the boundaries of municipal corporations.

In this regard, we note that §2A's authorization for county commissioners to pay all or part of the costs of highway projects within municipal corporations is similar to §219's authorization for counties to provide various forms of in-kind assistance to other political subdivisions. Thus, it permits the counties to cooperate with incorporated municipalities in the planning and construction of roads and streets whenever appropriate. However, it was not intended to expand the geographic scope of county commissioners' jurisdiction over

---

[2] In each of those cases, the complainant sought to overturn county commissioners' decisions on petitions for road openings. The Court of Appeals held that the procedural irregularities complained of did not deprive the commissioners of jurisdiction and that their actions therefore were subject to only limited judicial review by the circuit court, with no right of appeal from that court's decision. In each case, the Court of Appeals commented that "[t]he County Commissioners have exclusive jurisdiction in regard to the opening of public roads." *Id.*

street-opening decisions beyond that expressed in §15. Nor are the statements in *Greenland* and *Gaither* as to the exclusivity of that jurisdiction to the contrary, for those statements were made in determining the power of courts to review county commissioners' decisions made in the exercise of their jurisdiction and did not address whether that jurisdiction extends to streets in municipal corporations.

Moreover, the lack of a provision in Article 23A expressly conferring upon municipal corporations the power to open streets, in contrast with the detailed provision of Article 25, merely reflects the contrast between enactments regarding municipalities having the constitutional power of self-rule and those regarding counties without that power. Thus, the express power of municipalities to "expend municipal funds for any purpose deemed to be public and to affect the safety, health, and general welfare of the municipality and its occupants" under Article 23A, §2(b)(2) and their power to acquire property needed for public purposes under Article 23A, §2(b)(24) are broad enough to include the power to open streets. Indeed, the inclusion of authority to "do whatever [the municipality] deems necessary to establish, operate, and maintain in good condition the public ways of the town" in the model municipal corporation charter codified in Article 23B evidences the General Assembly's view that this is a power appropriately exercised by incorporated municipalities.[3] More particularly, the inclusion of power to open and close streets in the original charter of the Town of New Market evidenced the General Assembly's intention that thenceforth the town, not the county, should take these actions within the town's corporate boundaries. *See* Chapter 90, Laws of Maryland 1878 (incorporating Town of New Market).

The view that we take of this question is substantially reinforced by *Town of Glenarden v. Lewis*, 261 Md. 1, 273 A.2d 140 (1971). In that case, the Court of Appeals considered whether certain landowners' offer to dedicate a street right of way to the public had been accepted, so that the landowners could not alter their subdivision plans to return the right of way to private ownership without the consent of the appropriate government.[4] The court began its consideration of that

---

[3] However, the provisions of Article 23B are not themselves a grant of power to any municipality. *Campbell v. Mayor and Council of Annapolis*, 289 Md. 300, 310, 424 A.2d 738 (1981).

[4] A complete dedication requires governmental acceptance of the landowner's offer evidenced by a deed or other record; by opening, grading, or repairing at public expense; by long continued public use of the road; or (continued...)

question by identifying the governmental authority that might have accepted the dedication:

> From 1922 until 1961, the Prince George's Board of County Commissioners, who have now consented to the abandonment could have accepted this offer, but failed to do so. After that date ..., the town of Glenarden, created by charter in 1961, obtained the right to accept the dedication of Polk Avenue since it was within its corporate boundaries.

261 Md. at 4. In our view, this clear statement that the county had no power to accept an offered dedication of a street right of way within the boundaries of a municipal corporation strongly supports the conclusion that the county likewise could not open a street within the boundaries of the municipal corporation. Hence, we believe that the decision whether to permit the street extension at issue here rests with the Mayor and Council for the Town of New Market, not with the County Commissioners of Frederick County.[5]

III

Conclusion

In sum, it is our opinion that the County Commissioner of Frederick County do not have authority to open a street within the

---

[4](...continued)

by a statute or other official action. 261 Md. at 4-5. Until the dedication has been accepted, the landowner's offer may be revoked at any time. *Manek v. Bailey*, 247 Md. 434, 443-44, 231 A.2d 685 (1967).

[5] We find some additional indirect support for this conclusion in Article 23A, §2B(a)(2), which provides that, with limited exceptions, "legislation enacted by a county does not apply in a municipality located in such county if the legislation ... [c]onflicts with legislation of the municipality enacted under a grant of legislative authority provided either by public general law or its charter ...." Because the county commissioners' decision to approve a road opening is not legislation, that provision is not directly applicable here. Nonetheless, we think that it indicates the General Assembly's intent regarding the relationship between a county and a municipality: in the absence of a state mandate or other compelling reason for the contrary result, within a municipality the municipality's decisions take precedence over those of the county.

corporate boundaries of the Town of New Market without the consent of the town.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

LOCAL GOVERNMENT — MUNICIPALITIES — ZONING — MUNICIPALITY LACKS AUTHORITY TO ADOPT "PRACTICAL DIFFICULTY" STANDARD FOR VARIANCES

October 5, 1990

Stephen P. Johnson, Esquire

On behalf of the Town Council of Washington Grove, you have asked for our opinion concerning the standard to be applied by a municipal board of zoning appeals when considering an application for a variance. Specifically, you have asked whether a municipality may, by ordinance, authorize its board of zoning appeals to grant a variance upon a showing of "practical difficulty," or whether a showing of "unnecessary hardship" is required. As we understand the situation, the Washington Grove Town Council originally adopted an ordinance that allowed variances only on a showing of "unnecessary hardship." This ordinance was amended at a special town meeting to allow a variance on a showing of either "practical difficulty" or "unnecessary hardship."

For the reasons that follow, we conclude that a municipality lacks the authority to permit its board of zoning appeals to grant a variance on a showing of "practical difficulty." Therefore, we agree with your conclusion that Washington Grove's amended ordinance is inconsistent with State law.

I

Enabling Act Standard

Article 66B, §4.07(a) of the Maryland Code provides that the local legislative body of a municipality shall provide for the appointment of a board of zoning appeals. Among other powers, a board may "authorize upon appeal in specific cases a variance from the terms of the [zoning] ordinance." Article 66B, §4.07(d)(3).

The statute defines "variance" as follows:

> [A] modification only of density, bulk, or area requirements in the zoning ordinance where such modification will not be contrary to the public interest and where owing to conditions peculiar to the property, and not the results of any action taken by the applicant, a literal enforcement of the ordinance would result in *unnecessary hardship*.

Article 66B, §1.00 (emphasis added). This definition of "variance," including the requirement of "unnecessary hardship," applies wherever the term "variance" is used in Article 66B. *See Green v. Bair*, 77 Md. App. 144, 150, 549 A.2d 762 (1988). Thus, Article 66B contemplates that variances will be granted only on a showing of unnecessary hardship. *Cf. Mayor & City Council of Baltimore v. Polakoff*, 233 Md. 1, 194 A.2d 819 (1963) (power to grant exceptions to zoning regulation to be strictly construed).

Under Maryland law, "[t]he criterion for determining unnecessary hardship is whether the applicable zoning restriction when applied to the property in the setting of its environment is so unreasonable as to constitute an arbitrary and capricious interference with the basic right of private ownership." *Marino v. City of Baltimore*, 215 Md. 206, 217, 137 A.2d 198 (1957). "Practical difficulty," on the other hand, has been read to impose a lesser standard. *Loyola Loan Assoc. v. Buschman*, 227 Md. 243, 248-49, 176 A.2d 355 (1961).[1] Therefore, Article 66B cannot be read to authorize the use of the "practical difficulty" standard by a municipal board of zoning appeals.

Municipalities in Maryland have no inherent zoning power. "[T]he zoning powers of municipal corporations are derived from the State Enabling Acts and not from any general grant of the State's police power to municipal corporations." *Lunter v. Laudeman*, 251 Md. 203, 209, 246 A.2d 540 (1968). Therefore, the zoning power may be exercised only to the extent and in the manner directed by the General Assembly. *West Montgomery Assoc. v. Maryland Nat'l Cap. Park & Planning Comm'n*, 309 Md. 183, 198-99, 522 A.2d 1328 (1987). If Article 66B and local law conflict, Article 66B prevails. *Boulden v.*

---

[1] *Anderson v. Board of Appeals*, 22 Md. App. 28, 38-39, 322 A.2d 220 (1974), contains a detailed comparative discussion of the factors that give rise to "undue hardship" and "practical difficulty."

Mayor, 311 Md. 411, 535 A.2d 477 (1988). Thus, a municipality has no inherent power to alter the variance standard set forth in State law.

In an Ohio case that directly addresses the question presented here, *Cole v. Board of Zoning Appeals for Marion Township*, 39 Ohio App. 2d 177, 317 N.E.2d 65 (1973), the court held that an ordinance permitting variances on a showing of "unusual and practical difficulties" was invalid where the enabling statute permitted variances only in the case of "unnecessary hardship":

> The power to grant a variance is derived from the statute and not the zoning resolution and any provisions of a township zoning resolution purporting to create more stringent or more liberal standards for the granting of a variance than those set forth in [the statute] are invalid and unenforceable.

317 N.E.2d at 68. Other courts that have considered the question also have held that municipalities may not alter the variance power found in state enabling acts. *See Riverbend Partnership v. City of Mobile*, 457 So. 2d 371 (Ala. 1984); *Farnsworth v. Town of Windsor*, 190 A.2d 915 (Conn. 1963); *Strange v. Board of Zoning Appeals*, 428 N.E.2d 1328 (Ind. App. 1981); *Smith v. Paquin*, 77 N.J. Super. 138, 185 A.2d 673 (1962); *Gregory v. Town of Cambria*, 115 A.D.2d 288, 496 N.Y.S.2d 141 (1985), *aff'd* 69 N.Y.2d 655, 503 N.E.2d 1366 (N.Y. 1986); *Lincourt v. Zoning Board of Review*, 201 A.2d 482 (R.I. 1964); *Nucholls v. Board of Adjustment*, 560 P.2d 556 (Okla. 1976); *Bostic v. City of West Columbia*, 234 S.E.2d 224 (S.C. 1977).

It has been suggested to us that *Zengerle v. Board of County Comm'rs*, 262 Md. 1, 276 A.2d 646 (1971), permits a municipality to establish the standard for variances as "practical difficulty *or* unnecessary hardship." In *Zengerle*, the Court of Appeals considered the propriety of a variance granted under the Frederick County Code, which at the time permitted a variance on a showing of practical difficulty or unnecessary hardship.[2] Specifically, the Court considered whether an applicant who purchased property with the intent of applying for a variance could meet the practical difficulty standard, and

---

[2] The Frederick County Code has since been amended, and now requires a showing of "unreasonable hardship". §1-19-47(a).

held that the answer was yes.[3] No issue was raised as to the appropriateness of the "practical difficulty or unnecessary hardship" standard, nor was Article 66B and its effect discussed. Thus, the *Zengerle* decision cannot be deemed controlling on this point.

Finally, 58 *Opinions of the Attorney General* 521 (1973) does not support the proposition that municipalities are not bound by the definitions in Article 66B, §1.00. At issue in that opinion was an ordinance that defined the term "subdivision" more narrowly than it is defined in Article 66B. The effect of the ordinance was that the municipality assumed less regulatory power than was authorized. Since the statute did not require that a municipality exercise any form of subdivision control, this office concluded that that the municipality could permissibly exercise less than was authorized. In contrast, by redefining the term "variance" in its ordinance, Washington Grove seeks to exercise greater authority than it has been granted by Article 66B.

II

Other Law

Those who favor the current variance ordinance of the Town of Washington Grove, which includes a "practical difficulty" standard as an alternative basis for a variance, have suggested that Article 23A, §2(b)(30) grants municipalities general zoning authority and thus permits them to enact ordinances that go beyond the authority granted by Article 66B. Article 23A, §2(b)(30) provides as follows:

> In addition to, but not in substitution of, the powers which have been, or may hereafter be, granted to it, [a municipal corporation's] legislative body also shall have the following express ordinance-making powers:
>
> . . .
>
> (30) To provide reasonable zoning regulations subject to the referendum of the voters at regular or special elections.

---

[3] In an earlier case, *Gleason v. Keswick Improvement Association*, 197 Md. 46, 78 A.2d 164 (1951), the Court had held that one who purchased property with the intent to apply for a variance could not then make a showing of undue hardship.

However, this general grant of authority cannot justify a municipality's action in exceeding the power granted by Article 66B unless it is read to repeal the specific provisions of that article by implication. In our view, however, Article 23A, §2(b)(30) does not have that effect.

"It is a primary rule of statutory construction that implied repeals of statutes are not favored, and will be found only when absolutely necessary because a later statute is so inconsistent with, or repugnant to, an earlier one that the two cannot stand together." *Prince George's County v. Laurel*, 262 Md. 171, 182, 277 A.2d 262 (1971). The Court of Appeals has in the past declined to find conflicts between Article 66B and Article 23A and has held that they must be read together. *City of Annapolis v. Kramer*, 235 Md. 231, 201 A.2d 333 (1964). *Cf. Miller v. Pinto*, 305 Md. 396, 504 A.2d 1140 (1986).[4] The same rule applies here. Article 23A, §2(b)(30) sets forth the power of the local legislative bodies to enact reasonable zoning regulations. Article 66B, §4.07 grants the municipality the authority to create a board of zoning appeals that may permit departures from those regulations under certain circumstances. There simply is no conflict.[5]

It is also relevant that, although Article 23A, §2 was adopted in 1947, fourteen years after the adoption of the original Article 66B, the latter article was recodified in 1970 and the original limitations on variances were retained and strengthened.[6] Thus, in 1970 the General Assembly still viewed the variance limitations as having meaning and

---

[4] In *Miller v. Pinto*, the Court held that Article 25B, §13, which grants code home rule counties certain powers "in addition to" powers granted by other law, authorized a code home rule county to adopt appeal procedures in addition to those set out in Article 66B.

[5] Even if there were a conflict, as a general rule of statutory construction specific provisions, such as Article 66B, §4.07, prevail over general provisions, such as Article 23A, §2(b)(30). *Lumberman's Mutual Casualty v. Insurance Comm'r*, 302 Md. 248, 268, 487 A.2d 271 (1985).

[6] The original act, Chapter 599 of the Laws of Maryland 1933, gave boards of appeal the power "[t]o authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, the enforcement of the provisions of the ordinance will result in unwarranted hardship and injustice, but which will most nearly accomplish the purpose and intent of the regulations of the zoning plan."

effect. Nor is there any indication that the General Assembly believed that the pertinent provisions of Article 66B no longer applied to municipal corporations.

For all of the above reasons, we are of the opinion that Article 23A, §2(b)(30) does not grant authority to municipalities to broaden the powers of boards of zoning appeals to grant variances.

III

Conclusion

In summary, it is our opinion that a municipality may not, by ordinance, permit its board of zoning appeals to grant a variance on a showing of "practical difficulty."

J. Joseph Curran, Jr.
Attorney General

Kathryn M. Rowe
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

PERSONNEL

BUDGETARY ADMINISTRATION — APPROPRIATIONS — LAYOFF STATUTE AND REGULATIONS ARE INAPPLICABLE WHEN NO APPROPRIATIONS ARE AVAILABLE TO PAY SALARIES

December 5, 1990

Mr. Dennis Parkinson
Deputy Secretary of Budget and Fiscal Planning

You have posed two questions about layoffs of State employees that might be required because of reduced revenues: (1) Does Article 64A, §35 of the Maryland Code, which establishes a rule of seniority for certain layoffs, apply if employees are laid off because no appropriations are available to pay their salaries? (2) Does federal or State law require that employees who are to be laid off for this reason be provided with advance notice of the layoff?

For the reasons stated below, we conclude as follows:

1. Article 64A, §35 is inapplicable to employees released because no appropriations are available to pay salaries. In making layoffs for this reason, an appointing authority must of course avoid arbitrary or otherwise unlawful choices among similarly situated employees. However, an appointing authority is not legally required to apply Article 64A, §35 and the regulations implementing it if budgeted funds are simply no longer available to fund a position.

2. Although appointing authorities are free to give as much advance notice as they can when employees are released because of a lack of appropriations, in general neither federal nor State law mandates advance notice.

Federal law generally does not require advance notice to State employees who are to be laid off. However, 60 days' advance notice would be required of layoffs at any State entity that engages in a form of business, is separately organized from the State government, has its own governing body, and has independent authority to manage its personnel and assets.

State Personnel Regulations generally require 90 days' advance notice of a layoff. However, these regulations do not apply if an employee is instructed not to work because no appropriation to fund the employee's salary is available.[1]

I

The Layoff Statute

Article 64A, §35 defines a layoff, authorizes the Secretary of Personnel to adopt regulations governing layoffs, and prescribes certain requirements about seniority that must be in those regulations.[2] The Secretary of Personnel's layoff regulations, implementing the statute, are set out at COMAR 06.01.01.44 (classified employees) and 06.01.01.44-1 (unclassified employees).[3]

The statute describes a layoff as a situation in which "positions ... are to be abolished, discontinued, or vacated, because of change in departmental organization, or through stoppage or lack of work ...." Although §35 does not expressly identify a lack of funds as a basis for layoffs, we assume for purposes of this opinion that §35 was broadly intended to apply to an agency's decision to abolish, discontinue, or

---

[1] This opinion should not be understood to be addressing the rights of employees under a collective bargaining agreement.

[2] When the original Merit System law was enacted in 1920, §16 of the new Article 64A provided that "[a]n employee in a position that is to be abolished, discontinued, or vacated, because of change in departmental organization, or through stoppage or lack of work, shall be laid off and his name placed, in the order provided in the rules of the [State Employment] Commissioner, on the eligible list for the class of the position from which he was laid off." These rules specified the factors that would determine who would be laid off if less than all of the positions in a classification were "abolished, discontinued, or vacated." *See Hopper v. Jones*, 178 Md. 429, 431, 13 A.2d 621 (1940) (service ratings). The seniority standards now set out in §35(c) were added to the statute by Chapters 625 and 916 of the Laws of Maryland 1982.

[3] Although applicable to both classified and unclassified employees, the statute and regulations are inapplicable to State employees at an agency with an independent personnel system. *See generally* 73 *Opinions of the Attorney General* 285 (1988).

leave vacant a position for a variety of reasons, including budgetary ones.[4]

However, §35 cannot be considered in isolation. Whatever the statute's scope generally, the Court of Appeals has held that it does not apply to the extraordinary situation in which there simply is no appropriation to pay an employee's salary.

In *Hopper v. Jones*, 178 Md. 429, 13 A.2d 621 (1940), the General Assembly deleted from the budget bill an item that would have appropriated the salary of a particular industrial accident investigator. The agency then released him. The investigator who thus lost his job sued, contending that certain regulatory requirements flowing from the predecessor of Article 64A, §35 had not been complied with. The Court of Appeals held that the statute (and therefore the regulation implementing it) was inapplicable, because the Legislature's decision to discontinue the appropriation meant that the employee "lost his position by operation of law." 178 Md. at 433.

In our opinion, the teaching of *Hopper v. Jones* is this: the layoff statute and regulations simply do not address the duty of an agency to decline to pay an employee if no appropriation to do so is available. Those jobs are lost "by operation of law," rather than by the act of agency discretion that characterizes layoffs for other reasons. *See* Article III, §32 of the Maryland Constitution; §7-234 of the State Finance and Procurement Article ("SF" Article); 57 *Opinions of the Attorney General* 88 (1972).

Hopper v. Jones arose from the exercise of the General Assembly's power to cut the budget. But the Governor, too, has power to cut the budget, and the principle of the case applies as fully when the Governor acts to eliminate an appropriation. Under SF §7-213(a), the Governor, with the approval of the Board of Public Works, "may reduce, by not more than 25%, any appropriation that the Governor considers unnecessary." By this provision, "the General Assembly clearly has given the Governor extremely broad discretion to determine what ... the Governor ... believes or considers should be treated as not required under the circumstances." 65 *Opinions of the Attorney*

---

[4] Comparable laws in other states are more specific, however. *See, e.g.*, Ala. Code §36-26-22 (1989); Cal. Gov't Code §19997 (Deering 1990); Ohio Rev. Code Ann. §124.321 (Baldwin 1990); and Wis. Stat. §111.90 (1987-88) (all establishing layoff procedures for "lack of funds").

General 45, 51 (1980).[5] If the Governor, with Board approval, exercised this "extremely broad discretion" to eliminate the funding of a group of positions and coupled the reduction with a budget amendment under SF §7-209(b) to conform the appropriation to the reduction, those positions would be lost "by operation of law" fully as much as the position in *Hopper*. In the end, there would be no money to pay these employees and that, held the Court of Appeals, is a situation not addressed by Article 64A, §35.[6]

II

Notice of Layoffs

A. *Federal Law*

The Federal Worker Adjustment and Retraining Notification Act, Public Law No. 100-379, 102 Stat. 890, generally provides that "[a]n employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order ... to each representative of the affected employees as of the time of the notice of, if there is no such representative at that time, to each affected employee ...." 29 U.S.C. §2102(a)(1). A "mass layoff" is a reduction in force resulting in an employment loss at a single site of employment during any 30-day period for at least one-third of the full-time employees, if at least 50 employees are involved, or for any

---

[5] SF §7-213(b) sets out certain exceptions to the Governor's authority, including this one: "Except as provided in the Merit System Law, the Governor may not reduce an appropriation for the salary of an employee in the classified or unclassified service." In our view, this restriction does not address the elimination of positions. Rather, it simply preserves the procedures of Article 64A, §30 for categorical decreases in "rates of pay." *See* Chapter 11, Laws of Maryland 1985, Revisor's Note to SF §7-213.

[6] This analysis does not apply to layoffs when appropriations remain available to pay for the positions, even if the layoffs are a part of an agency's overall efforts to economize. The reasoning of the Court of Appeals in *Hopper v. Jones* applies only when there is no appropriation from which a salary could be paid to an employee in a particular position.

percentage of the work force if at least 500 employees are involved. 29 U.S.C. §2101(a)(3)(B).[7]

The term "employer" is the key to the statute's applicability. In pertinent part, the term "employer" is defined "as any business enterprise that employs ... 100 or more [full-time] employees ...." 29 U.S.C. §2101(a)(1). Neither the statute itself nor its legislative history discusses whether a government agency might be a "business enterprise," within the scope of this definition.

In its regulations implementing the statute, the federal Department of Labor has resolved this issue. Focusing on the statute's use of the term "business enterprise" and its underlying purposes, the Department of Labor has drawn a distinction between "regular" government agencies, which are outside the statute, and "public and quasi-public entities which engage in business," which are within it:

> Regular Federal, State, local and federally recognized Indian tribal governments are not covered. However, the term "employer" includes public and quasi-public entities which engage in business (*i.e.*, take part in a commercial or industrial enterprise, supply a service or a good on a mercantile basis, or provide independent management of public assets, raising revenue and making desired investments), and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets.

20 C.F.R. §639.3. *See also* 54 Fed. Reg. 16042, 16044 (April 20, 1989).

---

[7] A "plant closing" is defined as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees." 29 U.S.C. §2101(a)(2).

Hence, if a "mass layoff" were to occur at an ordinary State agency, the federal law would not apply.[8] Notice under the federal law would be required only for such layoffs at autonomous entities meeting the federal regulatory criteria.[9]

B. State Law

The layoff statute, Article 64A, §35, is silent about advance notice of layoffs. However, acting under the authority of that statute, the Secretary of Personnel has adopted regulations requiring 90 days' advance notice: "The appointing authority shall notify employees who are to be laid off at least 90 calendar days before the effective date of the layoff." COMAR 06.01.01.44B-1 (classified employees); COMAR 06.01.01.44-1B (unclassified employees).

Because the underlying statute is inapplicable to layoffs necessitated by a lack of appropriations, so would the implementing regulation be inapplicable. *Hopper v. Jones*, 178 Md. at 433. Moreover, notice, and the consequent delay in ending the agency's obligation to pay the salary, would pose special problems if there were no appropriation. If an agency has no money to pay an employee, either because no money was appropriated in the first place or an appropriation has been exhausted, the regulation cannot command any payment beyond the limit of the appropriation.[10]

The notice requirement of the regulation could not be applied to frustrate for 90 days the savings deemed necessary by the Governor, for then the regulation would conflict impermissibly with the exercise of the Governor's statutory prerogative. Nor is the regulation intended to have any such effect: when proposed, the 90 days' advance notice requirement was said to have "no economic impact." 16:10 Md. Reg. 1114 (May 19, 1989).

---

[8] Given this conclusion, we need not consider whether the federal government could constitutionally require, in effect, that a state continue to pay its employees when appropriations for that purpose have been exhausted.

[9] An example of the latter would be the Maryland Automobile Insurance Fund. *See* 58 *Opinions of the Attorney General* 88 (1973).

[10] Thus, if notice of a layoff had been given at a time when an appropriation remained available, but the appropriation was later eliminated, the notice period would be foreshortened.

III

Conclusion

In summary, it is our opinion that:

1. Article 64A, §35 does not apply to employees released because no appropriations are available to pay their salaries.

2. In general neither federal nor State law mandates advance notice if employees are instructed not to work because no appropriation to fund their salaries is available.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

The conclusion in this opinion was reaffirmed in 76 *Opinions of the Attorney General* ___ (1991) [Opinion No. 91-041 (Sept. 5, 1991)].

PRISONERS

SHERIFFS — HOME DETENTION — "EMPLOYMENT OF PRISONERS" SUBTITLE OF ARTICLE 27 AUTHORIZES HOME DETENTION PURSUANT TO COURT ORDER ONLY

February 26, 1990

The Honorable Bishop L. Robinson
Secretary of Public Safety and
Correctional Services

You have requested our opinion on two questions regarding "home detention" of inmates:

1. Does the "employment of prisoners" subtitle of Article 27 of the Maryland Code authorize counties to conduct home detention programs?

2. Is legislation advisable or necessary for counties to have home detention programs?

For the reasons stated below, we conclude as follows:

1. The "employment of prisoners" subtitle of Article 27 permits home detention pursuant to court authorization only.

2. Legislation is necessary if counties are to be authorized to have home detention programs that do not require court approval.

I

Background

Each sheriff in Maryland has a legal duty to "safely keep all persons committed to his custody by lawful authority until such persons are discharged by due course of law." The term "safely keep" means keep in jail. *Cocking v. Wade*, 87 Md. 529, 40 A. 104 (1898); *Baumgartner v. State*, 21 Md. App. 251, 319 A.2d 592 (1974). In the latter case, the Court of Special Appeals observed that "[o]nly a court order or a statute can release a sheriff of his responsibility to keep prisoners committed to his charge in ... 'strict confinement under lock and key.'" 21 Md. App. at 263 (citation omitted).

By "home detention," you refer to the confinement of an inmate to his or her home. The confinement is enforced by various means, including prescribed electronic or telephonic contact at regular intervals.

Because an inmate confined at home is obviously not under lock and key in jail, a sheriff may conduct a program of home detention only if a statute or court order authorizes it.[1] As we explain in Part II below, no provision of the "employment of prisoners" subtitle of Article 27, §§645K through 645BB, impliedly authorizes home detention.

II

Employment of Prisoners

Article 27, §645K states as follows:

> Whenever a person shall be convicted of a crime and sentenced to imprisonment in any county, town, or city jail by any court in the counties to which this subtitle applies, the judge imposing sentence may prescribe that insofar as possible the person may continue his regular employment or obtain new employment while serving the term of his sentence and the judge shall designate either the sheriff or Division of Parole and Probation to supervise, arrange for or obtain such employment.

---

[1] In some jurisdictions, the duty to keep certain detainees in custody has been transferred from the sheriff to another official. *See* Article 87, §§48 and 48A. *See also* Article 25A, §5(c) (power of the charter home rule counties to "regulate and control county jails, and county houses of correction or detention and reformatories, and to regulate all persons confined therein"). *See generally Epps v. Levine*, 457 F. Supp. 561, 565 n.2 (1978). However, these other officials have the same duty as the sheriff — to maintain detainees in a secure facility unless a statute (or court order) authorizes an alternative form of confinement.

> If a convicted person has been regularly employed, the sheriff or the Division of Parole and Probation shall arrange for a continuation of said work insofar as possible without interruption. The sheriff or the Division of Parole and Probation shall make every effort to secure some suitable employment for the prisoner if he is not employed in any job. The sheriff or the Division of Parole and Probation shall try to obtain employment for the prisoner paying a fair and reasonable wage, and the prisoner shall work at fair and reasonable employment and fair and reasonable hours per day and per week.

This provision does not generally authorize home confinement of prisoners engaged in employment, however, because the next section of the subtitle states as follows: "Whenever the prisoner is not employed, and between the hours or periods of employment, he shall be confined in jail unless the court shall direct otherwise." §645L. Thus, courts may authorize home detention of work-release prisoners, but home detention without court approval is forbidden by the statute.

The same limitation is contained in sections of the subtitle applicable to particular counties. For example, Montgomery County is authorized to establish work release and pre-release programs, but "[w]henever the prisoner is not employed or otherwise participating in his work release program, he shall be confined in the pre-release center unless the committing court shall direct otherwise." §645T(b). *See also* §§645U(b), 645V(a), 645(W)(a)(2), 645Y(h), §645Z(a), and 645BB(b)(4).

None of these provisions states an exception to the sheriff's duty under Article 87, §45 to keep inmates in jail. To the contrary, they reiterate the sheriff's responsibility to keep these inmates in the same place of confinement as other prisoners during the time when they are not employed or otherwise properly released, unless a court directs otherwise.

III

Conclusion

Under the applicable provisions of public general law, both pre-trial detainees and sentenced inmates who are confined in local jails or other detention facilities may be placed in home detention if, but only if, a court so directs.[2] If, as a policy matter, sheriffs or other officials responsible for the custody of prisoners ought to have the independent discretion to assign them to home detention, authorizing legislation is necessary.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[2] We have not canvassed all provisions of public local law potentially affecting this question.

PUBLIC OFFICERS

STATE ROADS COMMISSION — COMMISSIONERS ARE PUBLIC OFFICERS SUBJECT TO BAR AGAINST INCREASED COMPENSATION IN ARTICLE III, §35 OF THE CONSTITUTION

January 24, 1990

The Honorable Richard H. Trainor
Secretary of Transportation

You have requested our opinion on whether Article III, §35 of the Maryland Constitution would prevent increases in the compensation of the seven regional members of the State Roads Commission.

A regional member of the State Roads Commission is "entitled to the compensation provided in the State budget." §8-212(c) of the Transportation Article ("TR" Article). From July 1, 1973 to July 1, 1989, commissioners were paid $4500 per year. Section 3 of the Fiscal Year 1990 budget bill, Chapter 14 of the Laws of Maryland 1989, raised that annual compensation to $4700.

For the reasons detailed below, we conclude as follows:

1. Members of the State Roads Commission are "public officers," whose compensation may not be increased during their terms.

2. The four commissioners who began new terms in October 1989 may receive $4700, the increased compensation provided for in the Fiscal Year 1990 budget bill, but the three commissioners whose terms expire in 1992 may not be paid more than $4500 per year.

3. Administratively, there is no way that the Department can increase the present compensation of commissioners.

4. The only possible legislative solution to this problem is to amend TR §8-212(b) to eliminate the terms of the regional commissioners or to set the terms in excess of four years.

I

Commissioners Are Public Officers

Article III, §35 of the Maryland Constitution provides that the salary or compensation of a "public officer" may not be increased or diminished during his or her term of office, "except those whose full term of office is fixed by law in excess of 4 years." The purpose of this provision is "to prevent a public officer from using his office to pressure the General Assembly to grant increased compensation and to preclude the General Assembly from coercing a public officer by offering him increased compensation or threatening a decrease in pay." 70 *Opinions of the Attorney General* 177, 178 (1985). *See Comptroller v. Klein*, 215 Md. 427, 436, 138 A.2d 648 (1958). *See also, e.g.*, 60 *Opinions of the Attorney General* 823 (1975). The "prophylactic" purpose of Article III, §35 must be given effect even in situations like that presented in your letter, where the goals underlying the proposed increase are entirely appropriate. 70 *Opinions of the Attorney General* at 178.[1]

Members of the State Roads Commission serve four-year terms. TR §8-212(b). Hence, the only question to be resolved is whether commissioners are "public officers." If so, the prohibition in Article III, §35 applies to them.

In 30 *Opinions of the Attorney General* 132, 133 (1945), the Attorney General concluded that "[t]here can be no question but that a member of the State Roads Commission holds an office of trust and profit ...."[2] At that time, the statutory powers and duties of the Commission were much more extensive than they are now. *See* former Article 89B, §§53 to 65.[3] Nevertheless, we are convinced that the conclusion reached in the 1945 opinion is still correct and that the

---

[1] The prohibition in Article III, §35 applies so frequently that the manual used by bill drafters contains standard language to prevent the grant of salary increases to incumbent officers. *1989 Legislative Drafting Manual* at 65-66.

[2] The 1945 opinion went on to note of a commissioner that: "He takes the oath of office, his pay, tenure and duties are provided by the Legislature, and his duties are those of trust and responsibility, as an executive of the State government. He is certainly a public officer." 30 *Opinions of the Attorney General* at 133.

[3] In 1970 many of these functions were transferred to the State Highway Administration. *See* Chapter 526, Laws of Maryland 1970.

commissioners are public officers under the standards enunciated by the Court of Appeals.

Members of the State Roads Commission exhibit many of the traditional indicia of public officers. *See Board of Supervisors of Elections v. Attorney General*, 246 Md. 417, 439, 229 A.2d 338 (1967). The posts are created by law, TR §§8-210 and 8-211; their duties are continuing; the positions have definite terms, TR §8-212(b); and commissioners are required to take the oath demanded of persons elected or appointed to offices of profit or trusts, TR §8-212(a). Most importantly, the Commissioners exercise "some of the sovereign powers of government for the benefit of the public." *Duncan v. Koustenis*, 260 Md. 98, 105, 217 A.2d 547 (1970).

Although many of the commissioners' duties under prior law have been transferred, the State Roads Commission still retains significant powers over the exercise of "quick-take" condemnation. Article III, §40B of the Constitution provides that:

> The General Assembly shall enact no law authorizing private property to be taken for public use without just compensation, to be agreed upon between the parties or awarded by a jury, being first paid or tendered to the party entitled to such compensation, except that *where such property in the judgment of the State Roads Commission is needed by the State for highway purposes*, the General Assembly may provide that such property may be taken immediately upon payment therefor to the owner or owners thereof by said State Roads Commission, or into Court, *such amount as said State Roads Commission shall estimate to be of the fair value of said property*, provided such legislation also requires the payment of any further sum that may subsequently be awarded by a jury.

(Emphasis added.) These constitutional powers are also vested by statute exclusively in the commissioners. *See* TR §§8-218, 8-302(b), 8-318 through 8-331, and 8-334 through 8-339. Moreover, TR §2-103(f) and (g) preclude the Secretary of Transportation from transferring these powers or from exercising them in the first instance. The power of condemnation thus conferred upon the commissioners is a "prerogative of sovereignty." *Riden v. Philadelphia, B. & W. R.R. Co.*, 182 Md. 336, 339, 35 A.2d 99 (1943). In light of this exercise of the State's sovereignty, the commissioners unquestionably are public officers.

II

Applicability of the Fiscal Year 1990 Pay Increase

The Fiscal Year 1990 budget bill, Chapter 14, purported to increase the pay of all seven regional commissioners from $4500 to $4700. It became law April 4, 1989 and took effect July 1, 1989. A few months later, on October 10, 1989, the Governor approved the appointment of four commissioners pursuant to TR §8-211(b). For these four officers, the increased compensation was fixed before the beginning of their terms. Thus, these commissioners may receive the $4700 specified in the budget.

However, the terms of the remaining regional members of the Commission do not expire until 1992. If these commissioners were to receive the additional $200 specified in the budget bill, their compensation would be increased in violation of Article III, §35 of the Constitution. Thus, it is our opinion that these commissioners may not be paid more than $4500. If a vacancy should occur in one or more of these positions, the new appointee may receive the increased amount. *See Comptroller v. Klein*, 215 Md. 427, 138 A.2d 648 (1958).

III

Further Steps to Increase The Pay of The Commissioners

At the present time, the Constitution would prohibit any further administrative action to increase the pay of the commissioners. The two most common legislative methods of obviating an Article III, §35 problem are to alter the duties of the officer in question, to convert the position from that of an "officer" to that of an "employee"; or to eliminate the term or extend it in excess of four years.

We do not recommend the first approach in the present case, because the key duties of the commissioners are set forth in the Constitution and cannot be changed by legislative enactment. However, the General Assembly may eliminate the term of the commissioners to provide that they serve at will. Or, in the alternative, the terms of members can be extended to a period in excess of four years. In either case, once legislation of this kind has taken effect, the Constitution would not bar future pay increases for commissioners.

J. Joseph Curran, Jr.
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

PUBLIC UTILITIES

CONSTITUTIONAL LAW — WIRETAPPING — CALLER ID SERVICE IS NEITHER UNCONSTITUTIONAL NOR CONTRARY TO STATUTE

October 26, 1990

Mr. Frank O. Heintz
Chairman, Public Service Commission

You have requested our opinion concerning the legality of Caller ID telephone service, which enables a customer to see the telephone number from which an incoming call is originating. Specifically, you ask whether Caller ID violates the constitutionally protected right of privacy or statutory provisions governing "trap and trace devices."

For the reasons stated below, we conclude that the Commission's approval of the Caller ID service is neither unconstitutional nor contrary to statute. As your letter points out, Caller ID raises significant policy issues, which the Commission will be exploring and about which this office expresses no views. However, Caller ID may lawfully be offered to Maryland customers.

I

Caller ID Service

On August 31, 1989, the Chesapeake and Potomac Telephone Company of Maryland ("C&P") filed with the Public Service Commission a tariff for several new services, including Caller ID. On September 27, 1989, the Commission accepted C&P's tariff for filing. Thus, C&P was permitted to offer Caller ID to its customers. However, the Commission has now instituted a "in-depth review of the issues surrounding Caller ID ...." Order No. 68858, Case No. 8283 (filed July 9, 1990).

As we understand the facts, whenever a person places a call within C&P's telephone network, C&P's equipment identifies the number from which the call has been placed. This information is often essential for billing purposes.

The new Caller ID service takes this information and makes it available to the potential recipient of a call. As the Commission's order describes it:

> Caller ID enables the customer to see the telephone number from which an incoming call is originating. The number is shown on a display screen which the customer purchases from vendors of telephone equipment. The special telephone unit receives electronic signaling from the telephone company's switching equipment and displays the telephone number of the incoming call. This display allows the called customer to know who is calling before the customer answers the call. Customers who subscribe to Caller ID pay a monthly charge of $6.50 per residential line and a $8.50 per business line.

Order No. 68858, at 1-2.

Thousands of C&P customers have subscribed to Caller ID. The service enables them to identify the source of harassing calls, avoid certain calls, and prepare for other calls by gaining knowledge of the identity of the caller. At the same time, some have objected to the loss of privacy that occurs when a person's telephone number — particularly an unlisted number — is displayed to the person being called. *See* Order 68858, at 3-4.

II

Constitutional Issues

In an earlier letter of advice, Assistant Attorney General Richard E. Israel concluded that:

1. The Commission's "mere approval of a tariff for a caller identification service does not constitute state action for purposes of the due process clause and the Fourth Amendment"; and

2. Even if there were state action, the display of a telephone number alone does not violate the constitutionally protected right of privacy. Letter to Senator Catherine I. Riley (March 6, 1990).

For the reasons stated in Mr. Israel's letter, a copy of which is attached, we agree with this conclusion. *See generally Chan v. State*, 78 Md. App. 287, 298-301, 552 A.2d 1351 (1989).[1]

III

Statutory Issues

A. *Regulation of "Trap and Trace Devices"*

In the Electronic Communications Privacy Act of 1986, Congress regulated the use of pen registers and trap and trace devices, which record telephone numbers rather than the content of telephone conversations. A "trap and trace device" is "a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." 18 U.S.C. §3127(4).[2]

This federal legislation broke new ground, for pen registers and trap and trace devices were not regulated by the federal wiretap law, Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See United States v. New York Telephone Company*, 434 U.S. 159, 166 (1977); *Chan v. State*, 78 Md. App. at 302-03.

Two years later, the General Assembly enacted parallel legislation. Chapter 607 (Senate Bill 679), Laws of Maryland 1988. As the Court of Special Appeals has written, the Maryland statute's "provisions and its wording are virtually verbatim with those of its Federal

---

[1] *Barasch v. Pennsylvania Public Utility Comm'n*, 576 A.2d 79 (Pa. Cmwlth. 1990), held that Caller ID violated "an independent constitutional right of privacy ... in the Pennsylvania Constitution ...." 576 A.2d at 87. However, "the [Maryland] Court of Appeals has not yet identified any right to privacy protected by the Maryland Constitution." 74 *Opinions of the Attorney General* 19, 30 (1989).

[2] A "pen register," not directly relevant to this opinion, is "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which the device is attached." 18 U.S.C. §3127(3).

counterpart." *Chan v. State*, 78 Md. App. at 308. *See* Senate Judicial Proceedings Committee, Bill Analysis of Senate Bill 679.[3]

Under the Maryland law, like its federal counterpart, a "trap and trace device" is "a device that captures incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." §10-4B-01(e) of the Courts Article ("CJ" Article). In our view, the Caller ID mechanism is such a "trap and trace device." We recognize that the display screen attached to the telephone of the subscriber to Caller ID does not itself "captur[e] the incoming or other electronic impulses that identify the originating number ..."; instead, C&P's switching equipment does that. Nevertheless, the Caller ID mechanism, taken as a whole, precisely fits the definition, and there is no reason to think that the General Assembly meant to exclude from the statute such a mechanism.

B. Consent Exception

Both the federal law and its Maryland counterpart generally require that a court order be obtained before a trap and trace device may be used. 18 U.S.C. §3121(a); CJ §10-4B-02(a). Just as this restriction is identical in federal and State law, so are the exceptions to it:

> [The requirement for court approval] does not apply to the use of ... a trap and trace device by a provider of wire or electronic communication service:
>
> (1) Relating to the operation, maintenance, testing of a wire or electronic service or to the protection of the rights or the property of the provider, or to the protection of users of that service from abuse of service or unlawful use of service; or
>
> (2) To record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from

[3] The bill was based on a model act prepared by the United States Department of Justice. The portion of the bill dealing with trap and trace devices was not amended.

> fraudulent, unlawful, or abusive use of service, *or with the consent of the user of that service.*

CJ §10-4B-02(b) (emphasis added). The federal provision is essentially identical.[4]

The only exception potentially applicable to Caller ID generally is user consent.[5] The term "user of that service" is not defined for purposes of CJ Title 10, Subtitle 4B, in which the restrictions on trap and trace devices are set out. Nor does the federal statute define "user" in this context.[6]

In ordinary parlance, a caller is as much a "user" of telephone service as the recipient of the call. Indeed, in CJ §10-401(12), the General Assembly defined "user" to mean "any person or entity that ... [u]ses an electronic communications service" and is authorized to do so. But this definition is limited to CJ Title 10, Subtitle 4, concerning wiretapping and electronic surveillance, the provisions of which do not apply to trap and trace devices. In our view, the term "user" in Subtitle 4B should not be construed so expansively.

If "user of that service" were understood to include all potential callers, the consent provision for trap and trace devices would become meaningless. A potential caller does not know whether a trap and trace device has been installed on the other end of the line, and the caller's consent cannot be requested prior to the "captur[e]" of the caller's number.[7]

---

[4] In the federal statute, the consent language is separately numbered and is phrased, "where the consent of the user of the service has been obtained." 18 U.S.C. §3121(b)(3).

[5] If someone were receiving harassing or obscene calls and ordered Caller ID as a protective measure, the exception "to protect ... a user of that service, from ... unlawful or abusive use of service" would apply. That exception, however, would not apply to Caller ID customers who simply want to screen incoming calls for other reasons.

[6] The legislative history of the federal act does not elaborate on the meaning of the term "user." *See* S. Rep. No. 99-541, 99th Cong., 1st Sess. at 14, *reprinted in* 1986 U.S. Code Cong. and Admin. News 3555, 3568.

[7] C&P is capable of adding a so-called "blocking" feature to telephone lines, so that a caller can prevent the display of his or her number on a Caller ID display screen. C&P now makes this service available "to certified (continued...)

If, however, "user of that service" were understood to refer simply to the recipient of calls in this context, the consent provision in CJ §10-4B-02(b)(2) would not only be practicable but would also be harmonized with its federal counterpart. The latter unquestionably permits installation of a trap and trace device with the consent of the recipient of calls only. Under federal law, an actual wiretap is permissible with the consent of but a single party to the conversation. 18 U.S.C. §2511(2)(d). It is inconceivable that Congress, without discussion, meant to impose a more stringent two-party consent requirement for devices far less intrusive than a wiretap.[8]

To be sure, Maryland has departed from the federal model and requires two-party consent for wiretaps. But the General Assembly's policy choice in this regard is reflected in statutory language different from that of the otherwise parallel federal law. *Compare* CJ §10-402(c)(3) (wiretap permissible "where all of the parties to the communication have given prior consent") *with* 18 U.S.C. §2511(2)(d) (wiretap permissible "when one of the parties to the communication has given prior consent"). By contrast, Maryland's consent provision for trap and trace devices does *not* depart from the federal model.

We recognize that the one court to have addressed the legality of Caller ID, the Commonwealth Court of Pennsylvania, reached the opposite conclusion about the applicability of Pennsylvania's identically worded trap and trace device law. In *Barasch v. Pennsylvania Public Utility Comm'n*, 576 A.2d 79 (1990), Bell Telephone of Pennsylvania argued in part "that a Caller ID subscriber is the user of the service and consents to use of a trap and trace device by subscribing to Caller ID." 576 A.2d at 85. The court's discussion of this point, in full, is as follows:

---

[7](...continued)
agencies and individuals who have a unique need to protect their identity or from the location from which they are calling, when initiating telephone calls in the performance of their jobs." Order No. 68858, at 3. Someone who has the blocking feature but does not activate it arguably "consents" to the capture of his or her phone number by the recipient of the call.

Even if this blocking feature were universal, however, it would not solve the problem resulting from a construction of the term "user of that service" as embracing all callers. The feature would not be available to callers from pay telephones or telephones not linked to C&P's network. In short, there is no way to achieve consent from the entire universe of potential callers.

[8] *See* note 6 above.

> This argument must fail when one considers that "user" includes "any person or entity" who uses the telephone network and that a contrary and reasonable interpretation of that term could also be construed as the calling party rather than the Caller ID subscriber. 18 Pa. C.S. §5702. Hence, Bell's consent analysis fails to support an exception to the Wiretap Act.

Id. In our view, this brief discussion, devoid of analysis, is singularly unpersuasive.

IV

Conclusion

In summary, it is our opinion that the offering of Caller ID service is neither unconstitutional nor otherwise unlawful.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Attachment

March 6, 1990

The Honorable Catherine I. Riley
Maryland State Senate

This is in response to your request for advice of counsel on whether the use of a caller identification device on a telephone violates the constitutionally protected right of privacy. As a general rule, constitutional guarantees, such as the right of privacy, are a restraint only on governmental action. Although the Public Service Commission has accepted a telephone company tariff for a caller identification service, ordinarily such limited government action is insufficient to implicate this guarantee. Moreover, it is generally understood that the constitutionally recognized right of privacy protects only the contents of telephone conversations rather than the numbers used in making the calls.

On September 27, 1989, the Public Service Commission accepted a proposed tariff of the Chesapeake and Potomac Telephone Co. to offer a caller identification service. *See* Minutes of Administrative Meeting of Public Service Commission for Wednesday, September 27, 1989. Where a telephone subscriber wishes to have this service, a device is attached to the telephone which displays the telephone number of incoming calls. The question has arisen whether the use of this device violates the constitutionally protected right of privacy of the person calling.

Although a person's general right of privacy is left largely to State law, various provisions of the Federal Constitution protect individual privacy against certain kinds of governmental intrusion. *Katz v. United States*, 389 U.S. 347, 350-51 (1967). One of these provisions is the Fourth Amendment which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This provision is applied to the states through the Due Process Clause of the Fourteenth Amendment. There is a similar provision in the State Constitution. Maryland Declaration of Rights, Article 26.

Although the Fourth Amendment is usually invoked in criminal trials, its protection pertains to all citizens not just criminal suspects. *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986). Moreover, it protects the privacy of persons, rather than places. *Katz*, 389 U.S. at 351. Within the meaning of this Amendment, a "'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobson*, 466 U.S. 109, 113 (1984). However, the Fourth Amendment is only a restraint on government. Thus, it does not apply to private parties unless they are acting as agents of the government or acting with the participation or knowledge of government officials. *Ibid.*

The mere fact that a state regulates a business does not constitute state action for purpose of the Due Process Clause. *Jackson v. Metropolitan Edison Co.*, 441 U.S. 345, 350 (1974). Thus, when a state utility commission approves but does not order, a practice proposed by a private utility, this approval does not transform this private initiative into state action. *Jackson*, 419 U.S. at 357. This case was cited by the Circuit Court for Baltimore in the recent case of *Sapphire Communications of Maryland, Inc. v. Maryland Public Service Commission*, Circuit Court for Baltimore City, Case No. 8833036/CE89917. That case concerned a proposed telephone company tariff for a special "adult call exchange" which would be blocked unless a customer requested the service. The acceptance of the tariff did not, the Court said, constitute state action in a First Amendment challenge. As the Commission is exercising the same authority under Article 78, §27, it follows that mere approval of a tariff for a caller identification service does not constitute state action for purposes of the Due Process Clause and the Fourth Amendment. Of course, the use of caller identification by a government agency might itself be state action. However, there would have to be a protected privacy interest in the number from which the call is made.

In the *Katz* case, 389 U.S. at 353, it was held that parties to a telephone conversation have a reasonable expectation of privacy which is protected by the Fourth Amendment. However, a distinction has been drawn between the contents of a conversation and the numbers used to make a telephone call. In *Smith v. Maryland*, 442 U.S. 735, 742-46 (1979), it was held that the use of a pen register, which recorded numbers called from a particular telephone, did not violate the Fourth Amendment as there was no reasonable expectation that the numbers dialed would remain secret. It was noted that "Telephone users ... typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." *Smith*, 442 U.S. at 743. Of course, the emphasis in the *Smith* case was on a caller's expectation with respect to the number called not the number from which the call was made. *Id.* at 742. Moreover, a subscriber may have obtained an unlisted number with the intent of keeping the number confidential. However, the purpose of a pen register is to record information about the use of a caller's number. Moreover, the Court rejected the contention that there was a special privacy interest in the use of a person's own telephone. *Id.* at 743. Where a person voluntarily reveals confidential information to a third party, such as a bank or telephone company, there can be no reasonable expectation of privacy. *Id.* at 743-44. As even an unlisted telephone number is used and recorded by telephone company personnel, this suggests that such a number is not a constitutionally protected privacy interest.

In conclusion, it is my view that the use of caller identification service does not violate the constitutionally protected right of privacy. However, as suggested in the *Katz*, case, the State has broad power to enact legislation to protect privacy interests.

Richard E. Israel
Assistant Attorney General

RETIREMENT SYSTEMS

MILITARY SERVICE — FEDERAL LAW REQUIRES THAT RETIREMENT CREDIT BE GRANTED TO EMPLOYEES WHO RETURN TO GOVERNMENT JOBS AFTER MILITARY SERVICE

December 3, 1990

Neal M. Janey, Esquire
City Solicitor, Baltimore City Law Department

You have requested our opinion concerning the scope of Article 65, §88, which affords certain benefits to State and local government employees who leave their jobs to serve in the military and then seek reemployment. Specifically, you ask whether a provision of the statute that credits the period of military service for retirement purposes is applicable only to those Baltimore City employees who served in the military prior to the end of the active draft in 1973.

For the reasons stated below, we find that we need not construe Article 65, §88 in order to answer your question. Whatever the meaning to be ascribed to the Maryland statute, a provision of federal law now requires that pension or retirement system credit be given to Baltimore City employees who returned to their employment after military service, either during the draft or following its termination.

I

Maryland Law

Article 65, §88, enacted as Chapter 676 of the Laws of Maryland 1941, sets out the rights of returning servicemen in any pension or retirement fund or system under State law or the law of a political subdivision, including the City of Baltimore. More specifically, if military service is of the type described by the statute, a member of a pension or retirement system can take time away from the member's job without losing the accrual of that time toward pension and retirement benefits.[1]

Your inquiry focuses on the following language:

> The rights and status of any person inducted into the land or naval forces of the United States for training and service *pursuant to the act of Congress known as the Selective Training and Service Act of 1940, or any subsequent acts of a similar nature*, and any member of any reserve component of the land or naval forces of the United States on active duty or service within that period or ordered or assigned to active duty or service within that period, as well as any person who, within that period, enlists in the armed forces of the United States, and who may be absent in military service shall be as follows in any pension or retirement fund or system ....

Article 65, §88 (emphasis added).

The Selective Training and Service Act of 1940 imposed a draft; present law, the Military Selective Service Act, does not and has not since 1973.[2] Hence, you suggest that the present law is not a "subsequent ac[t] of a similar nature."

If this question about the proper construction of Maryland law were dispositive, we would analyze the present structure of the selective service system and attempt to discern whether it is close enough to the

---

[1] The pertinent language states that if a member "be again actively employed ... in any position for which membership in any pension or retirement fund or system under the laws of the State of Maryland, or of the City of Baltimore or any other political subdivision of the State ... is made a condition of employment within one year from the time he is relieved from active duty, he shall receive credit as membership service for the period of his absence ...."

[2] The Selective Training and Service Act of 1940 was later reenacted as the Selective Service Act of 1948, then the Universal Military Training and Service Act of 1951 and the Military Selective Service Act of 1967. Presently, the Military Selective Service Act is codified at 50 U.S.C. App. §450 *et seq.* On July 1, 1973, the President's power to induct men into the armed forces expired. 50 U.S.C. App. §467.

1940 Act to be regarded as "similar."[3] But it is unnecessary for us to do so, because a federal law on veterans' reemployment rights guarantees the pension service credit at issue.

II

Federal Law

A. History

The Selective Training and Service Act of 1940 and its succeeding reenactments provided certain reemployment rights for veterans. Specifically, §9 of the Selective Service Act of 1948 provided, subject to certain conditions, for the reemployment, protection from discharge without cause, and protection of benefits of qualified returning servicemen. Former 50 U.S.C. App. 459(b) through (h). In 1974, the provisions of §9 were recodified without substantial change in the Veterans Reemployment Rights Act (the "VRRA").[4]

The reemployment rights in the VRRA apply to "any person inducted into the Armed Forces ...."[5] Despite the use of the term "inducted," which might suggest involuntary service, the scope of the VRRA is not limited to involuntary inductees. Its benefits apply as well to enlistees and reservists. *Dailey v. Public School Retirement System of Mo.*, 707 F. Supp. 1087 (E.D. Mo. 1989); *Schaller v. Board of Education of Elmwood Local School Dist.*, 449 F. Supp. 30 (N.D. Ohio 1978); *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451 (N.D.

---

[3] Despite the end of the draft, the selective service system has been maintained as an active standby organization. Thus, the present Military Selective Service Act, an outgrowth of the original Selective Service Act of 1940, is still operational. Indeed, the regulations governing registration for military service are promulgated pursuant to that act. *See* 32 C.F.R. 1600 *et seq.*

[4] The VRRA was one chapter of the comprehensive legislation known as the Vietnam Era Veterans Readjustment Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578.

[5] Under 38 U.S.C. §101(20), the "Armed Forces" comprise "the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, including the reserve components thereof." *See also* 38 U.S.C. §101(27) (definition of "reserve components"). Article 65, §88 has the same scope. *See* Opinion No. 86-023 (April 2, 1986) (unpublished).

Fla. 1977); *Litwicki v. P.P.G. Industries, Inc.*, 386 F. Supp. 296 (W.D. Pa. 1974) *aff'd* 505 F.2d 189 (3rd Cir. 1974).

The VRRA guarantees that a returning veteran, "if still qualified to perform the duties of [the former] position, [shall] be restored by [the] employer ... to such position or to a position of like seniority, status, and pay." 38 U.S.C. §2021(a)(A)(i) and (B)(i). The VRRA provides that returning servicemen "shall be considered as having been on furlough or leave of absence during this period of training and service in the armed forces [and] shall be so restored without loss of seniority ...." 38 U.S.C. §2021(b)(1). In describing the status of reemployed servicemen, the VRRA states the following "sense of the Congress":

> [A]ny person who is restored to or employed in a position in accordance with [the VRRA] should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

38 U.S.C. §2021(b)(2).

Furthermore, the VRRA provides that persons subject to the act's protection "shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve Component of the Armed Forces." 38 U.S.C. §2021(b)(3). Both Ready Reservists and National Guardsmen are equally entitled to the protections of the VRRA. *See Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981).[6]

Finally, the VRRA applies retroactively. That is, if the VRRA grants a benefit linked to a period of military service, a veteran may claim the benefit even if the period of service occurred before the VRRA's enactment in 1974. *See Von Allmen v. State of Conn. Teachers Retirement Bd.*, 613 F.2d 356, 359-60 (2d Cir. 1979) (veteran entitled to retirement credit for military service in 1956-58);

---

[6] Additionally, 38 U.S.C. §2024 affords specific reemployment rights to reservists and national guardsmen, including all rights under §2021 for reservists or guardsmen called to active duty by the President.

Witter v. Pennsylvania National Guard, 462 F. Supp. 299 (E.D. Pa. 1978) (VRRA applicable to state employee who left job to volunteer in Vietnam and who later sought reemployment even though both events occurred before adoption of the statute).

B. Preemptive Effect

Prior to 1974, the VRRA encouraged, but did not require, state and local governments to afford these rights to their employees.[7] In the 1974 amendments, however, Congress provided that:

> (B) If such position was in the employ of a State, or political subdivision thereof, or a private employer, such person *shall*:
>
> (1) If still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay .... unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so ....

38 U.S.C. §2021(a) (emphasis added).[8]

---

[7] Former 50 U.S.C. App. §459(C) provided in relevant part:

> "If such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress that such person should*:
> (i) If still qualified to perform the duties of such position, be restored to such position or to a position of like seniority, status, and pay ..."

(Emphasis added.)

[8] The "changed circumstances" exception has been applied very narrowly. *See Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981).

The 1974 amendments thus expressed Congress' specific intent to insure the uniform application of reemployment rights among the states.[9] Whether the Maryland statute conflicts with federal law is irrelevant, because Congress has demonstrated its intent to occupy the field. Quite simply, the VRRA controls. Of course, states are free to afford protections for state or local employees in addition to those provided by the VRRA, but "they are not free to impose restrictions on the reemployment rights granted by the VRR Act." *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451, 455 (N.D. Fla. 1977). *See also Von Allmen v. State of Conn. Teachers Ret. Bd.*, 613 F.2d 356 (2d Cir. 1979) (state statute limiting credit to "period of service in times of war" preempted); *Dailey v. Public School Ret. System of Mo.*, 707 F. Supp. 1087 (E.D. Mo. 1989) (state statute limiting period of reserve service for which pension benefit allowable preempted); *Cronin v. Police Dep't of City of New York*, 675 F. Supp. 847 (S.D.N.Y. 1987) (state statute limiting pension credit to six months for each active service period in air national guard was in conflict with federal law and void).

C. Applicability to Pensions

In *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), the Supreme Court determined that pension credits are a form of seniority protected by the VRRA. In that case, Davis had been employed by Alabama Power Company from 1936 through 1943, at which time he left to enter the military. Davis served for 30 months, then resumed his position with Alabama Power, where he worked until he retired in 1971. Alabama Power then denied Davis credit under the company pension plan for the 30 months he had served in the military.

---

[9] As the Senate Report explained:

> Although a number of States have enacted legislation providing reemployment rights to veterans, the coverage, the rights provided, and the availability of enforcement machinery all vary considerably from state to state. Also, some state and local jurisdictions have demonstrated a reluctance, and even an unwillingness, to reemploy the veteran. Of if they do, they seem unwilling to grant them seniority or other benefits which would have accrued to them had they not served their country in the military.... For this reason, the bill ... would amend veterans' reemployment rights law to extend coverage to State governments and their political subdivisions.

S. Rep. No. 907, 93d Cong. 1st Sess. 109-10 (1974).

Explaining the reemployment rights of veterans, Justice Marshall wrote that the veteran "'does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.'" 431 U.S. at 584 (quoting *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284-85 (1946)). Examining the nature of a pension benefit, the Court determined that if a benefit would have accrued with reasonable certainty had the veteran been continuously employed, and if it is in the nature of a reward for service, the benefit is an incident of seniority that is protected under the VRRA. *See also Von Allmen v. State of Conn. Teachers Retirement Bd.*, 613 F.2d 356 (2d Cir. 1979); *Smith v. Industrial Employers and Distributors Assoc.*, 546 F.2d 314 (9th Cir. 1976); *Beckley v. Lipe-Rollway Corp.*, 448 F. Supp. 563 (N.D. N.Y. 1978).

The Supreme Court characterized the VRRA as evidence of "'Congress' desire to minimize the disruption in individual lives resulting from the national need for military personnel.'" To effectuate that purpose, the VRRA is "'to be liberally construed for the benefit of those who left private life to serve their country ....'" 431 U.S. at 584 (quoting *Fishgold*, 382 U.S. at 285). *Accord, Dyer v. Hinky Dinky Inc.*, 710 F.2d 1348 (8th Cir. 1983); *Schaller v. Board of Ed. of Elmwood Local School Dist.*, 459 F. Supp. 30 (N.D. Ohio 1978); *Witter v. Pennsylvania National Guard*, 462 F. Supp. 299 (Pa. 1978).[10]

---

[10] Additionally, other courts have directed employers to credit the period of military service toward the vesting of the employee's rights in a pension plan. *See Cronin v. Police Dept. of City of N.Y.*, 675 F. Supp. 847 (S.D.N.Y. 1987); and *Beckley v. Lipe-Rollway Corp.*, 448 F. Supp. 563 (N.D.N.Y. 1978).

III

Conclusion

In summary, it is our opinion that under the federal Veterans Reemployment Rights Act, qualified Baltimore City employees are entitled to military service credit for voluntary or involuntary service, whether the service was performed before or after the termination of the draft.

J. Joseph Curran, Jr.
Attorney General

Mary O. Lunden
Staff Attorney

Jack Schwartz
Chief Counsel
Opinions & Advice

SECURITIES ACT

INVESTMENT ADVISERS — SCOPE OF EXEMPTION FROM REGISTRATION REQUIREMENT

June 18, 1990

The Honorable Joel Chasnoff
Presiding Chairman
Joint Committee on Administrative, Executive and Legislative Review

On behalf of the Joint Committee on Administrative, Executive, and Legislative Review, you have requested our opinion on the scope of an exemption contained in 1989 legislation that amended the Maryland Securities Act to provide for stricter regulation of investment advisers. This legislation is Chapter 805 (House Bill 712) of the Laws of Maryland 1989. Specifically, you have asked whether certified public accountants are exempt from any portion of the Act by reason of the exemption codified at §11-401(b)(4)(ii) of the Corporations and Associations Article ("CA" Article); and whether the same provision accords a similar exemption to lawyers, engineers, insurance agents and brokers, or teachers.

Because the statutory scheme is complex, even the summary of our response to your request must be rather lengthy. At the outset, we point out that no member of the professions identified in your inquiry is exempt from any portion of the Act by virtue of membership in the profession alone. That is, whether an individual is exempt from a portion of the statute will depend upon that person's particular activities, assessed in light of the requirements of the particular exemption.

One provision — which we will refer to as the "incidental practice" exclusion — is set out in CA §11-101(f)(2)(iii) and potentially applies to lawyers, accountants, engineers, insurance agents and brokers, and teachers. A member of any of these professions who provides investment advice "solely incidental[ly] to the practice of his profession" *and* "[w]ho does not hold himself out as an investment adviser" is excluded from the provisions of the statute regulating investment advisers as such. These professionals, however, like all other persons, are subject to the anti-fraud and related provisions of the Securities Act.

The provision that is the focus of your inquiry, CA §11-401(b)(4) — which we will refer to as the registration exemption — is not limited to members of the professions eligible for the "incidental practice" exclusion. Any person who meets all four of the criteria in CA §11-401(b)(4) is exempt from the registration requirements of the Act.[1]

A person's membership in a regulated profession is essential to one of the four criteria of the registration exemption; CA §11-401(b)(4)(ii) requires that the person be "subject to regulation by a Maryland State agency, board, or commission that has disciplinary authority relating to financial counseling and advice." Of the professions identified in your inquiry, we conclude that certified public accountants and lawyers currently are subject to such regulation. Hence, if an individual CPA or lawyer meets the remaining three criteria in CA §11-401(b)(4), that CPA or lawyer will be exempt from the registration provisions of the Act. However, unless a CPA or lawyer *also* meets the test for the "incidental practice" exclusion in CA §11-101(f)(2)(iii), a CPA or lawyer exempt from registration is not exempt from compliance with other applicable provisions of the Act, in particular its disclosure requirements.

Although licensed professional engineers and certified insurance agents and brokers are subject to regulation by agencies that may have the power to impose discipline for misconduct with regard to "financial counseling and advice," neither of these regulatory bodies has expressly indicated that its disciplinary rules treat the subject. Until they have done so by rule or declaratory ruling, no licensed professional engineer or certified insurance agent or broker is exempt from the registration requirements of Chapter 805 by virtue of the registration exemption in CA §11-401(b)(4).

Finally, teachers, accountants who are not CPAs, and engineers who are not licensed professional engineers are not subject to regulation by bodies that have the power to impose discipline for misconduct with regard to "financial counseling and advice." Hence, no member of these professions is exempt from the registration

---

[1] CA §11-401(b)(2) and (3) contain other, narrower grounds for exemption that are outside the scope of your inquiry and will not be discussed in this opinion.

requirements of Chapter 805 by virtue of the registration exemption in CA §11-401(b)(4).

I

Applicable Law Prior to the 1989 Legislation

Ever since 1962, when Maryland adopted various provisions of the Uniform Securities Act of 1956, the State has regulated investment advisers to some degree. *See* Chapter 1, Laws of Maryland 1962.[2] The 1962 statute prohibited certain fraudulent or deceitful activities by any person who receives consideration from another "primarily for advising the other person as to the value of securities or their purchase or sale," former Article 32A, §14(a), now CA §11-302(a);[3] required investment advisory contracts to include certain provisions relating to adviser compensation, assignment, and notice of partnership changes, former Article 32A, §14(b), now CA §11-302(b); and made it unlawful under certain circumstances for an adviser to take control of client securities or funds, former Article 32A, §14(c), now CA §11-302(c).

The 1962 statute contained a definition of "investment adviser" largely identical to that found in the federal Investment Advisers Act of 1940, 15 U.S.C. §80b-2(a)(11), and the Uniform Securities Act of 1956, §401(f). Former Article 32A, §25(b), now CA §11-101(f)(1)(i), stated as follows:

> "Investment adviser" means a person who, for compensation, ... [e]ngages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and

---

[2] Securities legislation prior to the 1962 statute did not deal specifically with investment advisers. *See* Chapter 348, Laws of Maryland 1937; Chapter 552, Laws of Maryland 1920.

[3] The term "security" is very broadly defined in CA §11-101(p). The Supreme Court has observed that the term is to be applied case by case "to meet the countless and variable schemes devised by those who seek the use of the money of others ..." *SEC v. W. J. Howey Co.*, 328 U.S. 293, 299 (1946). Courts look to the "economic reality" of a transaction in applying the term. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

> as a part of a regular business, issues or promulgates analyses or reports concerning securities.

Prior to the 1989 amendment, CA §11-101(f)(2)(ii) contained the following "incidental practice" exclusion, mirroring that in federal law:

> "Investment adviser" does not include ... [a] lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession....[4]

However, unlike the federal Investment Advisers Act and the Uniform Securities Act of 1956, the Maryland law did not require the registration of investment advisers.[5]

II

1989 Legislation

Responding to complaints about the mushrooming "financial planning" industry, the Securities Division of the Attorney General's Office proposed legislation at the 1989 Session of the General Assembly to regulate financial planners.[6] According to a floor report on the legislation in the files of the House Economic Matters Committee, the measure had three primary provisions:

> (1) It strengthens existing anti-fraud provisions governing investment advisers; (2) It subjects financial planners to certain disclosure requirements by including them in the definition of investment adviser; and (3) It requires investment advisers,

---

[4] This paragraph contains additional exemptions from the definition of "investment adviser," but they are not relevant to the issues you have raised.

[5] The Uniform Securities Act of 1985, §203, requires the "licensing" of investment advisers.

[6] As introduced, the bill substantially tracked the model investment adviser legislation drafted by the North American Securities Administrators Association.

> including financial planners, to register with the Securities Commissioner.[7]

Specifically, the bill amended the existing definition of "investment adviser" in CA §11-101(f) to add, in paragraph (1)(ii), the regulation of one who:

> 1. Provides or offers to provide, directly or indirectly, financial and investment counseling or advice, on a group or individual basis;
>
> 2. Gathers information relating to investments, establishes financial goals and objectives, processes

---

[7] Another Committee document, "Highlights of House Bill 712," said that the bill, among other things:

- Expands existing law, which currently regulates only investment advisers who give advice with respect to securities, to include the new breed of financial planners who provide financial advice regarding a broader range of investments.
- Expands existing anti-fraud provisions governing all investment advisers, including the disclosures an investment adviser must make in soliciting clients.
- Requires that investment advisers register with the Securities Division before doing business in this state.

The Committee document also describes the reasons for House Bill 712 as the following:

- Financial Planning has changed with the expansion and diversity of financial products available to individual investors.
- A new occupational group has emerged: financial planners. This new group is not licensed, as are the more traditional groups which provided investment advice, such as accountants, attorneys, or insurance agents.
- Unlike the more traditional investment advisers, the new financial planners generally rely on commissions for their compensation, increasing the risk of abuse and conflicts of interest.
- This new group of financial planners is currently unregulated, yet is composed of almost 60% of all financial planners....

> and analyzes the information gathered, and recommends a financial plan; or
>
> 3. Holds himself out as an investment adviser in any way, including indicating by advertisement, card, or letterhead, or in any other manner indicates that he is a financial or investment 'planner', 'counselor', 'consultant', or any other similar type of adviser or consultant.

Thus, the term "investment adviser" is no longer limited to one who advises about or analyzes securities.

The measure also altered the "incidental practice" exclusion in CA §11-101(f)(2) to exclude the following persons from the definition of "investment adviser":

> A lawyer, accountant, engineer, insurance agent or broker, or teacher:
>
> 1. Whose performance of these services is solely incidental to the practice of his profession; and
>
> 2. Who does not hold himself out as an investment adviser; ....

This change both broadened the exclusion, by adding "insurance agent or broker" to the list, and narrowed it, by adding the "holding out" limitation."[8]

While House Bill 712 was pending in the House Economic Matters Committee, a controversial amendment was proposed to the "registration" subtitle of the legislation. At the urging of representatives of the certified public accountants, new CA §11-401(b), which would make it unlawful for any person to transact business in this State as an investment adviser without being registered, was amended to add the following exemption for a person who:

---

[8] The new "holding out" language is a codification of a well-established position of the staff of the Securities and Exchange Commission. In the SEC's staff's view, "holding out" as an investment adviser is antithetical to the notion of "incidental practice." This language was added to the Maryland statute to avoid confusion about what might constitute "incidental practice" under Maryland law.

(i) Is not an investment adviser as defined in §11-101(f)(1)(i) of this subtitle;

(ii) Is subject to regulation by a Maryland State agency, board, or commission that has disciplinary authority relating to financial counseling and advice;

(iii) Does not accept a commission, fee, or other remuneration for a referral to a client of products of others; *and*

(iv) Does not take or have custody of any securities or funds of any client to whom financial counseling or advice is provided.

CA §11-401(b)(4) (emphasis added).[9]

When the bill was amended in committee to incorporate this exemption, the title of the measure was altered to read that only "certain" investment advisers were being required to register and that the legislation was "expanding the class of individuals exempt from certain filing and registration requirements." 1989 House Journal at 1810.[10] In committee documents, the new language was described as an amendment solely to the legislation's filing and registration requirements.[11]

---

[9] The amendment was opposed by the Securities Division; brokers and dealers, *see* letter to the Delegate Casper R. Taylor, Jr. from Ira C. Cooke (Feb. 28, 1989); and representatives of organized financial planner groups, *see* memorandum to committee members from Dennis M. Gurtz (Feb. 24, 1989).

[10] The phrase "filing ... requirement" in the bill's title refers to the filing of an application for registration and the payment of a filing fee. CA §11-404(b).

[11] The House Economic Matters Committee Floor Report on House Bill 712 stated that the amendment:

> Exempts from the registration requirements an investment adviser who:
>
> 1. Satisfies the definition of a financial planner under the bill, but is not providing advice with respect to securities;

(continued...)

The amendment advanced by the CPAs was approved by the full House. 1989 House Journal at 7811. The measure was passed by the Senate without change. It was signed by the Governor as Chapter 805 of the Laws of Maryland 1989, with its registration provisions originally intended to take effect July 1, 1990, although the remainder of the bill became effective July 1, 1989.[12]

---

[11](...continued)

> 2. Is subject to regulation by a Maryland state agency, board, or commission with disciplinary authority relating to financial planning;
> 3. Does not accept a fee or commission for the referral to clients of the products of others; and
> 4. Does not retain custody of client funds.

And the Committee's paper entitled "Highlights of House Bill 712" said that:

> You are exempt from registration if:
> 1. You are a lawyer, accountant, engineer, insurance agent or broker, or teacher who provides financial advice solely incidental to the practice of your profession, *and*
> 2. You do not hold yourself out as a financial planner.
>
> You are also exempt from registration if:
> 1. You are subject to the jurisdiction of a Maryland State Board or agency that has disciplinary authority relating to financial planning; *and*
> 2. You don't accept commissions or have custody of funds; *and*
> 3. You are a "new" financial planner, not a "traditional" investment adviser who is already required to register under existing law.

[12] Chapter 331 (House Bill 518) of the Laws of Maryland 1990 delayed the effective date of the registration provisions until October 1, 1990.

III

Disciplinary Authority of Other Agencies Over Financial Planners

A. *Introduction*

"In attempting to determine legislative intent, we look first to the words of the statute, read in light of the full context in which they appear, and in light of external manifestations of intent or general purpose available through other evidence." *Cunningham v. State*, 318 Md. 182, 185, 567 A.2d 126 (1989). *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 514-15, 525 A.2d 628 (1987).

The language of CA §11-401(b)(4)(ii) assumes that one or more State agencies, boards, or commissions has disciplinary authority "relating to financial counseling and advice." The provision does not make clear, however, how explicitly the regulatory body must have addressed the matter. Is it enough that a member of a profession could, under some broadly worded rule, be disciplined for misconduct in connection with financial advice that he or she might give?

To take a random example, a dentist who "[b]ehaves dishonorably or unprofessionally" is subject to discipline. §4-314(a)(16) of the Health Occupations Article. A dentist who touted some fraudulent investment scheme to patients might well be disciplined under this provision. One could find similar language under many other professional licensing statutes. Is language of this kind, standing alone, enough to satisfy CA §11-401(b)(4)(ii)?

We think not. When the General Assembly added this registration exemption at the urging of CPAs, presumably it did so mainly to relieve CPAs and other professionals who might be similarly situated from the perceived burdens of dual oversight of their financial counseling activities, by both the licensing body and the Securities Division (the latter through the new registration requirement). But it must also have intended that the oversight of financial counseling by the licensing body be effective, in the sense that the licensing body can impose discipline for the kinds of fraudulent or grossly negligent practices most likely to injury investors. *Cf.* CA §11-412(a)(7) and (9). Moreover, a regulation cannot be said to "relat[e] to financial counseling and advice" unless its scope is so perceived by both members of the public and of the profession. Otherwise, the overall purpose of the legislation — to protect the recipients of financial counseling — would be compromised.

In other words, we understand the General Assembly to have concluded that the regulatory oversight of the licensing body for CPAs and potentially others would be sufficient protection for the public without registration with the Securities Division.[13] But if the licensing body has never stated, by rule or declaratory ruling, whether or how its disciplinary authority applies to financial counseling, this legislative objective would not be served. The members of the profession would not perceive themselves to be subject to discipline for misdeeds or incompetence in the rendering of financial planning services, and members of the public would be unaware of the protection afforded them by the licensing body.

In considering the scope of CA §11-401(b)(4)(ii), we examine the degree of specificity in the licensing law for CPAs, for this profession was foremost in the General Assembly's understanding of the impact of the exemption. Then we turn to the law applicable to the other professions about which you inquire, to see if those provisions are similar.

B. Certified Public Accountants

Section 2-301 of the Business Occupations and Professions Article ("BOP" Article) requires a license for an individual to practice "certified public accountancy" in Maryland, a term narrowly defined to refer to the conducting of certain audits and the rendering of certain opinions. *See* BOP §2-101(f). However, under BOP §2-315(a), the State Board of Accountancy may deny, suspend, or revoke a license or reprimand a licensee who is guilty of fraud or other dishonesty in "the practice of accountancy" or is guilty of gross negligence "in the practice of accountancy." BOP §2-315(a)(4) and (5).

The practice of accountancy is not defined in State law. However, by rule, the Board of Accountancy has defined the "practice of accountancy" as:

> [O]ffering to perform or performing for a client one or more types of services involving the use of

---

[13] To be sure, the Securities Division has tools for oversight of registrants — for example, examination of records (CA §11-411(e)) and summary suspension powers (CA §11-413) — that other regulatory bodies now lack. We think, however, that the General Assembly made a judgment about the overall capacity of the licensing bodies to punish and thus deter improper practices and did not view the availability of one or another particular enforcement tool as critical.

> accounting skills, or one or more types of management, *advisory or consulting services*, or the preparation of tax returns or the furnishing of advice on tax matters.

COMAR 09.24.01.01A(7) (emphasis added). Board regulations also contain a code of professional conduct for CPAs which, among other things, provides that "[a] licensee may not *in the performance of professional services* knowingly misrepresent facts." COMAR 09.24.01.04A(2) (emphasis added). And COMAR 09.24.01.01A(9) defines "[p]rofessional services" as "any services performed or offered to be performed by a licensee for a client *in the course of the practice of accountancy*." (Emphasis added.)

Because "accountancy" includes "advisory or consulting services," a CPA who engages in misconduct or incompetence in the provision of financial counseling and advice is subject to the Board of Accountancy's "disciplinary authority relating to financial counseling and advice." Despite the lack of detail in the Board's regulations, the Board should construe them in light of the modern practice of certified public accounting, which includes financial planning as part of a CPA's "advisory or consulting services."[14] CPAs ought to recognize that this aspect of their professional practice is as much subject to the disciplinary authority of their licensing board as any other.[15]

Our conclusion takes into account the background of the exemption, particularly the advocacy for it; the adoption of the exemption strongly implies the General Assembly's belief that the Board of Accountancy's regulatory regime is sufficient. *Cf. State v. Burning Tree Club, Inc.*, 315 Md. 254, 298-99, 554 A.2d 366 (1989)

---

[14] Numerous CPA informational and training materials recognize the role of that profession in "personal financial planning." *See, e.g., A Guide to Understanding and Using CPA Services* (Institute of Certified Public Accounting ("AICPA") 1984); *What Does a CPA Do*? (AICPA 1986); *Personal Financial Planning: The Team Approach* (AICPA 1987). The AICPA Professional Liability Insurance policy also insures for claims made with respect to a CPA's activities in personal financial planning.

[15] We nevertheless recommend that the Board of Accountancy consider amending its regulations to make explicit the duty of a CPA to adhere to proper professional standards when the CPA provides financial planning services. In this way, one who obtains such services from a CPA will have clear notice of the possibility of recourse to the Board if the CPA breaches those standards.

(legal advice to General Assembly about effect of legislation, whether or not correct, pertinent to assessment of legislative intent). Thus, if a CPA also satisfies the remaining three criteria in CA §11-401(b)(4), that CPA will be exempt from the registration requirements of Chapter 805.

C. Lawyers

Under Maryland Rule BV6a.1, a lawyer can be disciplined for misconduct or incompetence. Rule BV1k defines "[m]isconduct" as "an act or omission by an attorney, individually or in concert with any other person or persons which violates the Disciplinary Rules of the Code of Professional Responsibility ...., whether or not the act or omission occurred in the course of an attorney-client relationship." Rule 1.1 of the Rules of Professional Conduct mandates "competent representation [of] a client." In addition, Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

We have no doubt that if a lawyer were dishonest or incompetent in offering financial advice to a client, the lawyer would be subject to discipline by the Court of Appeals. The Court has made it clear that improprieties committed outside a lawyer's practice of law bear on the lawyer's fitness to practice and therefore are subject to the same sanctions. *Attorney Grievance Commission v. Silk*, 279 Md. 345, 369 A.2d 70 (1977). *Cf. In re Weiner*, 586 P.2d 194 (Ariz. 1978); *In re Smyzer*, 108 N.J. 47, 527 A.2d 857 (N.J. 1987).

Hence, we conclude that the standard of CA §11-401(b)(4)(ii) is satisfied. If a lawyer also satisfies the other criteria in CA §11-401(b)(4), the lawyer will be exempt from registration.

D. Engineers

The statutory definition of the practice of engineering appears to include no activity that would relate to financial planning. *See* BOP §14-101(f) (definition of "practice engineering"). The State Board for Professional Engineers may suspend, revoke or deny a license or reprimand a licensee for gross negligence or misconduct while practicing engineering or knowing violation of the code of ethics adopted by that board. BOP §14-317(5) and (7). The latter code of ethics provides, among other things, that an engineer may not be untruthful, deceptive or misleading in any professional report, statement, or testimony. COMAR 09.23.03.05C.

In our view, language of this kind is insufficient, standing alone, to constitute a regulation embodying "disciplinary authority relating to financial counseling and advice." Perhaps an engineer who engaged in dishonesty or grossly negligent practices while providing financial counseling and advice could be disciplined by the board for doing so. However, if a regulatory body's disciplinary rules are to provide protection to the public paralleling that of the registration requirement of Chapter 805, those rules must put both the profession and the public on notice of the nature of the protection. Engineers are not subject to such regulation.

E. Insurance Agents and Brokers

The Insurance Commissioner may discipline a certified insurance agent or broker who has "committed fraudulent or dishonest practices in the business of insurance" or has "otherwise shown lack of trustworthiness or lack of competence to act as agent or broker." Article 48A, §175(6) and (12). The Insurance Commissioner has not by rule or declaratory ruling indicated whether he views either of these statutory grants as sufficient to reach the financial planning activities of agents and brokers.

For the reasons stated in Part IIID above, this regulatory authority does not suffice under CA §11-401(b)(4)(ii).

F. Teachers

Unlike the other business occupations and professions that might be investment advisers or financial planners, teachers as a class have no general State disciplinary body. Private school teachers are not subject to intensive regulation or governmental discipline. And teachers at institutions of higher education — those most likely to have some involvement in financial planning — are similarly unregulated.

Hence, the registration exemption in CA §11-401(b)(4) does not apply to teachers.

G. Accountants and Engineers

Accountants who are not certified public accountants and engineers who are not licensed professional engineers are not "subject to regulation by [an] agency ... that has disciplinary authority relating to financial counseling and advice." Therefore, they do not meet one criterion of the registration exemption.

IV

Effect of Exemption

As explained in Part II above, the language of the 1989 legislation, its title, and its legislative history all make clear that the exemption in CA §11-401(b)(4) is only an exemption from registration.[16] All persons, including CPAs and lawyers, are subject to the statute's prohibition against fraud and misrepresentation. *See* CA §11-302(a). Moreover, CPAs and lawyers who do not fall within the "incidental practice" exclusion of CA §11-101(f)(2)(iii) are also subject to the statute's disclosure requirements and implementing regulations. *See* CA §11-302(d).

Further, when CPAs or lawyers hold themselves out as financial planners or engage in more than an incidental practice in this area, they are subject to registration under federal law if they meet the federal definition of "investment adviser," regardless of the applicability of the State registration requirement. *See* 15 U.S.C. §80b-2(a)(11). *See generally* Bloomenthal, *Securities Law Handbook* §22.02, at 738-39 (1989). Under 15 U.S.C. §80b-3(a), it is unlawful for any investment adviser unless registered with the SEC "to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser."

---

[16] *See* note 11 above and accompanying test.

IV

Conclusion

In summary, it is our opinion that a certified public accountant or a lawyer is exempt from the registration requirements of Chapter 805 of the Laws of Maryland 1989, if that individual meets all of the requirements of CA §11-401(b)(4). At present, no member of the other professions identified in your inquiry qualifies for this exemption.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Robert A. Zarnoch
Assistant Attorney General

Editor's Note:

The exemption language in the definition of "investment adviser" was modified by Chapter 502 (Senate Bill 691 of the Laws of Maryland 1992.

SOCIAL SERVICES

CRIMINAL LAW — REPORTING OF CRIMES BY SOCIAL SERVICES EMPLOYEES

July 31, 1990

The Honorable Carolyn W. Colvin
Secretary of Human Resources

You have requested out opinion on whether employees of local departments of social services have a duty or, if not, the discretion, to inform the police of criminal activity by their clients. Specifically, you have asked the following questions:

1. Is there any general duty for citizens, including State employees, to report crime?

2. Does the duty or discretion to report crime depend on whether a social services employee learns of the criminal activity in an official, as opposed to a personal, capacity?

3. Do the legal rules differ for acts of child abuse? Do they differ for criminal activity other than child abuse observed in the course of a child abuse investigation?

4. Does the employee's particular job affect this duty or discretion?

Your questions arise as a result of a potential conflict between laws designed to protect the confidentiality of those who apply for or receive social services, and society's interest in preventing criminal activity. You stated that the questions you have posed are asked frequently by local departments of social services.[1]

---

[1] In fact, just prior to your request, Alan M. Wright, Senior Assistant County Attorney for Montgomery County, asked us to look at very similar questions.

For the reasons stated below, we conclude as follows:

1. Except when a statute imposes reporting requirements, citizens, including State employees, have no legally enforceable duty to report a crime. However, Executive Branch employees are subject to discipline if they fail to report certain drug offenses.

2. The discretion to report a crime depends in part, but not exclusively, on whether a social services employee learns of the criminal activity in an official capacity. That is, the confidentiality restrictions that affect information gained in an employee's official capacity do not apply to information gained off-duty, in the employee's personal capacity. Hence, the employee has the discretion to report any or all information about a client's criminal activities gained in the employee's personal capacity.

A social services employee also has the discretion to report some, but not all, information about a client's criminal activities gained in the employee's official capacity. An employee may report any crime that he or she witnesses and any information about a client's apparently genuine intention to commit a future crime. Except as otherwise required by statute, an employee may not report officially obtained information about a client's past criminal activity.[2]

3. Certain professional employees are required by law to report any instance of suspected child abuse or neglect. Although the law does not mandate the reporting of other crimes observed during an investigation, an employee may report them to the police to the extent indicated in our second response above.

4. Except where a statutory reporting obligation addresses particular professions, an employee's job classification does not affect whether he or she reports a crime involving a client.

---

[2] In the past this office has provided informal advice on these and similar issues. Assistant Attorneys General have advised local departments that they may disclose a client's threat to commit a crime if disclosure would further the client's service plan. *See* Letter to Mr. Robert Shaffer, Director, Garrett County Department of Social Services from Assistant Attorney General Kathleen Morse (June 23, 1989); Letter to Ms. Carolyn Stayer, Assistant Director for Services, Harford County Department of Social Services from Assistant Attorney General Kathleen Morse (June 22, 1989). Although we agree with the advice authorizing disclosure, we do so for different reasons.

I

Background

A. Social Services Administration

The Social Services Administration ("SSA") of the Department of Human Resources is the "central coordinating and directing agency of all social service and public assistance activities of this State." Article 88A, §3 of the Maryland Code. In each county in Maryland, including Baltimore City, a local department of social services provides certain "social service and public assistance activities ...." Article 88A, §13(c). *See generally* 61 *Opinions of the Attorney General* 786, 787-88 (1976).[3] However, the Income Maintenance Administration ("IMA") within the Department of Human Resources is responsible for the "income maintenance functions," including aid to families with dependent children, previously the responsibility of SSA. Article 88A, §1A(a).

In administering the various programs, IMA, SSA and the local departments (and, it may be, other units within the Department of Human Resources) obtain information from or about public assistance and social service applicants and recipients. Much of this information is very personal in nature.[4] Federal and state laws and regulations have been designed to protect the privacy of these individuals and to encourage truthful responses when those administering State and federal welfare programs ask questions. To accomplish these objectives, the disclosure of confidential information is prohibited except under limited circumstances. *See* Part III below.

---

[3] This opinion reviewed the legal status of the local departments and concluded that they were part of the Executive Branch of State Government. 61 *Opinions of the Attorney General* at 793 and 795.

[4] For example, a social services employee who is working with a family "in crisis" will become intimately involved with the family. During this time, the employee will be privy to the family's most personal secrets, including drug or alcohol addictions, connections with criminal activity, interpersonal relationships, financial circumstances, psychological impairments, and so on.

II

Duty to Report a Crime

A. *Federal Law*

A federal statute requires persons to report the commission of crimes that are felonies under federal law: "Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more then $500 or imprisoned not more than three years, or both." 18 U.S.C. §54.

Despite the statute's broad language, a mere failure to report is not sufficient for a conviction. Federal courts uniformly require an affirmative act of concealment. *See United States v. Baez*, 732 F.2d 780, 782 (10th Cir. 1984); *United States v. Davila*, 698 F.2d 715, 717 (5th Cir. 1983); *United States v. Hodges*, 566 F.2d 674, 675 (9th Cir. 1977). *See generally* Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 Yale L. J. 1787, 1794 (1985).

B. *Maryland Law*

Under Maryland law, a citizen has no legal obligation to report a suspected crime, whether the crime is a felony or a misdemeanor, unless the General Assembly has imposed an obligation by statute. *See* 74 *Opinions of the Attorney General* 128 (1989).

The General Assembly has identified certain situations in which criminal activity must be reported. For example, §§5-704 and 5-705 of the Family Law Article ("FL" Article) set forth mandatory reporting requirements if the victim of suspected abuse or neglect is a child. Among other occupational groups, "human service worker[s]" who have reason to believe that a child has been subjected to abuse or neglect must report the pertinent facts, "[n]otwithstanding any other provision of law, including any law on privileged communications ...." *See* 75 *Opinions of the Attorney General* 76 (1990).[5] However, nothing in this statute, or any other, imposes a comparable legal duty

---

[5] The term "human service worker" includes "any professional employee of any ... social or social service agency ...," including any social worker and any caseworker. FL §5-701(f).

with regard to other criminal activity that comes to light during an investigation of child abuse or neglect.

Similarly, §19-347(b) of the Health-General Article ("HG" Article) imposes an obligation to report the suspected abuse of a nursing home resident. *See also* HG §10-705(b) (duty to report suspected abuse of a resident of a mental health facility); HG §7-1005 (duty to report abuse of one who is developmentally disabled); and FL §14-302 (duty to report abuse of adult lacking the physical or mental capacity to provide for his or her daily needs). In addition, local departments of social services are required by regulation to report intentional violations of the AFDC program. COMAR 07.03.18.04.

Finally, employees of Executive Branch agencies are subject to executive orders that impose obligations relating to their employment. *See* 74 *Opinions of the Attorney General* 200 (1989). One such order, Executive Order 01.01.1989.05, "State of Maryland Substance Abuse Policy," contains the following provision on the reporting of crimes:

> Where justified by reliable information and/or observation, criminal violations shall be referred to the appropriate law enforcement authority for further investigation and prosecution.

Executive Order 01.01.1989.05 at ¶B(2), 16:8 Md. Reg. 900 (April 21, 1989). In context, the term "criminal violations" refers to "[a]ny use of [an] illegal drug." ¶A(4)(a).

The focus of the executive order is the "workplace," defined as "a State owned or utilized premise for official State business." ¶A(5). The preamble states, in part, that a "drug-free workplace is fundamental to efficient, effective and responsive government" and that the "illegal use of the workplace as a market place for drugs endangers the health, safety and welfare of State employees."

Hence, we conclude that the duty to report crimes imposed by paragraph B(2) of the executive order generally requires Executive Branch employees, including employees at all levels of the Department of Human Resources, to report drug offenses at their offices.[6] The

---

[6] Failure to comply with this or other provisions in the executive order subjects an employee to discipline in accordance with the Merit System Law. ¶B(12).

executive order, however, does not require the reporting of drug offenses that take place elsewhere.

III

Discretion To Report A Crime

A. *Interpretive Principles*

Although Maryland citizens do not have a legal obligation to report crimes, we have said that doing so is ordinarily "a civic duty." 74 *Opinions of the Attorney General* at 132. The reporting of crimes by State social services employees is complicated by the confidentiality requirements of their job, however. Whether a social service employee may report a crime involving a client depends on whether the confidentiality provisions discussed below prohibit the employee from doing so.

Unfortunately, no federal or state court has considered this question. Nor is the legislative history helpful. Moreover, the Office of General Counsel of the federal Department of Health and Human Services ("HHS"), the agency responsible for implementing the federal confidentiality provisions, informs us that it has never been asked to look at the question and thus has never provided interpretive guidance on the issue.[7]

To answer your questions, we must determine the legislative goal sought to be achieved by the confidentiality provisions and the purpose for their enactment. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987). "[O]ur endeavor is always to seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment." *Morris v. Prince George's County*, 319 Md. 597, 603-04, 573 A.2d 1346, 1349 (1990).

In this pursuit we must begin with the language of the statute itself. *Morris v. Prince George's County*, 319 Md. at 603; *Newman v. Subsequent Injury Fund*, 311 Md. 721, 723, 537 A.2d 274 (1988). However, "[t]he aim or policy of the legislation against which we

---

[7] We intend to seek a formal opinion from the HHS Office of General Counsel on whether HHS concurs with the conclusions reached in this opinion.

measure the words used, is not drawn ... out of the air; it is evinced in the language of the statute as read in the light of other external manifestations of that purpose." *Kaczorowski*, 309 Md. at 514. *See also Watt v. Alaska*, 451 U.S. 259, 263-6 (1981) ("The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have [a] literal effect."). Similarly, we "may consider the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result, or one which is inconsistent with common sense." *Kaczorowski*, 309 Md. at 513. Our conclusions reflect this approach.

B. Federal Confidentiality Requirements

Under the Aid to Families With Dependent Children ("AFDC") program, Title IV-A of the Social Security Act, 42 U.S.C. §601 *et seq.*, the Secretary of HHS is authorized to make grants to the states to assist in "encouraging the care of dependent children in their own homes or in the homes of relatives." 42 U.S.C. §601. To qualify for such a grant, a state must, among other things, "provide safeguards which restrict the use or disclosure of information concerning applicants or recipients to purposes directly connected with" administering, investigating and auditing federal welfare programs. 42 U.S.C. §602(a)(9). Apart from circumstances not relevant to this discussion, disclosure is permitted only in "any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of [the state] plan or program" [§602(a)(9)(B)] and to a law enforcement officer searching for "a fugitive felon" [§602(a)(9)(D)]. Neither the statute nor the pertinent regulation contains an express authorization for disclosure of information for other criminal justice purposes. *See* 45 C.F.R. §205.50.

Under the Federal Foster Care and Adoption Assistance program, Title IV-E of the Social Security Act, 42 U.S.C., §670 *et seq.*, the Secretary of HHS is authorized to make grants to the states "for foster care and transitional independent living programs." 42 U.S.C. §670. To qualify for such a grant, a state must "provide safeguards which restrict the use of or disclosure of information concerning individuals assisted under the state plan to purposes directly connected with" administering, investigating or auditing federal welfare programs. 42 U.S.C. §671(a)(8). The only express reference to criminal investigations limits disclosure to investigations of offenses "in connection with the administration of" the program itself. 42 U.S.C. §671(a)(8)(B). The pertinent regulation simply mirrors the statute. 45

C.F.R. §205.50(a)(1)(i)(B). *See also* 45 C.F.R. §§1355.21 and 1355.30.

The Child Welfare Program, Title IV-E of the Social Security Act, 42 U.S.C. §620 *et seq.*, authorizes the Secretary of HHS to make grants to the states for "establishing, extending and strengthening child welfare services." 42 U.S.C. §620. To qualify for such a grant, a state must provide confidentiality safeguards similar to those required under AFDC and the Foster Care and Adoption Assistance program. *See* 45 C.F.R. 1355.21(a); 45 C.F.R. 1355.30; and 44 C.F.R. §205.50. Again, disclosure is permitted in "[a]ny investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plans or program" [45 C.F.R. §205.50(B)] and to a law enforcement officer searching for "a fugitive felon" [45 C.F.R. §205.50(F)(v)]. No other disclosure for criminal justice purposes is authorized.

The Child Abuse Prevention and Treatment Act, 42 U.S.C. §5101, *et seq.*, authorizes the Secretary of HHS to make grants to the states to assist "in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs." 42 U.S.C. §5103(b)(1). To qualify for such a grant, a state must provide "methods to preserve the confidentiality of all records in order to protect the rights of the child, and the child's parents or guardians." 42 U.S.C. §5103(b)(2)(E).

Regulations adopted by HHS under this act require states to "provide by statute that all records concerning reports and reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense." 45 C.F.R. §1340.14(i)(1). The regulations, however, provide that state statutes may permit release of such reports to (1) various persons and entities who investigate reports of suspected abuse or who provide services to the child or the child's family; (2) the child named in the report or a person responsible for the child's welfare; and (3) a state or local official responsible for the administration or oversight of child protective services. 45 C.F.R. §1340.14(i) through (xi).

Finally, under the Food Stamp Program, a participating state must provide "safeguards which limit the use or disclosure of information obtained from applicant households to persons directly connected with" the program. 7 U.S.C. §2020(e)(8). However, "notwithstanding any other provision of law, all information obtained under [the program] from an applicant household shall be made available, upon request, to local, State, or federal law enforcement officials for the purpose of investigating an alleged violation of [the Food Stamp] Act or any regulation issued under this Act." 7 U.S.C. §2020(e)(8)(B).

C. State Confidentiality Requirements

Article 88A, §6 governs the disclosure of information concerning a person or family who has applied for or who is receiving social services or financial assistance. Subsection (a) provides as follows:

> Except in accordance with a court order or to an authorized officer or employee of the State, or the United States, or a fiduciary institution having a right thereto in an official capacity, and as necessary to discharge responsibilities to administer public assistance, medical assistance, or social services programs, it shall be unlawful for any person or persons to divulge or make known in any manner any information concerning any applicant for or recipient of social services, child welfare services, cash assistance, food stamps, or medical assistance, directly or indirectly derived from the records, papers, files, investigations or communications of the State, county or city, or subdivisions or agencies thereof, or acquired in the course of performance of official duties.[8]

With regard to child abuse and neglect, Article 88A, §6(b) provides that, with limited exceptions, "all records and reports concerning child abuse and neglect are confidential." The exemptions to that prohibition against disclosure are similar to the types of disclosure permitted under HHS regulations. *Compare, e.g.*, 45 C.F.R. §1314.14(i)(2)(i) and (iv) *with* Article 88A, §6(b)(2) (disclosure permitted to those investigating child abuse or those providing services to the child and family).[9]

---

[8] Article 88A, §5(a) further provides that the "records, papers, files and communications" of SSA and local social service departments, when used by any other government agency "shall be limited to the purposes for which they are furnished."

[9] As amended by Chapter 234, Laws of Maryland 1986, Article 88A, §6(b) authorizes disclosure under the following circumstances:

(1) Under a court order;

(continued...)

Moreover, because Maryland participates in all of the federal programs discussed in Part IIA above, State regulations comply with federal confidentiality requirements. These regulations protect the confidentiality of "[a]ny information relating to individuals, whether recorded or not, which is acquired in the course of performance of official duties." COMAR 07.01.02.01. Further, "[t]he use of all information in possession of [SSA] shall be restricted to purposes directly connected with the administration of [SSA's] programs." COMAR 07.01.02.03(B). Moreover, SSA may disclose information without the consent of the client only under the following circumstances:

> (1) Upon proper legislative or judicial order;
>
> (2) to public officials for purposes directly connected with the administration of a program under titles, I, IV, X, XIV, XVI, XIX, or XX of the Social Security Act or of any other Federally assisted program which provides assistance or services to individuals on the basis of need;

---

[9](...continued)

(2) To personnel of local or State departments of social services, law enforcement personnel, and members of multidisciplinary case consultation teams, who are investigating a report of known or suspected child abuse or neglect or who are providing services to a child or family that is the subject of the report.

(3) To local or State officials responsible for the administration of the child protective services as necessary to carry out their official functions;

(4) To a person who is the alleged child abuser or the person who is suspected of child neglect if that person is responsible for the child's welfare and provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information;

(5) To a licensed practitioner who, or an agency, institution or program which is providing treatment or care to a child who is the subject of a report of child abuse or neglect; or

(6) To a parent or other person who has permanent or temporary care and custody of a child, if provisions are made for the protection of the identify of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information.

> (3) Information relating to recipients under programs financed wholly by the State may also be given to public officials for purposes directly connected with the administration of such a State-financed program.

COMAR 07.01.02.04. Maryland has also adopted regulations to comply with federal confidentiality requirements pertaining to child abuse and neglect. *See* COMAR 07.02.07.18.

This concern for the protection of personal privacy is also reflected in the more general provisions of the Maryland Public Information Act. *See* §10-612(b) of the State Government Article ("SG" Article). Under SG §10-616(b), "[a] custodian shall deny inspection of public records that relate to welfare for an individual." Further, SG §§10-626 and 10-627 subject to civil and criminal liability anyone who willfully and knowingly permits inspection of a public record that names or otherwise identifies an individual, if disclosure of the record is prohibited by the Public Information Act.

D. Scope Of The Confidentiality Protections

Maryland's confidentiality laws, like similar federal laws, are intended to protect public assistance and social services clients from exploitation and embarrassment. *In re Cager*, 251 Md. 473, 482, 248 A.2d 384 (1967). They are also designed to provide a confidential forum in which clients feel that they can disclose complete and accurate information without fear of retaliation. These objectives are consistent with those underlying federal law, said by one court to be to prevent a recipient's exposure to exploitation or embarrassment; to preserve the dignity and self-respect of the welfare recipient; and to assure the integrity and efficiency of the welfare program. *Krauskopf v. Giannelli*, 467 N.Y.S.2d 542, 544-5 (Sup. Ct. 1983)

In *Cager*, the Court of Appeals held that a State's Attorney could not use information obtained directly from an AFDC recipient in order to bring a neglect proceeding. In light of the importance of confidentiality, the Court held, information obtained from the applicant could only be used for the purpose for which it was furnished - in that case, to enable a State's Attorney to obtain information about a non-supporting father, not to institute a neglect proceeding against the mother, the AFDC applicant. 251 Md. at 482-83.[10] The Court further held that a regulation adopted by the then Department of Public Welfare intended that welfare records "be used only by persons with appropriate authority, and only for purposes *directly* connected with the administration of welfare programs." 251 Md. at 482 (emphasis in original).

Courts interpreting federal law likewise have consistently required a welfare nexus before confidential information may be disclosed. For example, in *Whisler v. Whisler*, 684 P.2d 1025 (Kan. App. 1984), the court held that federal law prohibits a state that participates in the AFDC program from disclosing any information gathered regarding applicants or recipients of AFDC, unless "the person requesting the information is directly motivated by and concerned with (1) the administration of the program; (2) an investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of the program; or (3) other listed activities in 42 U.S.C. §602(a)(9)." 684 P.2d at 1031. *See also Michigan Welfare Rights Organization v. Dempsey*, 462 F. Supp. 227, 237 (E.D. Mich. 1978). In applying this nexus test, the court in *Whisler* held that a request for an AFDC recipient's address to enable a father to visit his minor child was neither "directly motivated by and concerned with the administration of" the AFDC program "nor ... within any other statutory exceptions to the general confidentiality afforded AFDC recipients under federal law." 684 P.2d at 1031. *See also* Michigan Welfare, 462 F. Supp. at 238 (disclosure of the names and addresses of AFDC recipients to their husbands or boyfriends cannot serve any of the permissible purposes specifically laid down by the federal statute). *Cf. State of Wisconsin v. Moser*, 334 N.W.2d 878, 881 (1983) (disclosure of AFDC information in paternity proceedings is permissible since paternity actions are "directly connected with the administration of the AFDC program").

E. Exceptions To Confidentiality Requirements

Because the courts have never addressed the applicability of these confidentiality requirements to information acquired by a social services employee about a client's criminal conduct, we cannot answer your question as assuredly as we would wish. Still, of one thing we are certain: It is unimaginable that these laws and regulations are intended

---

[10] The Court focused its attention on Article 88A, §5 rather than §6. For purposes of this discussion, however, the Court's interpretation of §5 is equally applicable to §6.

to prohibit *all* reporting of client crimes by social services employees. We cannot suppose that Congress or the General Assembly intended to prevent a caseworker from reporting, for instance, that a client is holding a hostage at gunpoint.

To avoid absurd results like this, we must try to find a reasonable balance between the policies underlying the confidentiality requirements, on the one hand, and the paramount public policy goal of preventing criminal injury, on the other. It would be "inconsistent with common sense" to ignore the latter, and we do not think that the courts would do so in an actual case. *See Kaczorowski v. City of Baltimore*, 309 Md. at 513.

We may draw guidance from a comparable confidentiality requirement, the attorney-client privilege, a common law privilege deeply rooted in this nation's jurisprudence.[11] Like the confidentiality laws protecting welfare clients, the attorney-client privilege is designed to encourage clients to make full disclosure to their attorneys. *Fisher v. United States*, 452 U.S. 391, 403 (1976); *State v. Pratt*, 284 Md. 516, 519-20 (1979). Thus, an attorney may not reveal information from a client about past criminal conduct. *See Weinstein's Evidence*, ¶503(d)(1)[01], at 503-117 (1990 Supp.).

The attorney-client privilege is not limitless, however. A client's communication in pursuit of a criminal or fraudulent act yet to be performed is not privileged. *Clark v. United States*, 289 U.S. 1, 15 (1933). "The reasons for the privilege all cease to operate where the desired legal advice refers not to prior wrongdoing, but to future wrongdoing." *In re Berkely & Co.*, 629 F.2d 548, 555 (8th Cir. 1980). *See also, e.g., Securities & Exchange Comm'n v. Gulf & Western Indus., Inc.*, 518 F. Supp. 675, 680 (D.D.C. 1981); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 40 (D. Md. 1974). As this office advised in regard to an individual who fraudulently provided false information to the Public Defender in order to qualify for representation, "[a]ny possible intrusion into the confidential relationship of attorney and client is outweighed by the competing interest of preventing fraud in obtaining Public Defender representation." 66 *Opinions of the Attorney General* 15, 17 (1981).

---

[11] The common law attorney-client privilege in Maryland is now embodied in §9-108 of the Courts Article: "A person may not be compelled to testify in violation of the attorney-client privilege."

Also not protected by the privilege are observations an attorney makes of a client. An attorney may testify, for example, about the client's clothing or physical characteristics. *See United States v. Kendrick*, 331 F.2d 110, 114 (4th Cir. 1964). In discussing the privilege, the court in *Kendrick* held that a client's characteristics are "observable by anyone who talked with the client, and there is nothing ... to suggest that the client intends his attorney's observation of such matters to be confidential.... [T]he privilege protects only the client's confidences, not things which, at the time, are not intended to be held in the breast of the lawyer, even though the attorney-client relation provided the occasion for the lawyer's observation of them." *Id.*[12]

We cannot conceive any reason why the law would prohibit a social services employee from disclosing what an attorney is free to disclose, given the parallel policies of the two sets of confidentiality requirements. The law in both cases is intended to encourage unhampered discussion by providing a forum for a confidential relationship. The laws are not intended, however, to shield those who commit criminal activity. *See People v. Bass*, 529 N.Y.S. 1961, 963 (Sup. Ct. 1988) (the privilege should not be used "to cover a transaction which is in itself a crime").[13]

When a client tells an employee of an intention to commit a crime or to continue ongoing criminal conduct (or, more likely, when the employee hears this from others) and views the intent as serious, the information thus conveyed, in our view, is not intended to be protected by the confidentiality statutes. We distinguish the situation in which the client tells the employee of a past crime, with no suggestion of an intention to repeat the act. Here we do not believe that the law allows the employee to disclose this information. To do so would compromise the development of a relationship of trust between the client and the

---

[12] Observations made by a social worker were held not privileged as such information was not "acquired in confidence." *Lynna B. v. Gloradon M.*, 92 Cal. App. 3d 682, 155 Cal. Rptr. 256 (Ct. App. 1979).

[13] We note also that when the General Assembly enacted the statutory accountant/client privilege, §9-110 of the Courts Article, intending "to protect the expectation of privacy of individuals in matters involving contracts, domestic disputes, and other civil and equity controversies ..., it did not seek to create an expectation of privacy involving possible violations of the criminal ... laws ...." *In re Special Investigation No. 202*, 53 Md. App. 96, 103, 452 A.2d 458 (1982).

employee where the need to protect society is much less acute.[14] Just as the attorney-client privilege would bar disclosure of comparable information by an attorney, so too the confidentiality provisions applicable to a social services employee bar disclosure.[15]

Thus, we conclude that a social services employee who, in the course of official duties, witnesses a crime or learns of someone's serious intention to commit a crime is not prohibited from reporting that information to law enforcement authorities. We strongly recommend that the Department of Human Resources develop policies to govern this area of discretion.[16]

IV

Conclusion

In summary, it is our opinion that:

1. Except when a statute imposes reporting requirements, citizens, including State employees, have no legally enforceable duty to report a crime. However, Executive Branch employees are subject to discipline if they fail to report certain drug offenses.

---

[14] The implied exception to confidentiality strictures discussed above might also permit disclosure of information about certain heinous past crimes that by their compulsive nature (serial murder, for example) present an inherent risk of repetition even without an expressed intention to repeat the crime.

[15] Although communications made by a client to a licensed social worker while receiving counseling are privileged, we believe that the same exceptions govern that relationship as govern the other confidential relationships we have discussed. *See* §9-122(b) of the Courts Article.

[16] It is a matter of professional judgment whether, under some circumstances, a social services employee ought to refrain from reporting, for example, a comparatively minor drug possession offense that the employee witnesses, in order to be able to continue to provide services like drug treatment therapy to the client. *See* §5-316(c) of the Courts Article (mental health providers have the option of providing treatment or informing law enforcement officials that a patient intends to inflict an injury to a specified victim).

2. The discretion to report a crime depends in part, but not exclusively, on whether a social services employee learns of the criminal activity in an official capacity. That is, the confidentiality restrictions that affect information about criminal activity gained in an employee's official capacity do not apply to information gained off-duty, in the employee's personal capacity. Hence, the employee has the discretion to report any or all information about a client's criminal activities gained in the employee's personal capacity.

A social services employee also has the discretion to report some, but not all, information about a client's criminal activities gained in the employee's official capacity. An employee may report any crime that he or she witnesses and any information about a client's intention to commit a future crime. Except as otherwise required by law, an employee may not report officially obtained information about a client's past criminal activity.

3. Certain professional employees are required by law to report any instance of suspected child abuse or neglect. Although the law does not mandate the reporting of other crimes observed during an investigation, an employee may report them to the police to the extent indicated in our second response above.

4. Except where a statutory reporting obligation addresses particular professions, an employee's job classification status does not affect whether he or she reports a crime involving a client.

J. Joseph Curran, Jr.
Attorney General

Sharon Krevor-Weisbaum
Staff Attorney

Jack Schwartz
Chief Counsel
Opinions & Advice

STATE LOTTERY

GAMBLING — CONSTITUTIONAL LAW — COMPACT CLAUSE — MULTISTATE LOTTERY AGREEMENT DOES NOT VIOLATE FEDERAL GAMBLING LAWS AND DOES NOT REQUIRE CONGRESSIONAL APPROVAL

May 31, 1990

The Honorable Rosa Lee Blumenthal
Maryland House of Delegates

You have requested our opinion on several questions relating to §9-111(b) of the State Government Article ("SG" Article), which authorizes the State Lottery Agency to join in the operation of a multistate lottery. SG §9-111(b) provides as follows: "With the approval of the [State Lottery] Commission and the Legislative Policy Committee, the Director [of the State Lottery Agency] may enter into an agreement to operate a multi-state lottery with any other political entity outside the State that operates a lottery."

Specifically, you ask:

1. Is it a violation of federal gambling statutes to operate an interstate gambling wire service?

2. Would the establishment of an interstate compact to operate a multistate lottery require the ultimate approval of the United States Congress under Article I, §10, clause 3 of the United States Constitution (the "Compact Clause"), which provides that "[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State ..."?

3. Would the compact have to create an interstate authority to establish a banking exchange and an interstate communications service and to control the entire multistate operation, with participating representation by the several states?

4. Does the approval of the Legislative Policy Committee called for by SG §9-111(b) satisfy the Compact Clause's requirement for legislative approval of a multistate compact or agreement?

For the reasons stated below, we conclude as follows:

1. While a private interstate gambling wire service would be a violation of federal law, the State Lottery Agency's participation in a multistate lottery like that contemplated by SG §9-111(b) would not violate federal law.

2. The establishment of a multistate lottery agreement would not fall within the purview of the Compact Clause and therefore would not require congressional approval. In light of our conclusion in this regard, we need not address your remaining two questions.

I

Background

After almost a century of political and social disfavor, modern lotteries were reborn in 1963 with the advent of the state-run New Hampshire Sweepstakes. By 1974, 13 states, including Maryland, were operating lotteries. Currently, 27 states and the District of Columbia have authorized state-run lotteries to produce additional revenues for their state governments.

In 1985, the states of Maine, Vermont, and New Hampshire entered into an agreement to operate a Tri-State Lotto Game. The purpose of the agreement was to increase the prize pool, thereby making it possible to offer prizes larger than the states could offer individually and consequently increasing the attractiveness of the lottery.

The success of the Tri-State Lotto has served as an impetus to other states interested in pooling resources to provide a larger prize fund for winners of their state lotteries. On September 16, 1987, six states and the District of Columbia signed an agreement to operate a multistate lotto game to be called "Lotto America." The participating states are Iowa, Kansas, Oregon, Missouri, Rhode Island, and West Virginia. The authorization given by SG §9-111(b) permits the Maryland State Lottery Agency to explore the possibility of becoming a signatory to this type of agreement.

II

Federal Anti-Gambling Statutes

Current federal law prohibits various lottery-related activities. *See* 18 U.S.C. §§1301 (prohibiting the interstate transportation of lottery tickets or related material); 1302 (prohibiting the mailing of lottery tickets, material, or any publications advertising a lottery or any check or other instrument or money for the purchase of a lottery ticket); 1303 (prohibiting any Postal Service employee from knowingly delivering any such material); and 1304 (prohibiting broadcasting of any advertisement or information concerning any lottery). Under 18 U.S.C. §1307, however, state-run lotteries are exempt from many of these prohibitions.[1] This section provides, in relevant part:

> (a) The provisions of sections 1301, 1302, 1303, and 1304 shall not apply to —
>
> (1) an advertisement, list of prizes, or other information concerning a lottery conducted by a State acting under the authority of State law which is —
>
> (A) contained in a publication published in that State or a State which conducts such a lottery; or
>
> (B) broadcast by a radio or television station licensed to a location in that State or a State which conducts such a lottery ...

* * *

---

[1] In addition, the Charity Games Advertising Clarification Act of 1988, Pub. L. No. 100-625, 102 Stat. 3205 (1988), exempted from federal prohibition the advertising of a lottery, gift enterprise, or similar scheme conducted by a nonprofit or governmental organization or as a promotional activity by a commercial organization, if the scheme is legal in the state where conducted. *See* 18 U.S.C. §1307(a)(2). The effective date of that amendment was delayed to April 7, 1990, to afford the states time to enact their own laws to prohibit advertising private lotteries, if they chose to do so. H.R. Rep. No. 557, 100th Cong., 2d Sess. 3, *reprinted in* 1988 U.S. Code Cong. & Admin. News 4343, 4344.

> (b) The provisions of section 1301, 1302, and 1303 shall not apply to the transportation or mailing —
>
> (1) to addresses within a State of equipment, tickets, or material concerning a lottery by that State acting under the authority of State law ....

Similarly, 18 U.S.C. §1953 prohibits the interstate transportation of "wagering paraphernalia," but specifically exempts the transportation of "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law ...." 18 U.S.C. §1953(b)(4).

Some federal restrictions on state-run lotteries remain — for example, the interstate mailing of lottery subscription tickets is prohibited by 18 U.S.C. §1302 and is not exempt from that prohibition under 18 U.S.C. §1307(b). Nonetheless, states may engage in a wide range of lottery-related activities. Neither the Tri-State Lotto nor the recent Lotto America arrangement conflicts with federal law. The Lotto America agreement, for example, provides that ticket sales shall occur only within the boundaries of each participating jurisdiction; only prize funds are transferred between the states.[2]

With specific reference to your inquiry about "an interstate gambling wire service," 18 U.S.C. §1084(a) prohibits persons engaged in the business of betting or wagering from using "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers ...."[3] This provision was

---

[2] While 18 U.S.C. §1302 bars interstate mailing of money to purchase a lottery ticket, it does not prohibit the interstate mailing of money to pay a prize winner. Lottery states currently mail prize money regularly to winners who are not residents of the state conducting the lottery.

[3] Radio and television broadcasting facilities are not within the scope of 18 U.S.C. §1084. *See* 18 U.S.C. §1081 ("'wire communication facility' means any and all instrumentalities, personnel, and services ... used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission").

intended to suppress illegal bookmaking. *See* H.R. Rep. No. 967, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Adm. News 2631.

The provisions of 18 U.S.C. §1084 thus appear to recognize the generally understood distinction between betting or wagering and lotteries: A bet or wager is an agreement between two or more persons that each will gain or lose according to the outcome of an uncertain event, typically a sporting event; while a lottery is a scheme for pooling funds from which to distribute prizes by pure chance among persons who pay consideration for an opportunity to win. *See Opinion of the Justices*, 385 A.2d 695, 700 (Del. 1978); 38 Am. Jur. 2d *Gambling* §§3, 5, and 6 (1968); 54 C.J.S. *Lotteries* §7 (1987). The legislative history of 18 U.S.C. §1084 is replete with references to private bookmaking on sporting events, but gives no indication of an intent to prohibit states from engaging in telephonic or similar communications regarding their own lotteries.

The House Report on 18 U.S.C. §1953, which was enacted at the same time as 18 U.S.C. §1084, indicates the same. The report noted that 18 U.S.C. §§1301 and 1305 already prohibited interstate transportation of lottery tickets; however, that prohibition did not apply to sports betting slips. H.R. Rep. No. 968, 87th Cong, 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News 2634, 2635. Therefore, 18 U.S.C. §1953's prohibition against interstate transportation of wagering paraphernalia was enacted to close that loophole, "as part of the Attorney General's legislative program to combat organized crime and racketeering." *Id.* The contemporaneous enactment of 18 U.S.C. §1084 and 1953 and their closely related thrusts indicate that 18 U.S.C. §1084's references to "bets or wagers" limit that section's reach to gambling other than lotteries.

In any event, the multistate lottery arrangements under consideration do not involve the use of interstate wire communication facilities to transmit bets or information from or to individuals who play the lottery games; all communications would be between the participating states themselves and would be confined to information like the number and dollar value of tickets sold by each state and the winning numbers.[4] Hence, whatever the scope of 18 U.S.C. §1084, we believe that neither the existing multistate lotteries nor any that Maryland might join uses interstate wire communications in a prohibited way.

---

[4] *See* footnote 2 above and accompanying text.

III

The Compact Clause

Article I, §10, cl. 3 of the United States Constitution provides, in pertinent part, that "[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State ...." "Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States." *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 459 (1978).

However, the United States Supreme Court has held that the Compact Clause applies only to agreements "'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" 434 U.S. at 468, (quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)). *See also Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976). The Court has consistently pointed out that the Compact Clause was not intended to frustrate cooperative efforts between states but rather to guard against the "enhancement of state power at the expense of the federal supremacy ...." *See Multistate Tax Comm'n*, 434 U.S. at 470. *See also Holmes v. Jennison*, 14 Pet. 540, 573-74, 10 L. Ed. 579 (1840). The relevant inquiry, therefore, must focus on the "impact [of an interstate compact] on our federal structure." *Multistate Tax Comm'n*, 434 U.S. at 471.

The mere fact that a multistate lottery game will result in larger prizes and additional revenue does not increase the "political power" of the party states relative to that of the federal government. Similarly, the fact that a multistate agreement would create an administrative arm "is irrelevant if it does not impermissibly enhance state power at the expense of Federal supremacy." 434 U.S. at 472.

Each state, through appropriate legislation, may authorize a state-run lottery without threatening the just supremacy of the federal government, as shown by the federal statutes discussed above. Hence, it is difficult to see how the joint operation of a lottery by two or more states, in and of itself, interferes with that supremacy so that the

Compact Clause is applicable.[5] The Supreme Court of Missouri, rejecting just such a Compact Clause challenge to a multistate lottery agreement, concluded that "[t]here is no threat to federal authority. Congress retains its power to regulate lotteries to the full extent of its delegated powers." *Tichenor v. Missouri State Lottery Comm'n*, 742 S.W.2d 170, 176 (Mo. 1988).

In light of our determination that a multistate lottery agreement does not constitute an interstate compact within the meaning of the Compact Clause, it is not necessary to address your final two inquiries.[6]

IV

Conclusion

In summary, it is our opinion that a multistate lottery agreement is permissible under federal laws and would not constitute an interstate compact requiring congressional approval under the Compact Clause.

J. Joseph Curran, Jr.
Attorney General

Shelley S. Wasserman
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[5] In accord with this conclusion are an April 4, 1984, opinion of the Attorney General of Maine and an April 23, 1986, opinion of the Attorney General of Oregon (Opinion No. 8177).

[6] We note, however, that the portion of SG §9-111(b) requiring Legislative Policy Committee approval of a decision to enter a multistate lottery agreement raises a serious constitutional question. We have repeatedly pointed out the questionable validity of such "legislative veto" provisions. *See* letter to Governor Schaefer from Attorney General Curran on House Bill 376 (May 24, 1990) (citing prior letters). However, legislative veto provisions are generally severable. *Id.*

STATE'S ATTORNEYS

"PRIVATE PRACTICE OF LAW" — PRO BONO ACTIVITIES — STATUTORY RESTRICTIONS ON THE "PRIVATE PRACTICE OF LAW" DO NOT PROHIBIT UNCOMPENSATED CIVIL PRO BONO ACTIVITIES

May 25, 1990

The Honorable Andrew L. Sonner
State's Attorney for Montgomery County

You have requested our opinion on the scope and applicability of provisions in Article 10, §40 of the Maryland Code prohibiting the "private practice of law" by State's Attorneys and members of their staff. Specifically, you pose the following two questions:

1. Does the phrase "the private practice of law" forbid the volunteering of time for civil pro bono activities by State's Attorneys and their deputies and assistants?

2. Do the variations in language from section to section within [Article 10, §40] have any bearing on whether personal time may be volunteered for civil pro bono activities by State's Attorneys and their deputies and assistants?

For the reasons stated below, we conclude as follows: Those State's Attorneys (and, in some counties, Deputy and Assistant State's Attorneys) who are prohibited by Article 10, §40 from engaging in "the private practice of law" are not thereby barred from performing uncompensated civil pro bono service. However, language in Article 10, §40(c)(1)(ii), (i)(1), and (m)(1) further prohibiting appearances before any court or other entity should cause the State's Attorneys for Anne Arundel, Charles, and Harford Counties to refrain from such appearances, even in pro bono matters. Finally, under legislation effective July 1, 1990, the State's Attorney, Deputy State's Attorneys, and Assistant States Attorneys for Prince George's County may engage in pro bono activity, including court and other appearances, but only under the auspices of the Prince George's County Bar Foundation.

I

Pro Bono Obligations

Rule 6.1 of the Maryland Rules of Professional Conduct, entitled "Pro Bono Publico Service," provides as follows:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, or by financial support for organizations that provide legal services to persons of limited means.

The comment to the rule goes on to say that "[e]very lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged." Although not previously embodied in a rule, the pro bono obligation of lawyers has long been a part of the ethical precepts of the profession. *See* Ethical Considerations 2-25, 8-3, and 8-9 of the former Code of Professional Responsibility.

Leaders of the Maryland Bar have been especially active recently in encouraging greater pro bono participation by this State's lawyers. A commission chaired by Representative Benjamin Cardin produced a number of recommendations for more effective provision of legal services to the poor. The Maryland State Bar Association has launched its "People's Pro Bono" program, designed to encourage pro bono activities by members of that association. And this office became the first Attorney General's office in the country to adopt a pro bono program for its lawyers.

As your letter points out, many State's Attorneys and the lawyers who work for them would like to volunteer to provide civil pro bono representation. They are concerned, however, by seemingly restrictive language in many of the subsections of Article 10, §40.[1] Your request asks us to clarify the extent of the restrictions.

II

Private Practice Restrictions In Article 10, §40

A. *Legislative History*

Article 10, §40 was originally enacted in 1945. Chapter 791, Laws of Maryland 1945. Originally codified as §37A, the provision's title indicated that it "relat[ed] to the salaries and expenses of the State's Attorneys and Assistant State's Attorneys of the several Counties." The statute was simply a laundry list of salaries. It contained no provisions regarding the private practice of law.

The first such restriction, enacted in 1965, applied to the State's Attorney for Montgomery County. The General Assembly increased the salary of the State's Attorney by 60 percent and, at the same time, added the following language: "The State's Attorney shall devote his full time and attention to the duties of his office as State's Attorney and shall not engage in the private practice of law at any time in any

---

[1] Language of one kind or another restricting private civil practice by State's Attorneys or, in some instances, by staff members appears in subsections addressing the following counties: Allegany (§40)(b)), Anne Arundel (§40(c)), Baltimore (§40(d)), Calvert (§40(e)), Charles (§40(i)), Frederick (§40(k)), Harford §40(m)), Howard (§40(n)), Montgomery (§40(p)), Prince George's (§40(q)), St. Mary's (§40(s)), Somerset (§40(t)), Washington (§40(v)), Wicomico (§40(w)), and Worcester (§40(x)). No pertinent language appears in subsections addressing the following counties: Caroline (§40(f)), Carroll (§40(g)), Cecil (§40(h)), Dorchester (§40(j)), Kent (§40(o)), Queen Anne's (§40(r)), and Talbot (§40(u)).

We note that the State's Attorney for Garrett County is to serve "full-time." §40(e)(1). However, this office has advised that a requirement for full-time service applies only to "regular working hours during the work week ... and does not prohibit ... the private practice of law outside the normal work period." Thus, such language does not prohibit pro bono service on personal time. Letter of advice to Delegate Michael J. Sprague from Assistant Attorney General Robert A. Zarnoch (March 12, 1979).

No provision of Article 10, §40 applies to the State's Attorney for Baltimore City. As far as we are aware, no other statute or ordinance imposes a private practice restriction on that office. However, as a policy matter, the State's Attorney for Baltimore City generally prohibits private practice, except for certain pro bono activities.

jurisdiction during his tenure of office." Chapter 397, Laws of Maryland 1965, then codified at §40(p)(1). The bill also doubled the salaries of the Deputy State's Attorney and four Assistant State's Attorneys and imposed the same private practice restriction on them. Chapter 397, then codified at §40(p)(2).[2]

The next year, the General Assembly raised the salary of the State's Attorney for Prince George's County and also provided "that the State's Attorney shall not engage in the private practice of law in any matter whatsoever." Chapter 732, Laws of Maryland 1966, codified at §40(q)(1). This language was not significantly different from that enacted the year before regarding Montgomery County. However, the General Assembly also imposed a more exacting version of the restriction: "The State's Attorney ... shall not, except in connection with and in the performance of his duties as such State's Attorney, appear as counsel or represent any party professionally before any Court, Magistrate, Board, Commission, or Agency of this State or any County or political subdivision of this State." *Id.* The General Assembly chose somewhat different wording to express essentially the same thought with respect to the Deputy State's Attorney and three full-time Assistant State's Attorneys for Prince George's County, who also got large raises:

> The Deputy State's Attorney and the three full-time Assistant State's Attorneys ... shall not, except in connection with and in the performance of their duties ..., appear as Counsel or represent any party professionally before any Court, Magistrate, Board, Commission or Agency of this State or any County or political subdivision of this State. It is intended by the provisions herein that the Deputy State's Attorney and the full-time Assistant State's Attorneys shall devote their full time and attention to the duties of their office as required, and shall not represent any client or receive any professional fee of any kind in connection with any matter which is pending or which is appropriate to be pending before any Court, Magistrate, Board, Commission or Agency.

Chapter 732, Laws of Maryland 1966, then codified at §40(q)(2).[3]

---

[2] The restrictions were later combined and are now codified at §40(p)(7).

[3] This restriction is now codified at §40(q)(5).

Three years later, when the General Assembly increased the salary of the State's Attorney for Harford County by 50 percent, it also adopted the same restrictive language as had been enacted for the State's Attorney for Prince George's County. *See* Chapter 118, Laws of Maryland 1969, codified at §40(n)(1).

In 1970, the General Assembly again followed the language of the Prince George's County restriction when it created two full-time Assistant State's Attorney positions for Anne Arundel County, at a significantly increased salary. Chapter 718, Laws of Maryland 1970. However, that same year, when the General Assembly more than doubled the salaries of the State's Attorney and Deputy State's Attorney of Frederick County, it adopted a restriction tracking a portion of the simpler Montgomery County language: "It is intended ... that the State's Attorney and deputy State's attorney shall not engage in the private practice of law in any matter whatsoever." Chapter 213, Laws of Maryland 1970, codified at §40(k)(3).[4]

In 1972, the General Assembly created the position of Deputy State's Attorney for Charles County, at a salary greater than that of the State's Attorney. The legislation provided that the Deputy State's Attorney "shall devote full time to the duties of the office and shall not engage in the private practice of law at any time in any jurisdiction, during the tenure of office." Chapter 328, Laws of Maryland 1972, codified at §40(i)(2).[5]

In 1974, in four separate pieces of legislation, the General Assembly raised the salaries of the State's Attorneys for Baltimore, St. Mary's, Washington, and Worcester Counties and imposed corresponding restrictions on private practice. Again, however, the General Assembly did not use consistent language in enacting these restrictions.

For two jurisdictions, Baltimore and Washington Counties, the General Assembly essentially followed the Montgomery County model. The State's Attorney for Baltimore County, the Deputy State's Attorneys, and certain full-time Assistant State's Attorneys, "shall serve full-time and may not engage in the private practice of law."

---

[4] This provision is now worded as follows: "The State's Attorney and Deputy State's Attorney may not engage in the private practice of law."

[5] This provision is now worded as follows: "The deputy State's Attorney shall serve full time and may not engage in the private practice of law."

Chapter 723, Laws of Maryland 1974, codified at §40(d)(1), (2), and (3). For the State's Attorney for Washington County, the phrasing was slightly different: "The State's Attorney may not engage in the private practice of law at any time in any jurisdiction during his tenure of office." Chapter 547, Laws of Maryland 1974, codified at §40(v)(5).

For two other jurisdictions, St. Mary's and Worcester Counties, the General Assembly followed the Prince George's County model. Thus, for the State's Attorney for St. Mary's County, the restrictive language was as follows: "During his term of office, the State's Attorney may not appear as counsel or represent any party professionally before any Court, Board, Commission or Agency of the State or any County or political subdivision in this State, except in connection with and in the performance of his duties as the State's Attorney." Chapter 284, Laws of Maryland 1974, then codified at §40(s).[6] An ever more elaborate formulation was that applicable to the State's Attorney for Worcester County: "[T]he State's Attorney, during his term of office, may not, except in connection with and in the performance of his duties as such State's Attorney, appear as counsel or represent any party professionally before any Court, Magistrate, Board, Commission on Agency of the State, or any County or political subdivision of the State or any other state. It is intended by the provisions of this subsection that the State's Attorney may not engage in the private practice of law in any manner whatsoever ...." Chapter 112, Laws of Maryland 1974, then codified at §40(x)(1).[7]

---

[6] In 1980, the restriction applicable to the State's Attorney for St. Mary's County was relaxed in several respects. The prior language prohibiting court and other appearances was modified so that the prohibition applied only to bodies sitting in St. Mary's County. Also, the State's Attorney was permitted a limited civil practice. Chapter 690, Laws of Maryland 1980.

The next year, however, the General Assembly raised the State's Attorney's salary and adopted the following restriction: "During his term of office, the State's Attorney may not engage in the private practice of law in any matter whatsoever." Chapter 82, Laws of Maryland 1981, codified at §40(s)(1)(i).

[7] Later, the General Assembly repealed this restriction and expressly authorized the State's Attorney for Worcester County to engage in "the private practice of law provided that the private practice does not in any manner interfere with the performance of his duties as State's Attorney." Chapter 587, Laws of Maryland 1979. Finally, the General Assembly repealed this language and simply provided that "the State's Attorney's salary shall be as set by the County Commissioners," without further reference to a private practice ban. Chapter 749, Laws of Maryland 1982, codified at §40(x)(1).

Also in 1974, the General Assembly adopted a restriction on the private practice of the State's Attorney for Allegany County nearly identical in wording to that adopted for the State's Attorney for Worcester County. Chapter 857, Laws of Maryland 1974, then codified at §40(b)(1). The unusual aspect of the Allegany County legislation is that the restriction was not linked to a salary increase.

In 1976, when the General Assembly doubled the salary of the State's Attorney for Wicomico County, it added the following restriction: "The State's Attorney shall serve full time and may not engage in the private practice of law." Chapter 824, Laws of Maryland 1976.[8]

Also, in 1976, when the General Assembly raised the salary of the State's Attorney for Anne Arundel County to that of a circuit court judge, it imposed on the State's Attorney the same restriction on appearances as had previously been enacted for the full-time Assistant State's Attorneys in that office. Chapter 533, Laws of Maryland 1976, codified at §40(c)(1).

In 1979, the General Assembly rewrote the restriction applicable to the Deputy State's Attorney and certain Assistant State's Attorneys for Anne Arundel County. Instead of the language prohibiting *both* court and other appearances *and* private practice, the 1979 legislation simply precluded "the private practice of criminal law" for the deputies and some assistants and "the private practice of law" for other assistants. Chapter 21, Laws of Maryland 1979, then codified at §40(c)(3)(i) and (4)(i).[9]

In 1980, the General Assembly increased the salary of the State's Attorney for Howard County from a flat $25,000 to a salary equal to

---

[8] A year earlier, the General Assembly coupled a raise for the Assistant State's Attorneys for Wicomico County with the following restriction: "The Assistant State's Attorneys shall devote their full time and attention to the duties of their office as Assistant State's Attorneys and may not engage in the private practice of law at any time in any jurisdiction during their tenure of office." Chapter 158, Laws of Maryland 1975, then codified at §40(w)(5). This restriction was repealed by Chapter 123, Laws of Maryland 1980.

[9] Then, in 1981, the General Assembly simplified the language to provide that "[t]he Deputy State's Attorney and the Assistant State's Attorneys shall be precluded from the private practice of criminal law and, with the exception of one Assistant, shall serve full time." Chapter 127, Laws of Maryland 1981, codified at §40(c)(5).

that of District Court judges. By amendment, the bill set out the following simple restriction: "He may not engage in the private practice of law." Chapter 492, Laws of Maryland 1980, codified at §40(n)(1).

Also in 1980, when it raised the salary of the State's Attorney for Allegany County to 75 percent of that of a District Court judge, the General Assembly replaced the previously adopted "no appearances" language with the simpler "no private practice" restriction: "During his term of office, the State's Attorney may not engage in the private practice of law." Chapter 875, Laws of Maryland 1980, codified at §40(b)(1).

In 1981, however, when the General Assembly raised the salary of the State's Attorney for Charles County, it reverted to the "no appearances" language of the Prince George's County model. Chapter 305, Laws of Maryland 1981, codified at §40(i)(1).[10]

In 1985, the General Assembly increased the salary of the State's Attorney for Calvert County from $28,000 to 90 percent of that of a District Court judge. In the same legislation, the General Assembly provided as follows: "While in office, the State's Attorney shall serve full time and may not engage in the private practice of law." Chapter 419, Laws of Maryland 1985, codified at §40(e)(1)(iii).

In 1989 the General Assembly increased the salary of the State's Attorney for Somerset County from $24,000 to $60,000. Coupled with the raise was the following restriction: "The State's Attorney may not engage in the private practice of law at any time in any jurisdiction during the State's Attorney's tenure of office." Chapter 403, Laws of Maryland 1989.

The most recent pertinent enactment is the only one that addresses pro bono activity. In Chapter 185 (House Bill 881) of the Laws of Maryland 1990, the General Assembly clarified its intention about the "no appearances" version of the private practice ban previously adopted for the State's Attorney for Prince George's County and the staff of that office. Article 10, §40(q)(1) and (q)(5) provide as follows, effective July 1, 1990: "However it is not intended that these

---

[10] "Except in connection with and in the performance of duties as State's Attorney," the State's Attorney for Charles County "shall serve full time, and may not appear as counsel or present any party professionally before any court, board, commission, or agency of this State or of any of its political subdivisions, or otherwise engage in the private practice of law."

[restrictive] provisions will preclude the State's Attorney [and Deputy and Assistant State's Attorneys] from participating in the pro bono program administered by the Prince George's County Bar Foundation."

B. Assessment of Legislative Objective

We set out this tedious litany in an effort to draw from the history of §40 some sense of the legislative purpose. We believe that we understand the legislative objective, taken as a whole, although we are uncertain about the significance of the variations in wording.

The restrictions on private practice are inextricably linked to compensation. When §40 was first enacted in 1945, all State's Attorneys were permitted to augment their limited statutory salaries through private practice. Then, as the population of many of the jurisdictions grew and so, correspondingly, did the work of the State's Attorneys' offices, the General Assembly perceived the need for those offices to be led or staffed by lawyers concerned solely with that work. But if it wanted a State's Attorney or staff member who would be so occupied with the work of the office as to preclude a practice on the side, the General Assembly would have to set a commensurate salary. Hence, with but a single exception, all of the restrictions on private practice, however phrased, were enacted as components of legislation significantly increasing the salary of the State's Attorney or staff member in question. Indeed, sometimes the titles of bills raising a salary and imposing a corresponding private practice restriction referred to the salary only, without specific reference to the restriction; the latter was evidently understood to be a mere detail of the subject of salary. *See, e.g.*, Chapter 328, Laws of Maryland 1972; Chapter 112, Laws of Maryland 1974; Chapter 875, Laws of Maryland 1980.

Pertinent cases from other jurisdictions confirm our view that the private practice restrictions are a matter of compensation policy, and do not address other public policy issues. *County of Madera v. Gendron*, 59 Cal. 2d 798, 31 Cal. Rptr. 302, 305, 382 P.2d 342 (1963) (the "effect of [such] legislation is to limit [the prosecutor's] compensation to the official figure"). *See also Ray v. Hand*, 225 Ga. 589, 170 S.E.2d 692, 694 (1969); *State ex rel. Becker v. Wiley*, 133 P.2d 507, 514 (Wash. 1943).[11]

---

[11] This conclusion does not require us to revisit prior advice on whether a restriction on private practice is within the scope of Article III, §35 of the Maryland Constitution, which provides, in part, that the "salary or compensation of any public officer" serving a term of four years or less may (continued...)

We cannot offer a satisfactory explanation for the variations in wording from one provision to another. Perhaps they merely reflect the vagaries of drafting, rather than policy choices that differ from one jurisdiction to the next. Essentially, there are two models: the relatively simple "shall not engage in the private practice of law" language first enacted in 1965 for the State's Attorney for Montgomery County; and the more elaborate "shall not appear before any court" language, first enacted — *in addition to* "no private practice" language —for the State's Attorney for Prince George's County in 1966. Later drafters may have happened upon one or the other of these two models and then sometimes added variations of their own. We really cannot tell.

Nevertheless, we cannot ignore the more stringent "no appearances" language or simply assume that it means the same thing as the "no private practice" restriction. Perhaps the General Assembly was concerned that a State's Attorney might have, or be perceived to have, undue influence with a tribunal, and so decided to bar all court and other appearances, compensated or not. *Cf. Aldridge v. Capps*, 56 Okla. 678, 156 P. 624 (1916). In any event, we have no basis for advising that the "no appearances" restriction should not be given the effect that its wording unmistakably conveys.

---

[11](...continued)
not be "increased or diminished during his term of office." This office has previously advised that Article III, §35 does not prohibit the imposition of a ban on private practice during a State's Attorney's term. The crux of the reasoning is that "the prohibition of [Article III, §35] plainly refers to the public compensation of an officer." Letter of advice to Senator Joseph J. Long, Sr. from Assistant Attorney General Richard E. Israel (Jan. 12, 1979). *See also* letter of advice to Delegate Philip Carey Foster from Assistant Attorney General Robert A. Zarnoch (March 20, 1990); letter of advice to Delegate Daniel A. Long from Assistant Attorney General Linda H. Lamone (Feb. 19, 1987).

Although a ban on private practice does not affect public compensation, and therefore does not invoke Article III, §35, such a ban surely addresses compensation as whole, for it limits the State's Attorney to the level of public compensation. The point of the present opinion is that these bans should not be taken to have prohibited *uncompensated* pro bono service, for that is a matter beyond their scope.

III

Applicability To Pro Bono Activities

Because we have concluded that the General Assembly's enactment of private practice restrictions was intended solely to regulate the compensation of State's Attorneys and staff members affected by the restrictions, it follows that these restrictions should not be construed to prohibit uncompensated civil pro bono activities. To extend the prohibition beyond its intended scope would be inconsistent with the legislative goal. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 514-15, 525 A.2d 628 (1987).[12]

We do not mean to suggest that, as a general matter, pro bono representation is not "the practice of law." In other contexts, of course it is. *See* §10-101(h) of the Business Occupations & Professions Article ("BOP" Article). *Cf.* 52 *Opinions of the Attorney General* 244, 245 (1967) ("it seems to be clear that a person might 'practice law' gratuitously ..."). If someone is neither a lawyer nor acting under a lawyer's supervision and is providing even uncompensated legal services, that person would be engaged in the unauthorized practice of law. *See* BOP §10-601(a). *See also* 42 *Opinions of the Attorney General* 338, 339 (1957) ("One may be guilty of the 'practice of law' without a license even though he receives no fee for the services performed.").

Rather, our point is that the provisions of Article 10, §40 should be construed to conform to the legislative goal underlying these particular provisions. In our view, that goal was to limit the total compensation of a State's Attorney or staff members to a salary specified in the statute, not to prohibit those lawyers from carrying out their professional obligation to render uncompensated pro bono service.

At the same time, we cannot advise those who are governed by language prohibiting their appearance before courts and other bodies that they may ignore that language in carrying out pro bono activities. Until the General Assembly addresses itself specifically to pro bono activities by these State's Attorneys, we advise that the State's Attorneys for Anne Arundel, Charles, and Harford Counties should refrain from court and other prohibited appearances if they undertake pro bono activities.

---

[12] Nor does a "full-time" requirement prohibit pro bono activities on a lawyer's personal time. *See* the second paragraph of note 1 above.

refrain from court and other prohibited appearances if they undertake pro bono activities.

Our conclusions are not undermined by Chapter 185 of the Laws of Maryland 1990, the recently enacted legislation expressly authorizing certain pro bono activities by the State's Attorney for Prince George's County and his staff. As we have pointed out, the Prince George's County provisions were the most rigorous of any, and the Prince George's County Delegation, the sponsor of the legislation, might reasonably have thought that these restrictions, unless clarified, would effectively preclude any meaningful pro bono service. Moreover, Chapter 185 limits pro bono activities to those under the aegis of a particular program. For these reasons, we do not regard Chapter 185 as implicitly conveying any legislative understanding of provisions apart from those affecting the State's Attorney's Office for Prince George's County. We do think, however, that Chapter 185 underscores the need for more general legislation authorizing pro bono activities.

Finally, the analysis in this opinion is directed only to the restrictive language in the statute. We do not address the limitations that a State's Attorney might, as a matter of office policy, choose to impose.

IV

Conclusion

In summary, it is our opinion that in all counties, State's Attorneys and the members of their staff are not prohibited by Article 10, §40 from engaging in uncompensated civil pro bono activities.[13] However, the State's Attorneys for Anne Arundel, Charles, and Harford should not engage in the representation of pro bono clients before any State court or any other State or local agency. We recommend that either the General Assembly by statute or the Court of Appeals by rule adopt an express authorization for uncompensated civil pro bono representation in every jurisdiction.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[13] The State's Attorney for Prince George's County and his deputies and assistants may engage only in pro bono activities under the program of the Prince George's County Bar Foundation.

TAXATION

RECORDATION TAX — CREDIT UNIONS — FEDERAL CREDIT UNIONS' STATUTORY EXEMPTION FROM STATE AND LOCAL TAXES DOES NOT APPLY TO RECORDATION TAX ON MORTGAGES AND DEEDS OF TRUST

September 10, 1990

Mr. Wylie L. Ritchey, Jr.
Chief Deputy Clerk
Circuit Court for Baltimore County

You have requested our opinion concerning the continuing validity of a 1975 letter of advice regarding the applicability of the recordation tax to certain instruments. That letter indicates that a mortgage or deed of trust given to a federal credit union is exempted from recordation tax by a federal statute, 12 U.S.C. §1768.

For the reasons stated below, we conclude that the 1975 advice letter is incorrect. The federal statute exempting a federal credit union from paying State and local taxes does not apply to the recordation tax charged upon the recording of a mortgage or deed of trust given to a federal credit union.

I

Scope of Federal Statutory Exemption

In a November 24, 1975 letter of advice to Howard Smith, Clerk of the Circuit Court for Montgomery County, Assistant Attorney General William Rubin responded to a question concerning a federal credit union's entitlement to a refund of recordation tax paid upon the recording of a mortgage given to the credit union. The credit union based its claim for refund on the exemption from federal, state, and local taxes, except real and personal property taxes, afforded federal credit unions under 12 U.S.C. §1768. The letter advised that the federal exemption applied to a mortgage or deed of trust given to a federal credit union.

We conclude that this advice was in error. The exemption set forth in 12 U.S.C. §1768 provides, in pertinent part, as follows:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.

The plain language of this statute exempts a federal credit union from paying a tax that would otherwise be payable *by the federal credit union*. Nothing in the statute expressly or impliedly exempts from state tax a mortgage or deed of trust given to a federal credit union if, like the recordation tax, the incidence of the tax falls on the borrower who is giving the mortgage or deed of trust to the credit union, rather than on the credit union.[1]

In support of its interpretation of 12 U.S.C. §1768, the 1975 letter cited a Supreme Court decision and an Attorney General's opinion, both of which we believe to be distinguishable. In *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939), the statutory exemption afforded the federal corporation expressly covered "loans."[2] The

---

[1] Although no statutory provision expressly imposes liability for the recordation tax on the borrower, certain provisions of law do reflect this longstanding practice. Section 14-104 of the Real Property Article, which creates a presumption, absent written agreement to the contrary, that State recordation tax and State and local transfer taxes will be shared equally by the parties to the instrument, expressly excludes mortgages and deeds of trust from application of the presumption. *See also* §12-105(f)(2) of the Tax-Property Article, which expressly provides that the borrower shall pay the recordation tax on subsequent draws under a line-of-credit mortgage or deed of trust. *Cf.* Chapter 619 of the Laws of Maryland 1916, Preamble (describing "long established custom").

[2] The contrast between the statute construed in *Pittman* and 12 U.S.C. §1768 is striking. The former exempted the federal corporation's "franchise, its capital, reserves and surplus, and its loans and income" from taxation. The latter exempts the credit unions' "franchises, capital, reserves, surpluses, and other funds, and their income ...." The term "loans" is conspicuously absent from 12 U.S.C. §1768.

Court found that the term "loans" covered the entire process of lending, including a mortgage given to the corporation as security for repayment of the loan. Similarly, the statutory exemption afforded the Reconstruction Finance Corporation and other enumerated corporations, which was the subject of 27 *Opinions of the Attorney General* 448 (1942) also expressly covered "loans." Other similar federal exemptions that apply to state recordation tax on mortgages or deeds of trust are 12 U.S.C. §2023, which expressly covers "[t]he mortgages held by the Farm Credit Banks," and 7 U.S.C. §1984, which expressly covers "mortgages or other lien instruments held by or transferred to the Secretary" of Agriculture.

Thus, when Congress has intended a federal exemption from state and local taxation to apply to loan instruments to which the exempted agency or instrumentality is a party, it has clearly expressed that intention. Since 12 U.S.C. §1768 contains no language expressly or impliedly covering loans by a federal credit union or instruments given in connection with a loan, a mortgage or deed of trust given a federal credit union is not exempted from Maryland recordation tax by that federal statute.

II

Conclusion

The advice set forth in the November 24, 1975 letter, that mortgages and deeds of trust given to a federal credit union are exempt from State recordation tax under 12 U.S.C. §1768, is in error. Therefore, the 1975 advice letter is withdrawn.

J. Joseph Curran, Jr.
Attorney General

Julia M. Freit
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Taxation — Income Tax — Applicability of Exemption for Military Service "Outside the United States"

October 15, 1990

David C. Brown, Assistant Director
Income Tax Division
Comptroller of the Treasury

You have requested our opinion concerning an income tax exemption for military pay that is attributable to service "outside the United States." You have asked whether the taxpayer must actually be stationed outside the United States to qualify for this exemption or whether the exemption is also available to a taxpayer stationed in the United States who performs services outside it (for example, on board a ship).

For the reasons stated below, we conclude that the exemption applies to compensation for any military service performed outside the United States, regardless of the site of the taxpayer's duty station; the exemption is not limited to military service performed while the taxpayer is stationed outside the country.

I

Exemption

In 1989 the General Assembly amended §10-207 of the Tax-General Article ("TG" Article), which provides for various subtractions from the federal adjusted gross income of a Maryland resident to determine adjusted gross income for State tax purposes. This new subtraction, as enacted in Chapter 637 (House Bill 65) of the Laws of Maryland 1989, provides as follows:

> (1) The subtraction under subsection (a) of this section includes the first $15,000 of military pay that is:
>
> (i) received by an individual who is in active service of any branch of the armed forces; and

(ii) attributable to military service of the individual outside the United States.

(2) The amount of the subtraction under paragraph (1) of this subsection:

(i) is reduced dollar for dollar in the amount by which military pay received by the individual exceeds $15,000; and

(ii) is reduced to zero if the amount of military pay received by the individual exceeds $30,000.

TG §10-207(q). Your question is whether this subtraction is available only to those Maryland residents who are stationed outside the United States as members of the armed forces.

II

Analysis

"[T]he beginning point of statutory construction is the language of the statute itself." *Morris v. Prince George's County*, 319 Md. 579, 603, 573 A.2d 1346 (1990). On its face, the subtraction in TG §10-207(q) applies to military pay for any military service outside the United States. The only limitation is a dollar amount. The statute makes no reference to a further limitation in terms of the taxpayer's being stationed outside the United States.

It is quite true that the legislative history, as documented in the committee files, is largely focused on the plight of members of the armed services who are stationed outside the United States. For example, the fiscal note analyzed the bill in terms of "military personnel who were legal residents of Maryland and were stationed outside the United States." However, this focus may have resulted simply from the fact that exact data was available on the number of Marylanders who are stationed outside the United States as members of the armed forces.

The legislative history also reveals that at least the Senate committee considering the legislation was made aware that the bill was not limited to taxpayers permanently stationed outside the United States. This construction of the bill is implicit in a suggestion that the subtraction be limited to military service outside the United States of *at least 30 days*, unless the taxpayer was injured in the line of duty. *See* statement of March 23, 1989 from Montgomery County Chapter, Maryland Retired Officers Association to Senate Budget and Taxation Committee. The suggested durational minimum would have made little sense if the bill already conditioned the benefit on the taxpayer's being stationed overseas. Although another suggestion by the Association to cap the subtraction was adopted, this limitation was not. *See* 1989 *Senate Journal* at 2759-2761.

Moreover, there is evidence that the chief sponsor, Delegate Clarence Davis, chose to frame a bill that went beyond taxpayers stationed outside the United States. In 1984, Delegate Davis introduced a similar bill, House Bill 1062, which was expressly limited to members of the armed forces "with a permanent overseas duty status." In the absence of such an express limitation in the 1989 law or of any clear legislative intention to limit the application of the law to those stationed outside the United States, it is our view that the application of the law should not be limited in this manner.

So long as the subtraction is calculated in a reasonable manner by the taxpayer, this calculation should be accepted by the Comptroller's Office. The Comptroller may, of course, adopt reasonable regulations to administer the subtraction for military pay. *See* TG §§2-102 and 2-103.

III

Conclusion

In summary, it is our opinion that the exemption under the State income tax law for a part of military pay attributable to service outside the United States is not limited to Maryland residents who are stationed outside the country.

J. Joseph Curran, Jr.
Attorney General

Richard E. Israel
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

TRANSPORTATION

MASS TRANSIT ADMINISTRATION — STATUTORY CONSTRUCTION — SIGNALS FOR LIGHT RAIL TRANSIT TROLLEYS ARE LAWFUL

November 14, 1990

Neal M. Janey, Esquire
City Solicitor, Department of Law

You have requested our opinion concerning the legality of the use of white lights in certain signals designed for the Light Rail Transit System.

For the reasons stated below, we conclude that the signals proposed to be used to guide the movement of the Light Rail Transit trolleys are lawful.*

I

Background

The Mass Transit Administration ("MTA") is now constructing the Central Light Rail Line, a portion of the new Light Rail Transit ("LRT") System. One part of this line will follow city streets, primarily Howard Street. A signaling system will be necessary so that an LRT trolley will proceed through an intersection only when all other conflicting traffic is stopped.

Cross-traffic is obviously conflicting, but sometimes parallel traffic is as well. For example, when a trolley travelling northbound on Howard Street stops for passengers at Saratoga Street, the tracks will place the trolley near the curb. The tracks will then curve westward, across the path of traffic proceeding north on Howard Street. When conventional traffic on Howard Street has a green light, the trolley

---

* When this opinion was first issued, it contained certain factual errors not affecting the conclusion. This version of the opinion, dated and numbered to conform to the original version, corrects those errors.

operator cannot proceed. Nor can the trolley operator determine whether it is safe to proceed during the interval when the conventional traffic signal shows red for Howard Street traffic, because the operator will not be able to confirm, by looking at the conventional traffic signal, that traffic moving eastbound and westbound on Saratoga Street also has a red light.

Under the proposed signaling system, all conflicting vehicular and pedestrian traffic at an intersection will be stopped for a brief period of time to allow the LRT trolley to pass. These conventional traffic signals, maintained by the city, will be synchronized with a special display for the LRT operator.

The LRT signal will be on a separate box, physically apart from the conventional traffic signal.[1] In order to avoid any confusion on the part of a vehicle driver or pedestrian, the LRT signal will not use the conventional pattern of circular green, red, and yellow lights; instead, the status of traffic at the intersection will be displayed to the LRT trolley operator by the lighting of a horizontal, vertical, or diagonal bar colored white.[2]

---

[1] One of the designs is illustrated in the attachment to this opinion.

[2] The MTA has established the following design criteria for these devices, called "indicator heads":

> 1. The configuration or shape of the display on the LRT indicator heads will be different so as not to resemble a conventional city traffic control device.
> 2. The LRT indicator heads will be painted a color different from the city's traffic control devices.
> 3. The LRT indicator heads will only relay safety signal information to an LRT operator. They do not attempt to control or direct movement of traffic in any street crossing or intersection.
> 4. The LRT indicator heads will be positioned away from the city's standard traffic control signals and will not hide or interfere with the effectiveness of the latter system.
> 5. To prevent confusion with the city's use of green, red, and yellow traffic signaling lenses, the LRT heads will purposely display a white bar as a position light indicator to the LRT operator.

(continued...)

> The operator will proceed only when the LRT signal display confirms that all of the conventional traffic signals that control conflicting movements are red.

II

Federal Law

If the portion of the LRT system in question were a "railroad" and therefore subject to the federal Railroad Safety Act of 1970, 45 U.S.C. §421 *et seq.*, the signals used to control movement of the LRT trolleys might be subject to certain federal regulations. *See* 49 C.F.R. §236.23(d) (use of red, yellow, and green lights). In our view, however, the portion of the LRT system in question is not subject to the federal act.

In *Chicago Transit Authority v. Flohr*, 570 F.2d 1305 (7th Cir. 1977), the court was "convinced that Congress was not dealing with urban rapid transit, but with the conventional railroad network which spans the United States. Congress clearly never intended the word 'railroad' as used in the Railroad Safety Act of 1970 to include urban rapid transportation." 570 F.2d at 1309. Like the Chicago system, the LRT system will function solely as an urban transportation operation, using specially designed cars substantially smaller and lighter than railroad cars.

You have expressed some concern because in *Flohr*, the court pointed to the fact that the rails used for the Chicago transit system were not railroad rails and would be used exclusively for transit purposes. *See* 570 F.2d at 1307. On portions of the Central Light Rail Line, Conrail will have the right to operate its freight trains on the track at night, when the LRT system is closed.

---

[2](...continued)
The distinctive character of the LRT indicator heads will assure compliance with §21-205 of the Transportation Article, which in part prohibits "unauthorized" signals that "resembl[e]" a "traffic control device." *See* Part III below.

But we do not read the court's passing reference to the Chicago system's exclusive use of the rails as implying that the court would have reached a different result if that fact were otherwise. Indeed, the court's focus on Congress' overall intent suggests that the fundamental character of the Chicago system, and not any one particular fact about it, was determinative.

In any event, *no* Conrail trains will run on the rails where the signals in question are to be installed; as in *Flohr*, this portion of the LRT system's right-of-way will be used exclusively for urban rapid transit. Hence, the reasoning and holding of *Flohr* squarely apply at least to this portion of the LRT System.[3]

III

State Law

The Maryland Vehicle Law regulates traffic signs, signals, and markings. In particular, §21-202(a) of the Transportation Article ("TR" Article) deals with the color of "traffic control signals":

> (1) Except for special pedestrian signals that carry a word legend, where traffic is controlled by traffic control signals that show different colored lights or colored lighted arrows, whether successively one at a time or in combination, only the colors green, red, and yellow may be used.
>
> (2) These lights apply to drivers and pedestrians as provided in this section.

TR §21-205 prohibits the display of "any unauthorized sign, signal, marking or device that attempts to direct the movement of traffic."

In considering whether these provisions of the Vehicle Law prohibit the use of white bar indicators for the LRT trolleys, we apply

---

[3] We do not consider whether or to what extent the Railroad Safety Act might apply to other portions of the LRT system.

the methods of statutory construction endorsed by the Court of Appeals. We start with the statutory language itself, attempting to give effect to all of the words in the statute. *Morris v. Prince George's County*, 319 Md. 597, 603, 573 A.2d 1346 (1990). "But our endeavor is always to seek out the legislative purpose, the general aim or policy, the ends to be accomplished, the evils to be redressed by a particular enactment.... In the conduct of that enterprise, we are not limited to study of the statutory language." 319 Md. at 603-04.

A "traffic control signal" is "any traffic control device ... by which traffic alternately is directed to stop and permitted to proceed." TR §11-168. A "traffic control device," in turn, is "any sign, signal, marking, or device that ... [i]s placed by authority of an authorized public body or official to regulate, warn, or guide traffic." Finally, the term "traffic" means "pedestrians, vehicles and other conveyances ... while using any highway for travel." TR §11-166.

An LRT trolley is a "vehicl[e] ... using [a] highway for travel."[4] While the trolley will operate on a fixed rail, rather than on the paving of the street, in any meaningful sense the trolley will use a highway, Howard Street, for travel.[5] Thus, the LRT trolleys will be part of the "traffic" on Howard Street.

The context of TR §21-202(a) strongly suggests, however, that it was written with conventional types of traffic in mind — that is, vehicles capable of self-propelled movement in all directions, rather than a vehicle moving on fixed rails in a single direction. For example, TR §21-202(b) states that "[v]ehicular traffic facing a circular green signal may proceed straight through or, unless a sign at the place prohibits a turn, turn right or left." This provision makes perfect sense for motor vehicles and bicycles, but makes no sense at all for an LRT trolley sharing a highway with other traffic. If the conventional traffic

---

[4] A "vehicle" is "any device in, on, or by which any individual or property is or might be transported or towed on a highway." TR §11-176. An LRT trolley is not a "motor vehicle," however, because that term excludes any vehicle operated on rails. TR §11-135(a).

[5] A "highway" is "the entire width between the boundary lines of any way or thoroughfare of which any part is used by the public for vehicular travel ...." TR §11-127.

light facing the LRT trolley is green, the trolley must still stop if there is a conflicting traffic movement across the tracks. Similarly, TR §21-202(h) enjoins "[v]ehicular traffic facing a steady red signal alone" to stop before entering the intersection. But in some situations an LRT trolley is able to proceed safely only when the facing traffic light is red (and the lights are red in the other quadrants as well). It could not have been the legislative objective to apply generally applicable signaling requirements to the movement of a conveyance that must heed its own special signal.

Nor could the General Assembly reasonably be understood to have mandated the use of a signal for the LRT trolleys that would only risk confusion by drivers or pedestrians. If the LRT System were required to use only green, red, and yellow lights in its signals, then in places the LRT signal would show a green light when the conventional traffic signal facing the same direction would be showing a red light. Drivers and pedestrians might well be confused about the signal applicable to them.

To be sure, at a few intersections in downtown Baltimore, the placement of the track would enable the trolley operator to follow the conventional traffic signal. But the use of mixed signaling — a special device at one corner, a conventional device at the next — would increase the risk that a trolley operator might become momentarily confused. Consistency about operational rules is an important safety consideration.

MTA's design for the LRT system signals virtually eliminates these problems by using a distinctive marking in a wholly separate and differently configured device for the entire portion of the system in downtown Baltimore. In our view, the General Assembly simply did not have this situation in mind when it enacted TR §21-202(a), and we should not allow an overly literal reading of the statute to bring about a result that was not intended and that would be contrary to sound policy. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 525 A.2d 628 (1987).

IV

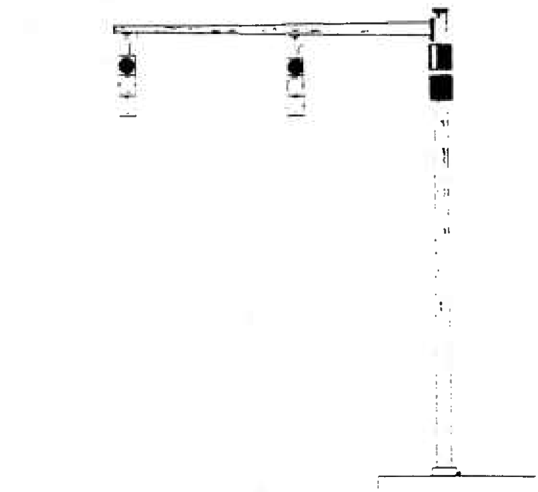
Conclusion

In summary, it is our opinion that the signaling devices planned for the light rail trolleys traveling through downtown Baltimore are lawful.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Attachment A



TYPE A
Traffic stop
Trolley - go

TRUST CLERKS

Attorneys — Practice of Law — Trust Clerks Are Not Prohibited From Practicing Law Because They Hold That Position

May 4, 1990

The Honorable Richard H. Outten
Clerk of the Court

You have requested our opinion on whether a private attorney who has been designated the trust clerk for the Circuit Court for Worcester County is precluded by §10-603(b)(4) of the Business Occupations and Professions Article ("BOP" Article) from practicing law during his tenure as trust clerk. The particular trust clerk to whom you refer is appointed by the judges of the court and is not an employee of the Clerk of the Court; his duties are part-time only.

For the following reasons, we conclude that BOP §10-603(b)(4) does not apply to this trust clerk.

I

Trust Clerk

A trust clerk is a person designated by a court to aid the court in the supervision of certain estates and guardianships. *See* Md. Rule V70 e. Since 1970, Md. Rule 1223 has required that each circuit court designate a trust clerk and determine the trust clerk's compensation, and Subtitle V of the Maryland Rules has set forth the duties and responsibilities of trust clerks.[1] Prior to 1970, Maryland's equity courts appointed trust clerks as authorized by local rules or as an exercise of the inherent authority of the chancellor.[2]

By longstanding tradition, practicing members of the bar have been appointed to serve part-time as trust clerks for the circuit courts in several of Maryland's counties, including those in the First and Second Judicial Circuits. According to a survey recently conducted for the Conference of Circuit Judges, eleven counties (Caroline, Carroll, Cecil, Dorchester, Harford, Kent, Prince George's, Queen Anne's, Somerset, Talbot, and Worcester) require that their trust clerk be a member of the bar. In Baltimore City, Baltimore County, and Prince George's County, the trust clerk performs the duties of the position on a full-time basis; in all other counties, the person designated as trust clerk performs those duties on a part-time basis, and the amount of time required varies with the caseload.

II

Law Practice Prohibition

A. *Introduction*

BOP §10-603(b)(4) provides in pertinent part as follows:

---

[1] In response to the enactment of the Estates and Trusts Article, Chapter 4 of the Laws of Maryland 1969, the Court of Appeals revised the Maryland Rules concerning persons under disability (Chapter R) and fiduciaries (Chapter V). 38th Report of the Standing Committee on Rules of Practice and Procedure. Originally, Rule 1223 mandated the circuit courts for the counties, the then Supreme Bench of Baltimore City, and the Register of Wills for each county to designate a trust clerk, and limited the Register to designating either the Register himself or one of his deputies. The current rule was adopted October 1, 1980, effective January 1, 1981.

[2] Section 2-501(a) of the Courts Article authorizes the judges of the circuit courts to employ court administrators, assignment commissioners, auditors, masters, examiners, court reporters, messengers, bailiffs, court criers, librarians, clerks, secretaries, stenographers, jury commissioners, law clerks, and other employees necessary to conduct the business of the court.

> (b) Even if an individual has been admitted to the Bar, the individual may not practice law while employed:
>
> . . .
>
> (4) as a clerk or deputy clerk of any court or an employee of a clerk....

According to the Revisor's Note, BOP §10-603(b)(4) is new language derived, in pertinent part, "without substantive change" from former Article 10, §28. *See* Chapter 3, Laws of Maryland 1989 at 478. Former §28 provided:

> Any register of wills or clerk of any court, or deputy register or clerk or assistant clerk, appointee or employee of said register of wills or clerk of any court, or bailiff of any court, or officer or employee of any juvenile court except a master for juvenile causes, who is not employed full time who shall pursue the practice as attorney at law in this State during the term of their office or appointment, shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than twenty-five dollars nor more than one hundred dollars, and be suspended from the pratice of law before any of the courts of Maryland for one year.[3]

Thus, the question comes down to this: What did the General Assembly intend when it used the term "any ... clerk of any court" in §28? Did it mean only *the* Clerk of the Court ("*the* Clerk"), *e.g.*, the Clerk of the Circuit Court who is elected pursuant to Article IV, §25 of the Maryland Constitution?[4] If so, then a trust clerk who is neither

---

[3] Although the punctuation suggests otherwise, the phrase "who is not employed full time" modifies only the exception for a master of juvenile causes. *See* Chapter 123, Laws of Maryland 1970.

[4] The Clerk of the Court of Appeals and the Clerk of the Court of Special Appeals are appointed by and serve at the pleasure of their respective courts. Article IV, §17 of the Constitution (Court of Appeals); §2-401 of the Courts Article (Court of Special Appeals). The Chief Clerk of the District Court, the chief administrative clerk for each district, and a clerk of the District Court in each county are appointed by the Chief Judge of the District Court. Article IV, §41F of the Constitution; §§2-601 and 2-602 of the Courts Article.

the Clerk nor within one of the other classes specified in the statute — a deputy clerk, an assistant clerk, or an appointee or employee of the Clerk — is not prohibited from practicing law. However, if the General Assembly intended the term to apply generically to anyone who serves a court in a clerical capacity, then the statute prohibits trust clerks from practicing law.

In determining legislative intent, we begin with the language of the statute itself. *Newman v. Subsequent Injury Fund*, 311 Md. 721, 723, 537 A.2d 274 (1988). This language is to be given its natural and ordinary meaning. *Boulden v. Mayor*, 311 Md. 411, 414, 535 A.2d 628 (1988). However:

> [W]e are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other "external manifestations" or "persuasive evidence," including ... amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case.

Kaczorowski v. City of Baltimore, 309 Md. 505, 514-15, 525 A.2d 628 (1987). "Furthermore, we construe statutes, if at all feasible, so that no word or phrase is rendered surplus or meaningless." *State v. 149 Slot Machines*, 310 Md. 356, 361, 529 A.2d 817 (1987). We turn then to the legislative history of former Article 10, §28.

B Legislative History

Former Article 10, §28's practice-of-law prohibition is of ancient origin. It has its roots in a 1786 Act of the General Assembly that provided:

> No person, being register of wills for any county in this state, shall plead as an attorney at law in any court in the county where he is register of

> wills, for any person or persons, on any pretense whatsoever; ....

Chapter X, Laws of Maryland 1786.

In 1862, the reach of this prohibition was extended as follows:

> No Register of Wills, or deputy Register, clerk of any court, or deputy clerk, shall practice as an Attorney-at-Law in any of the courts of this State, for any person or persons.

Chapter 179, Laws of Maryland 1862. Thus, the classes of officials affected were expanded to include deputy registers, clerks of court, and deputy clerks; and the affected officials were prohibited from practicing before *any* Maryland court, not just a court in their county.

We think that the language of the 1862 Act left no doubt that the term "clerk of any court" was intended to mean only *the* Clerk and was not used in a generic sense to mean all clerks who serve the courts. Otherwise, the reference to Deputy Clerk would have been surplus and meaningless.

In 1868, the Legislature again amended the statute. This time it was changed to read:

> No Register of Wills or Clerk of any Court shall practice as attorney at law in any of the courts of this State whatsoever, nor shall any Deputy Register of Wills, or any Deputy Clerk of any Court, practice as attorney at law in any court of this State of which he is an officer, or to which he may be attached as a deputy or assistant officer.

Chapter 404, Laws of Maryland 1868.

Thus, the General Assembly decided to distinguish between the Registers of Wills and the Clerks of Court, on the one hand, and their deputies on the other. The former continued to be prohibited from practicing before any of the courts of Maryland, whereas the latter were prohibited only from practicing before their own courts. This distinction compels the conclusion that "Clerk of any Court" was not intended to be an all-inclusive term, but rather was limited to *the* Clerk.

In 1898 the Legislature narrowed *the* Clerks' (and Registers') prohibition so that they, like their deputies, could practice before courts other than their own. The 1898 statute provided:

> No Register of Wills or clerk of any court shall practice as an attorney at law in any of the courts of this State of which he is such register or clerk, nor shall any deputy clerk of any court practice as attorney at law in any court of this State, of which he is an officer, or to which he may be attached as a deputy or assistant officer.

Chapter 472, Laws of Maryland 1898. Once again, the continuing distinction between "clerk of any court" and "deputy clerk" confirms the view that the former means only *the* Clerk.

In 1914, the statute was rewritten and a penalty added. The new statute provided:

> Any Register of Wills or Clerk of any Court, or deputy Register or Clerk or assistant Clerk, appointee or employee of said Register of Wills or Clerk of any Court, or bailiff of any Court, or officer or employee of any Juvenile Court, who shall pursue the practice as attorney at law in this State during the term of their office or appointment, shall be deemed guilty of a misdemeanor and on conviction shall be fined not less than Twenty-five Dollars, and be suspended from the practice of law before any of the Courts of Maryland for one year.

Chapter 236, Laws of Maryland 1914.

Thus, the prohibition was broadened in two ways. First, the classes of officials to whom it applied was increased. In addition to the

Register of Wills, the Clerks of Court and their deputies, the prohibition was expanded to apply as well to their appointees and employees, to assistant clerks, to bailiffs, and to officers and employees of any Juvenile Court. Secondly, the statute broadly prohibited "practice as [an] attorney at law in this State," not just practice before the local court.

This broadening of the statute made it even clearer that the "Clerk of any Court" reference was limited to *the* Clerk, for there would have been no need to apply the restriction to assistant clerks if the term were more expansive. Furthermore, although the list of affected officials and employees was lengthened considerably, a trust clerk appointed by a court was not among them.

Section 28 was last amended by Chapter 123 of the Laws of Maryland 1970, which repealed and reenacted it for the sole purpose of excepting a part-time Master for Juvenile Causes from its law practice prohibition. In 1989, as part of the code revision process, §28 was repealed and its prohibition was reenacted, without substantive change, as part of the new Business Occupations and Professions Article. It became §10-603(b)(4) of the new article.[5]

III

Conclusion

In summary, it is our opinion that the General Assembly intended the term "any ... clerk of any court," as used for well over a century in former Article 10, §28 and more recently in its offspring, BOP §10-603(b)(4), to mean only *the* Clerk of the Court, and not a trust clerk. We base this conclusion on the lengthy legislative history of §28's consistent distinction between, and often differing treatment of, *the* Clerks and deputy clerks, and against the background of the longstanding administrative practice of several circuit court benches. *Cf. Baltimore v. Pattison*, 136 Md. 64, 68, 110 A. 106 (1920)

[5] Chapter 3 of the Laws of Maryland 1989 codified the substance of former §28 as part of new BOP §10-604(b)(4); Chapter 632 of the same Session Laws repealed BOP §10-603, and §10-604 was renumbered §10-603.

(practice of clerks in charging certain fees "has been so long and so universally recognized and acted upon as to become a part of the common law of the State").

Therefore, in our opinion, an individual who is appointed a trust clerk pursuant to Rule 1223 is not, by that fact alone, prohibited from practicing law.[6] Only if the individual designated as trust clerk also is *the* Clerk of the Court or a member of one of the other classes expressly enumerated in BOP §10-603(b)(4) (*e.g.*, an employee or appointee of the Clerk of the Court) is he or she prohibited from practicing law.

J. Joseph Curran, Jr.
Attorney General

Judson P. Garrett, Jr.
Deputy Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[6] We note that Rule 1232, the Code of Conduct for Judicial Appointees, differentiates between full-time and part-time appointees in its regulation of law practice. Canon 4I provides as follows:

> (1) Except as provided in subsection (2), a judicial appointee should not practice law.
> (2) A part-time judicial appointee may practice law to the extent permitted by the appointing authority, but the judicial appointee shall not use or attempt to use the appointee's position to further that practice.

However, Rule 1232 does not apply to trust clerks. *See* introductory paragraph (definition). The Rules Committee may wish to consider an amendment applying this rule to trust clerks.

WORKER'S COMPENSATION

UNINSURED EMPLOYER'S FUND — CONSTITUTIONAL LAW — SEPARATION OF POWERS — PROCEDURES FOR LICENSE SUSPENSION FOR FAILURE TO PAY ASSESSMENTS APPLY TO ATTORNEYS

July 18, 1990

Marshall H. Feldman
Executive Director
Uninsured Employers' Fund Board

You have requested our opinion concerning the application of a provision of the Workers' Compensation Law to attorneys. Specifically, you have asked (i) whether the portions of Article 101, §91 of the Maryland Code that require the suspension of an employer's license to do business if the employer fails to pay certain assessments to the Uninsured Employers' Fund applies to attorneys; and (ii) if so, what procedure the Fund would follow to pursue such a suspension.

For the reasons that follow, we conclude that (i) the suspension provisions do apply to attorneys and (ii) the Fund should file the required notification with the Bar Counsel pursuant to Maryland Rule BV6 a 1.

I

License Suspension

The Uninsured Employers' Fund was formed in 1967 to pay workers' compensation awards that were not promptly paid by the employer. Once the Fund pays the award, it is subrogated to the rights of the claimant against the uninsured employer and may institute a civil action to recover its payment. Article 101, §90(d). The Fund is maintained by means of assessments against uninsured employers whose awards are paid by the Fund. Article 101, §91(d).

The General Assembly sought to assure that licensed employers would pay their assessments by requiring the suspension of a delinquent employer's license:

> (e) If the employer shall fail to pay these assessments ...[t]he Director [of the Fund] shall notify the employer that the employer is in default and that the employer's license to do business in this State may be suspended....
>
> (h) Notwithstanding any other provision of this article, if an employer fails to pay an assessment required under this section, the Director ... shall notify the employer by certified mail, return receipt requested, that the employer's license to do business in this State may be suspended. The Director shall forward a copy of the notification to each State, county, or municipal licensing agency that has issued a license or permit to the employer for an activity for which workmen's compensation coverage is required by law. Within 15 days after receipt of the notification, the licensing agency shall provide the employer with such notice and opportunity for a hearing as may be otherwise required by law.
>
> (i) If a hearing is required by law to be held by the licensing agency, the licensing agency shall send written notice of the hearing date to the Director .... Upon a finding of the licensing agency that an employer has failed to pay an assessment as required in this section, the licensing agency shall suspend the license of the employer until the employer pays, or agrees to pay, the assessment in a manner approved by the Uninsured Employers' Fund Board.

Article 101, §91.[1]

II

Application of Suspension Provisions to Attorneys

Attorneys are required by law to maintain worker's compensation coverage for their employees. Article 101, §21(a)(1) defines employer to include every person that has "in the State one or more employees subject to this article." Employees subject to the article include, among others:

> (1) Every person ... in the service of an employer under any contract of hire ... [and]
>
> (5) Every person performing services for remuneration in the course of the trade, business, profession or occupation of an employer at the time of the injury, provided such person in relation to this service does not maintain a separate business, does not hold himself out to and render service to the public and is not himself an employer subject to this article.

Article 101, §21(b). Just as attorneys who are employers are generally subject to the workers' compensation law, so we conclude that they are subject to the sanctions in Article 101, §91.

"[T]he beginning point of statutory construction is the language of the statute itself." *Morris v. Prince George's County*, 319 Md. 597, 603, 573 A.2d 1346 (1990). "[T]he words of the statute are intended to have their natural, ordinary and generally understood meaning in the absence of evidence to the contrary." *Brodsky v Brodsky*, 319 Md. 92, 98, 570 A.2d 1235 (1990).

---

[1] Article 101, §90(e) and (f) provide a similar mechanism for the recovery of awards paid by the Fund.

Article 101, §91 speaks broadly of "a license to do business in this State." A "license" is "the formal permission granted by the sovereign ... to pursue some occupation or to carry on some business without which the act permitted would be illegal. *ACORN v. City of New Orleans*, 407 So. 2d 1225, 1228 (La. 1981). *See also Sea Lar Trading Co., Inc. v. Michael*, 433 N.Y.S.2d 403 (Sup. Ct. 1980); *Black's Law Dictionary* 829 (5th ed. 1979).

Attorneys are commonly referred to as "licensed" to practice law. Indeed, the Court of Appeals has written of an attorney's "license," *Attorney General v. Waldron*, 289 Md. 683, 701, 426 A.2d 929 (1981), and not long ago the Supreme Court referred to an attorney's "professional licensure." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 67 (1988). *See also, e.g.*, 7 Am. Jur. 2d *Attorneys at Law* §25, at 79 (1980) (discussing "conduct rendering [an attorney] unfit to hold a license to practice ...").

Under §10-101(b) of the Business Occupations and Professions Article ("BOP" Article), "admission to the bar" means authorization by the Court of Appeals to practice law in this State. Admission to practice and a license to practice "are inseparable and refer to the same thing." *In re H.S.*, 165 S.W.2d 300 (Mo. App. 1942). And the specific authority to practice law in a jurisdiction constitutes a license. *State Bar of Georgia v. Haas*, 133 Ga. App. 311, 211 S.E.2d 161 (1974). Thus, the statutory language leads us to conclude that admission to the bar is a "license" that may be suspended pursuant to Article 101, §91.

The context of the statute supports this conclusion. *See Morris v. Prince George's County*, 319 Md. at 604. Testimony in committee showed that the Fund sought the legislation in order to give it extra leverage to collect overdue assessments from employers.[2] This purpose would be ill-served if an entire class of employers, attorneys, were excluded simply because their authorization to practice, for whatever historical reasons, is not specifically referred to as a "license" in the Maryland Code.

---

[2] *See* Testimony of William T. S. Bricker, then-Director of the Uninsured Employers' Fund Board, on House Bill 379 (1985 Session).

III

Separation of Powers

Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other, and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." We next consider whether the General Assembly violated this separation of powers provision by requiring the Court of Appeals to suspend an attorney for failure to pay the assessment.

The most recent case to address the relative powers of the legislative and judicial branches to regulate the admission and actions of attorneys was *Attorney General v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981), which concerned a statute that barred the practice of law by certain retired judges. The Court began with the premise that "the regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct are essentially judicial in nature, and, accordingly, are encompassed in the constitutional grant of judicial authority to the courts of this State." 289 Md. at 692.

However, the Court of Appeals also noted that the flexibility inherent in the doctrine of separation of powers allows for some limited exertion of legislative authority. Therefore, the General Assembly may act pursuant to its police or other legitimate power to aid the courts in the performance of their judicial functions and may establish minimum criteria for the learning and character of persons admitted to the bar. 289 Md. at 699.[3]

---

[3] Different states have reached varying conclusions about this balance. At one extreme, some courts have held all legislative action in the area to be invalid. *See Re Opinion of the Justices*, 180 N.E. 725, 81 A.L.R. 1059 (Mass. 1932); *In re Day*, 54 N.E. 646, 50 L.R.A. 519 (Ill. 1899). At the other extreme, courts have held the legislative qualifications to be exclusive, recognizing no power in the courts to add to them. *See Re Applicants for License to Practice Law*, 55 S.E. 635, 10 L.R.A. (NS) 288 (N.C. 1906).

The Court concluded that the prohibition at issue in *Waldron* did not fall into either of these categories and did not merit the creation of a new category, observing that the problem it addressed had been extensively addressed in the Court's rules. The statute, in effect, revoked the license of certain members of the bar based on criteria "entirely unrelated to their educational or moral fitness to engage in the practice of law." 289 Md. at 703. The Court further stated that once a person has met the criteria for admission to the bar and been so admitted, that attorney may be deprived of his or her license only through judicial action for proper cause. 289 Md. at 701. Thus, the Court held the provision to be unconstitutional.

In our view, a number of factors differentiate Article 101, §91 from the provision found invalid in *Waldron*.

First, the statute does not itself act to suspend the attorney but leaves the actual suspension to the judicial branch. Courts in other states have upheld similar required suspensions. For example, in *State ex rel. Robeson v. Oregon State Bar*, 291 Or. 505, 632 P.2d 1255 (1981), the Oregon Supreme Court upheld a statute that required suspension of an attorney for failure to pay a professional liability fund assessment, finding nothing in the statute that would "'unduly burden or substantially interfere with the judiciary' ... in performing its judicial functions ...." 632 P.2d at 1258 (quoting *Sadler v. Oregon State Bar* 275 Or. 279, 285, 550 P.2d 1218 (1976)). Statutes that require suspension or disbarment for certain criminal convictions have also been upheld. *In re Casebier*, 284 P. 611 (Kan. 1930); *Bryant v. State*, 457 S.W.2d 72 (Tex. Civ. App. 1970). *Cf. People v. Buckler*, 453 P.2d 404 (Colo. 1968).

Furthermore, while a person's prior service as a judge is "entirely unrelated to their educational or moral fitness to engage in the practice of law," a person's failure to pay lawful obligations is clearly relevant to their moral fitness to engage in such practice. Moreover, unlike the situation in *Waldron*, the Rules of Professional Conduct do not expressly regulate the matter in question. Although the preamble to the rules states that a "lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs," the rules do not specifically address legal shortcomings that fall short of criminal misconduct and that do not involve clients. Thus, enforcement of the section would not be likely to hinder the judiciary's disciplinary power. *See Heslin v. Connecticut Law Clinic of Trantolo*, 461 A.2d 938 (Conn. 1983); *Knight v. Margate*, 431 A.2d 833 (N.J. 1981).

Finally, unlike the situation in *Waldron*, Article 101, §91 is a general law applicable to all trade, professional, and occupational licensees and does not single out the practice of law for special regulation. It is generally accepted that the judicial power over the practice of law does not act to exempt attorneys from civil or criminal statutes of general application. *Heslin v. Connecticut Law Clinic of Trantolo*, (consumer protection statute); *Davis v. Ogden City*, 215 P.2d 616 (Utah 1950) (license tax); *Short v. Demopolis*, 109 Wash. 2d 52, 691 P.2d 163 (1984) (consumer protection statute).[4]

In fact, *Waldron* forms the sole exception to a long history of cooperation between the legislative and judicial branches in regulating admission to the practice of law. From the earliest times, Maryland followed the English practice of having courts admit the attorneys who are to practice before them.[5] Yet legislative regulation also dates from early in the history of the State.

In 1674, the General Assembly passed two similar acts, Chapters 20 and 31, providing for "a certain number of honest and able Attorneys [to be] admitted nominated and sworne" by the Governor for the Provincial Court and by the commissioners of the County Courts for the local courts. The acts also set maximum attorney's fees, to be

---

[4] An express exemption renders the Maryland Consumer Protection Act inapplicable to the "professional services" of lawyers and various other professionals. §13-104(1) of the Commercial Law Article.

[5] The practice was apparently established in England in 1292 by order of Edward I, who directed the justices to appoint a "sufficient" number of attorneys for each county. Attorneys remained essentially unregulated, however, until 1402, when Parliament passed 4 Henry IV, ch. 18, which directed the justices to examine all attorneys "and they that be good and vertuous, and of good Fame, shall be received." The act also provided the power to remove attorneys. *See State v. Johnston*, 2 H. & McH. 160 (1786); *see also In re Day*, 54 N.E. 646, 50 L.R.A. 519 (Ill. 1899); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 119 A. 139, 100 A.L.R. 226 (R.I. 1935).

paid in tobacco, and provided that an attorney who charged a larger amount was to be disbarred. Both acts were repealed in 1676.

In 1707 the Governor and Council became "[c]onvinced by dayly Experience that her Majestys Subjects of this province Suffer Extremely by the Corruption Ignorance and Extortion of Severall Attorneys Admitted to practice in the provinciall and County Courts without any Qualification of Honesty Experience or Learning...." Proceedings of the Council of Maryland 1707, XXV *Archives of Maryland* at 224. As a result, the Governor and Council ordered that no person should be admitted to practice law unless they are members of the Inns of Court or Chancery in England or until "they have previously undergone an Examination of their Capacities honesty and good behavior" before the Governor and Council.[6] The House of Delegates objected to this change and asked that the Governor "order and restore the Several Courts to their antient Rights of admitting & Suspending the Attorney and Practitioners ...." XXVII *Archives of Maryland* at 247.

A debate between the two houses ensued as to whether admission and suspension of attorneys historically rested with the judiciary.[7] The debate ended in 1708 with the enactment of a law, Chapter 8, similar in content to the 1674 Act, except that it barred admission of those previously denied by the Governor and Council. This latter provision was repealed in 1709 and the entire law was repealed in 1715 and replaced by a law that gave the justices power to admit or suspend

---

[6] In addition to acting as an advisory body for the Governor, the Council acted as the Upper House of the Legislature and constituted the Provincial Court.

[7] This debate was repeated in early separation of powers cases concerning regulation of the bar. *Compare Matter of Cooper*, 22 N.Y. 67 (1860); *Re Applicants for License to Practice Law*, 55 S.E. 635, 10 L.R.A. (NS) 288 (N.C. 1906); *with In re Day* 54 N.E. 646, 50 L.R.A. 519 (Ill. 1899); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 179 A. 139, 100 A.L.R. 226 (1935). The Maryland Court of Appeals has recognized that the power is essentially judicial, *Public Service Commission v. Hahn Transportation, Inc.*, 253 Md. 571, 253 A.2d 845 (1969), but as recently as 1963 the Court referred to admission as "a legislative, not a judicial function in that the right may constitutionally be regulated by statute." *Bastian v. Watkins*, 230 Md. 325, 329, 187 A.2d 304 (1963).

attorneys "until his majesty's pleasure shall be known therein" and once again barred admission of those previously denied by the Governor and Council. Chapter 48, Laws of Maryland 1715, §§12 and 13.

In 1783 the General Assembly passed a law empowering the courts to examine applicants to determine their knowledge, abilities and integrity, and provided an appeal for applicants who were denied. Chapter 17, Laws of Maryland 1783. Subsequently, the General Assembly imposed a requirement of two years legal study and provided that admission to any court in the State would serve as admission to all of them. Chapter 268 of the Laws of Maryland 1831. The modern system, in which all admissions are supervised by the Court of Appeals, was created in 1898. Chapter 139, Laws of Maryland 1898.[8]

Decisions of the Court of Appeals indicate that the Court viewed these statutes as defining and limiting its power over the admission of attorneys. For example, in *State v. Johnston*, 2 H. & McH. 160 (1786), the Court held that only the applicant could appeal from an admissions decision, as that was the only appeal granted by statute. Later, in *In the Matter of Charles Taylor*, 48 Md. 28 (1877), the Court gave effect to a statute barring the admission of a black applicant with the following statement: "The power and duty of this court being thus limited and defined by law, nothing is left for us except to deny the present application...." 48 Md. at 31. *See also In re Maddox*, 93 Md. 727 (1901) ("If we should say that females are entitled to be admitted to the bar, when the Legislature has not said so, we would exceed our authority and usurp the functions of a different and an independent department of the State government.").

Given this long history of judicial recognition of the exercise of legislative power in this area; and given the fact that Article 101, §91 leaves suspension in the judicial branch, does not conflict with existing rules, does not apply solely to attorneys, and involves a matter that is not irrelevant to a person's fitness to practice, it is our view that §91 does not violate the requirement of separation of powers.

[8] This act also extended the education requirement to three years.

IV

Complaint Procedures

Disciplinary actions against attorneys are conducted pursuant to the BV Rules. Under those rules, complaints are to be filed with the Bar Counsel, Rule BV6 a 1. In most cases, the complaint is then referred to an inquiry panel. Rule BV6 a 4. The panel may recommend to the Review Board dismissal, reprimand, or the filing of charges. Rule BV6 d 4(b). The Board may approve, reject, or modify the recommendation, or remand or dismiss the complaint. Rule BV7 b. If the Review Board approves a recommendation that charges be filed, they are filed by the Bar Counsel in the Court of Appeals. Rule BV 9 a, b. The Court of Appeals may direct that the charges be transmitted to and heard by any court and designates the judge or judges to hear the charges. Rule BV9 b. The findings of fact and conclusions of law are then filed with the Court of Appeals, which may then order disbarment, suspension, reprimand, inactive status, dismissal, or remand. Rule BV11.

Because Article 101, §91 requires that the normally available hearing procedures be applied to suspensions for non-payment, this procedure would apply to actions brought under that section. Therefore, the Fund should notify the Bar Counsel when payment has not been made.

V

Conclusion

In summary, it is our opinion that:

(1) Article 101, §91 in its entirety applies to, and may be enforced against, attorneys; and

(2) The notification required by that statute should be sent to the Bar Counsel.

J. Joseph Curran, Jr.
Attorney General

Kathryn M. Rowe
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

SYNOPSES OF

UNPUBLISHED OPINIONS

AGRICULTURE

WEIGHTS AND MEASURES — LIQUID PROPANE

A merchant may sell liquid propane only by liquid measure or by weight.

Opinion No. 90-033

To: *The Hon. Wayne A. Cawley, Jr.*
Secretary of Agriculture

June 26, 1990

RETIREMENT SYSTEMS

JUDICIAL RETIREMENT PLAN — MASTERS — PRINCE GEORGE'S COUNTY

A certain child support master who was appointed by the Prince George's County Circuit Court to a half-time position will qualify for membership in the Judicial Retirement Plan if the position becomes full-time.

Opinion No. 90-032

To: *The Hon. Ernest A. Loveless, Jr.*
Seventh Judicial Circuit of Md.

June 20, 1990

SHERIFFS

COLLECTIVE BARGAINING — HARFORD COUNTY

In the absence of express State stututory authority, the Sheriff of Harford County may not recognize an organization of deputies for purposes of collective bargaining.

Opinion No. 90-001

To: *Barbara Osborn Kreamer*
Maryland House of Delegates

January 5, 1990

CITATORS

And

INDEX

OPINIONS

OF THE

ATTORNEY GENERAL

CITED

OPINIONS OF THE ATTORNEY GENERAL CITED

ACTS OF

THE

GENERAL ASSEMBLY

ACTS OF THE GENERAL ASSEMBLY
Construed or Referred To:

Page

CONSTITUTION

OF THE

UNITED STATES

AND

CONSTITUTION OF MARYLAND

CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF MARYLAND

Page

Page

CODE

OF

PUBLIC GENERAL LAWS

Page

Page

Page

Page

Page

Page

Page

Page

Page

AGRICULTURE ARTICLE

BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE

Page

COMMERCIAL LAW ARTICLE

Page

COMMERCIAL LAW ARTICLE (Cont'd.)

CORPORATIONS AND ASSOCIATIONS ARTICLE

Page

Courts and Judicial Proceedings Article

Education Article

Page

EDUCATION ARTICLE (Cont'd.)

Page

EDUCATION ARTICLE (Cont'd.)

ENVIRONMENT ARTICLE

ESTATES AND TRUSTS ARTICLE

Page

Family Law Article

Financial Institutions Article

Health - Environmental Article

Page

HEALTH - GENERAL ARTICLE

Page

Health - General Article (Cont'd.)

Page

Health - General Article (Cont'd.)

Page

Health Occupations Article

Natural Resources Article

Real Property Article

State Finance and Procurement Article

Page

STATE FINANCE AND PROCUREMENT ARTICLE (Cont'd.)

STATE GOVERNMENT ARTICLE

Page

Page

TRANSPORTATION ARTICLE

CODE

OF

MARYLAND REGULATIONS

(COMAR)

CODE OF MARYLAND REGULATIONS (COMAR)

Page

TOPICAL INDEX

TO

OPINIONS

TOPICAL INDEX

— A —

Page

— B —

Page

Page

Page

Page

— S —