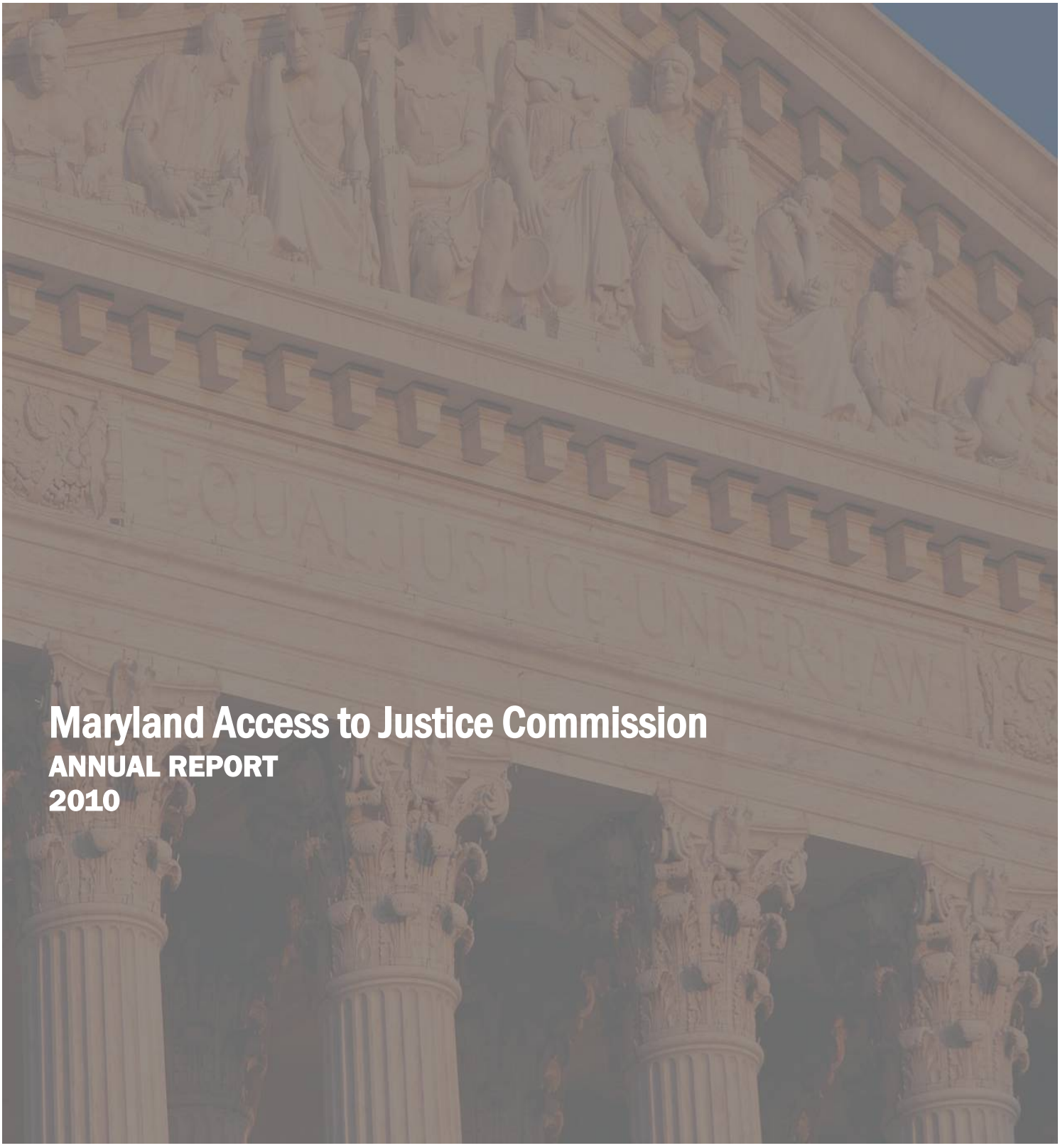

Maryland Access to Justice Commission

ANNUAL REPORT
2010

Maryland Access to Justice Commission
2001 E/F Commerce Park Drive
Annapolis, Maryland 21401
410.260.1258
www.mdcourts.gov/mdatjc

OUR MISSION

By bringing together leaders and stakeholders from the Maryland Judiciary and its justice system partners, the Commission gives meaningful voice to the public whose interest it serves. Therefore . . . the Commission shall develop, consolidate, coordinate and/or implement initiatives designed to, and which are consistent with the Judiciary's policy to expand access to, and enhance the quality of, civil justice for persons who encounter barriers in gaining access to Maryland's civil justice system.

Duties. To carry out its purposes, the Commission shall:
(i) Consult extensively with members of communities that experience barriers to justice, including persons living in poverty, language minorities, persons with disabilities, and others, to obtain their views regarding the barriers to equal justice and proposed solutions;
(ii) Establish a coordinated planning process that involves members of the community affected by the crisis in equal access to justice in an effort to develop strategies to improve access and reduce barriers;
(iii) Facilitate efforts to create improved coordination and support of civil legal services programs;
(iv) Work with the courts, administrative agencies and lawmaking bodies to propose and promote rules and systemic changes that will open greater access to the justice system; and
(v) Propose and promote strategies to generate adequate levels of public, private and volunteer resources and funding for the State's civil justice network and the access to justice initiatives identified by the Commission.

Excerpted from:
Maryland Court of Appeals, Administrative Order as to the Maryland Access to Justice Commission, 19 March 2010.

Maryland Access to Justice Commission

Hon. Irma S. Raker
Chair, Maryland Access to Justice Commission
Judge (Ret.), Court of Appeals of Maryland

Hon. Ben C. Clyburn
Vice-Chair, Maryland Access to Justice Commission
Chief Judge, District Court of Maryland

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Family Division Director, Circuit Court for Baltimore County

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State Law Librarian, Maryland State Law Library

Cathy Ashby
Director, Ruth Enlow Library

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Chair, Judicial Institute
Judge, Court of Appeals of Maryland

Gray Barton
Executive Director, Problem-Solving Courts Committee

Joan Bellistri
Chair, Conference of Maryland Court Law Library Directors

Frank Broccolina
State Court Administrator,
Administrative Office of the Courts

Tracy Brown
Exec. Dir., Women's Law Ctr. of Maryland

Del. Michael E. Busch
Speaker, Maryland House of Delegates
Designee: Del. Kathleen Dumais

Hon. Benjamin Cardin
Senator, United States Senate
Designee: Bill Van Horne

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Designee: Jessica Clark

Jessica Clark
Budget Analyst, Ofc. of Capital Budgeting, Department of Budget and Management
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Designee: Jose Felipe Anderson

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Former Executive Director, Alternative Directions

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Public Defender, Office of the Public Defender

Hon. Kathleen Dumais
Delegate, Maryland House of Delegates
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Susan Erlichman
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Fedder and Garten Professional Assn.

Sen. Lisa Gladden
Senator, Maryland Senate
Designee for Senate President Thomas V. “Mike” Miller, Jr.

Sharon Goldsmith
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Designee: Michael Millemann

Hon. Glenn T. Harrell, Jr.
Judge, Court of Appeals of Maryland

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Chair, Conference of Circuit Judges
Administrative Judge, Circuit Court
for Baltimore City

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Past President, Maryland State Bar Assn.

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Executive Director, Legal Aid Bureau, Inc.

Connie Kratovil-Lavelle
Executive Director, Family Administration,
Administrative Office of the Courts

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Chief Judge, Court of Special Appeals

Hon. Dawne Lindsey
Chair, Conference of Circuit Court Clerks
Clerk, Circuit Ct. for Allegany Co.

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Admin. Judge, Circuit Ct. for Somerset Co.
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Executive Director, Governor's Office on
Crime Control & Prevention
Member and Designee for
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Senate President, Maryland Senate
Designee: Sen. Lisa Gladden

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and Conflict Resolution Office

COMMISSION STAFF

Pamela Cardullo Ortiz
Executive Director

Iris Joiner
Administrative Assistant

Letter from the Chair

Dear Colleagues:

The Maryland Access to Justice Commission was created in Fall 2008. The Commission was established to enhance the resources available to support civil legal services and improve access to the courts and to legal help for the most vulnerable Marylanders. From the outset, the Commission was faced with the most significant funding shortage affecting civil legal services to date.

I am happy to report that, thanks to the extraordinary collaboration of the State's many justice system partners, including the Judicial, Legislative, and Executive Branches, legal services providers and the Bar, a significant setback was averted by increasing the court filing fee surcharge to generate additional funds for legal services providers. The State's response to the crisis in funding for civil legal services will generate an estimated six and one-half million dollars during the current fiscal year, and places Maryland in the forefront of states which have responded positively to preserve access to justice at current levels.

Now the real work begins. With the immediate crisis addressed, the Commission set to work during the remainder of 2010 to advance the recommendations made in the 2009 *Interim Report*. The committees and subcommittees have been very active and have produced exciting and substantive materials to improve the justice system in Maryland.

It has been a challenging and productive year. Many challenges remain if we are to realize the promise of access to justice for all. The strong partnerships we have forged through the Commission hold great potential. The well-being of Maryland's most vulnerable individuals and families depend upon our ability to fulfill that promise.

Sincerely,

Irma S. Raker

Irma S. Raker
Maryland Court of Appeals (ret.)
Chair, Maryland Access to Justice Commission

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APPENDICES

Introduction

The past year has witnessed continued deprivation, job loss, foreclosures and hardship for many Maryland families. During difficult times, the network of supporting services for low- and moderate-income families becomes even more essential, particularly when fewer resources are available. Access to the courts becomes especially critical in such times. The Maryland Access to Justice Commission has emerged as a collaborative forum where the many entities that constitute the civil justice system can work together to strengthen the system and provide improved access to justice for all.

Despite these challenging economic times, the Judiciary, the Executive and Legislative branches of government, the legal services community and the Bar have found common ground in supporting the right of all Marylanders to obtain legal help and solve legal problems. For some this may mean the opportunity to retain housing in the face of foreclosure or eviction; for others it means the ability to be heard in a contested custody matter, or protection from domestic violence. For others it means maintaining financial support for a little while longer, or regaining wrongfully deprived wages. Support for access to justice strengthens the safety net that protects vulnerable individuals and their families. It is clear that the work of the Maryland Access to Justice Commission remains critically relevant.

Administrative Order

On March 19, 2010, Chief Judge Robert M. Bell, by administrative order, formally created the Commission and established the membership, duties and purpose. See Appendix 1.

Maryland's Year Long Public Inquiry Process

During 2009 and 2010, the Commission held a series of public events to garner insights from stakeholders, litigants and members of the public. The Commission held regional "Listening Events," entitled *Tell Us What You Think*, at community locations around Maryland.

Locations

The Commission chose virtually all non-court, community-based locations to hold the Listening Events in order to encourage people to attend who might otherwise be intimidated by a courtroom atmosphere. Events were held at the following locations on the dates listed below:

June 23, 2009	Sheppard Pratt Conference Center, Baltimore
July 28, 2009	University of Maryland, College Park
September 22, 2009	Allegany College, Cumberland
October 27, 2009	Chesapeake College, Wye Mills
November 24, 2009	Wicomico Co. Public Library, Salisbury
December 15, 2009	Southern Maryland Higher Education Center, California
January 19, 2010	Langley Park Community Center, Hyattsville
February 23, 2010	Executive Office Building, Rockville
March 23, 2010	Our Daily Bread, Baltimore
April 20, 2010	Maryland Court of Appeals, Annapolis

Procedure

A Spanish interpreter and an ASL interpreter were provided for all ten Listening Events. The proceedings were held generally in the nature of a public hearing. Speakers were invited to approach a podium, or sit at a table facing a panel of featured listeners from the Maryland Access to Justice Commission, its committees, and the Maryland Judiciary, and occasionally including local political representatives. All proceedings were recorded.

Members of the public, stakeholders, Listening Event speakers and others were invited to submit written testimony. Testimony was accepted by mail, email, phone, or fax, or could be provided in-person at the Listening Events.

Information about the Listening Events was distributed to potential participants by email, through online notices on the Commission and Judiciary web pages, and through press releases and local news coverage.

Invitees

Over 400 stakeholder organizations serving persons in critical populations across the State were invited to attend. Invited organizations included legal services providers, social service agencies, domestic violence organizations, advocates for children, organizations serving persons with disabilities, the elderly, the homeless, the lesbian, gay, bisexual and transgendered community, as well as those serving people from particular ethnic or cultural groups. Clients of those organizations and members of the public were invited to attend and testify as well.

Eighty-three (83) Speakers, Forty-six (46) Written Submissions

During its year-long public inquiry process the Commission heard testimony from 83 speakers and received written testimony from 46 individuals.

Sharing What We Learned

To ensure the lessons from the Listening Events permeate the work of the Commission and the Judicial Branch, transcripts from all ten events, along with written testimony, have been made available to Commission members. A summary of all the events as well as highlights of post-hearing interviews were presented to the full Commission. See Appendix 3.

Defining Access to Justice

The Commission adopted a definition of "access to justice" as follows:

> *Access to justice means all Marylanders can benefit from the rights, protections, services and opportunities that the law and the legal system provide. Having access to justice requires that the information and resources Marylanders need to access these rights are adequately funded and are available regardless of ability, age, gender, religion, institutionalization, income, language, literacy, race, ethnicity or sexual orientation.*
>
> *Access to justice must include:*
>
> - *Practices, procedures and resources that support the ability of the self-represented to navigate through and fully participate in the legal system, including online resources.*
> - *Courthouses and facilities housing law-related services that are supported and maintained with adequate funding in order to be safe, accessible, convenient, and technologically current.*
> - *The availability of a full range of legal services including information, advice, appropriate referrals, and full representation by an attorney, as necessary.*
> - *The opportunity to participate in mediation or other appropriate dispute resolution services as well as the opportunity to understand their benefits and limitations.*
> - *The commitment of all branches of government to support these principles through fiscal and legislative policies designed to make them a reality for all Marylanders.*

Access & Delivery of Legal Services

Addressing the Crisis of Funding for Civil Legal Services

The Commission exercises leadership in advocating for stable and sufficient funding for civil legal services. The Commission was created at the onset of the current economic downturn and immediately faced a significant crisis in funding for the civil legal services delivery system. One primary source of funding for legal services has been the Interest on Lawyers Trust Account (IOLTA) program. Due to the economic crisis and unprecedented low interest rates, IOLTA income fell from $6.7 million in Fiscal Year 2008 to approximately $2 million in Fiscal Year 2010. To address this significant decline in resources, the Maryland Access to Justice Commission partnered with the Maryland Judiciary, the Maryland Legal Services Corporation, Maryland Legal Aid and others to advocate for an increase in court filing fee surcharges to generate additional revenue for civil legal services. With its partners, the Commission successfully advocated for the passage of Senate Bill 248. The bill, signed by the Governor in May, 2010, is expected to generate approximately $6.5 million during the current fiscal year.

Supporting Lawyers Who Work in the Public Interest

The Maryland General Assembly called upon the Commission after the 2010 Legislative Session, asking the Commission to study the feasibility of a bill that would have created a new loan assistance repayment program for Maryland lawyers doing public interest or public service work. House Bill 703 would have created a larger, separate loan assistance repayment program for lawyers, financed by a $50 fee paid by all attorneys. Del. Samuel "Sandy" Rosenberg, the bill's sponsor, joined the Access and Delivery of Legal Services Committee for a discussion of the bill. The Commission made a number of suggestions to aid the General Assembly in considering an enhanced loan assistance repayment program.

Other Legislative Advocacy

The Maryland Access to Justice Commission has become an effective voice for low-income Marylanders through legislative advocacy, undertaken in collaboration with the Maryland Judiciary. The Commission was called upon to weigh-in on several key pieces of legislation that will have an impact on low-income Marylanders and their ability to access civil legal services.

- In March, the Commission sent a letter to the Maryland Congressional and Senate delegations in support of the federal Civil Access to Justice Act (CAJA) which would reauthorize and increase funding for the Legal Services Corporation. CAJA remained pending at the close of the 111th Congress.

- The Commission communicated with Maryland State legislators to oppose budgetary language that would have required the disclosure of the names of individual clients served by law clinics at the University of Maryland School of Law, and would have had a chilling effect on access to justice in the State. The proposed language was eventually dropped.

- The Commission joined with other Access to Justice Commissions across the country in urging the Federal Deposit Insurance Corporation (FDIC) and Congress to address an oversight that left IOLTA programs out of the unlimited FDIC insurance coverage provided to certain accounts in the Frank-Dodd Wall Street Reform and Consumer Protection Act. The Act was amended to incorporate the requested changes, was passed by Congress, and has been signed into law.

Enhancing Access to Representation for Victims of Domestic Violence

In an initiative created by the Office of the Vice President of the United States, Baltimore was one of two cities selected to participate in an effort to reduce domestic violence and enhance access to legal representation for victims. At the invitation and request of the Maryland Access to Justice Commission, the law firm of Venable, LLP, agreed to sponsor and fund a three-year fellowship at the House of Ruth in Baltimore. During October 2010, Commission Chair, Hon. Irma S. Raker and representatives from Venable, LLP, the House of Ruth and the University of Baltimore School of Law, were invited to the White House to attend an announcement by President Barrack Obama and Vice President Joseph Biden. The event highlighted key domestic violence initiatives they were launching around the country. One of these initiatives was the new Venable Access to Justice for Victims of Domestic Violence Fellowship created at the University of Baltimore School of Law, the result of a collaborative partnership between Venable, LLP, the House of Ruth, the University of Baltimore School of Law and the Maryland Access to Justice Commission. The fellowship, which will accept applicants this Spring, will place a graduate of the University of Baltimore School of Law who has participated in the Family Law Clinic, in a one-year position with the House of Ruth's Protective Order Advocacy Representation Project (POARP) at the District Court in Baltimore City.

Fee-Shifting to Promote the Public Interest In Maryland

In its *Interim Report*, the Commission recognized the role fee-shifting schemes play in expanding access to legal representation. The Commission noted the large number of varying fee-shifting statutes in the State, and noted especially the lack of a provision for attorney's fees in cases involving State constitutional claims. In Recommendation 3 in that report, the Commission endorsed the principle of a "general fee-shifting provision as a means to promote access to justice through an award of attorney's fees for individuals successfully enforcing their rights under Maryland law or the Maryland Constitution." (*Interim Report,* p. 26). In furtherance of that recommendation the Commission developed a white paper entitled, *Fee-Shifting to Promote the Public Interest in Maryland.* The paper addresses the many issues likely to be raised in considering a general fee-shifting provision for State statutory and constitutional claims. It includes, in a final section, a proposed statute.

Civil Right to Counsel

The first recommendation made by the Commission in its 2009 *Interim Report* was an endorsement of a broader right to counsel:

> **Recommendation 1**
> The Maryland Access to Justice Commission supports the principle that low-income Marylanders should have a right to counsel at public expense in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody. *Interim Report,* p. 7.

In furtherance of that goal, the Commission's Civil Right to Counsel Subcommittee spent the better part of 2010 conducting an in-depth examination of how a right, once established, might be implemented. The subcommittee also prepared a fiscal narrative – a realistic effort to approximate the fiscal impact of a civil right to counsel, should one be established. The Commission endorsed and published the implementation document and fiscal narrative in a single report entitled, *Implementing a Civil Right to Counsel in Maryland.*

Promoting *Cy Pres* Awards

In an effort to better understand how *cy pres* awards benefit the civil legal services delivery system, the Commission has asked the Maryland Judiciary to begin collecting information from judges about these awards including how often they are made, the amount of the award, and to whom the funds are directed.

Fee Waivers

The Access & Delivery of Legal Services Committee has been exploring ways to ensure court filing fee waivers are provided to those who are in need. The Committee is reviewing proposed modifications to the Circuit Court and District Court fee schedules to provide an automatic fee waiver in civil matters to individuals represented by the Office of the Public Defender (similar to the automatic waiver provided to individuals represented by MLSC grantees), and to require judges to use the MLSC income guidelines in determining whether to grant the waiver. The committee is continuing its work on this topic in 2011.

Self-Represented Litigants

District Court Self-Help Center

The Maryland Access to Justice Commission was instrumental in assisting the District Court of Maryland in launching its first self-help center. The District Court Self-Help Center was created at the court location in Glen Burnie, Maryland. It is operated by Maryland Legal Aid under contract with the Maryland Access to Justice Commission and is staffed by two full-time attorneys, a paralegal and an administrative assistant. The Center, which opened its doors in December, 2009, served 4,300 individuals in its first year.

Efforts are underway to expand the reach of the Center by providing assistance to users remotely via phone, email, Skype and Live Chat. The District Court of Maryland, with the Commission's assistance, hopes to launch the virtual self-help center sometime during 2011.

Promoting Limited Scope Representation

During 2010, the Self-Represented Litigant Committee completed work on a set of draft rules and forms designed to promote the practice of limited scope representation. The materials were developed as a follow-up to the white paper included in the Commission's Fall 2009 *Interim Report*, and in fulfillment of Recommendations 36 and 59, included therein, in which the Commission urged the "development and provision of 'unbundled' legal services to the low- and moderate-income population." (*Interim Report,* p. 42). The proposed rules and forms were submitted to the Maryland State Bar Association (MSBA) for comment. The Commission reviewed the feedback received from the MSBA and endorsed a final version of the draft rules and forms. Those have been forwarded to the Court of Appeals Standing Committee on Rules of Practice and Procedure for consideration.

Better Service for Court Users

The Commission produced and distributed to all courts copies of a booklet entitled *What Can I Do to Help You? A Guide for Court Staff: How to Distinguish Legal Information from Legal Advice to Better Serve the Public*. In addition to the booklet, courts were provided one-page laminated cards and wall posters entitled *Can We Help You?*, listing advice court staff can and cannot provide in aiding the public. These materials were used to educate court staff as to how to respond more effectively to the public.

More Effective Forms Management

The Commission's Forms Management Subcommittee serves as an effective conduit for communication between departments and entities responsible for forms development and management. The subcommittee accomplished the following:

- During 2010, the subcommittee developed a **Forms Management Workflow Process Model** to ensure all new forms and modifications follow a uniform protocol for development, approval and posting.
- The group produced a **Forms Change Request Form** to allow users to suggest changes or corrections and are exploring ways to provide for automated forms change notifications.
- The subcommittee developed an **automated forms interface for District Court forms** using an online survey utility. The automated interface aids users in identifying and selecting the forms and instructional information they need to file actions in the District Court. Since its creation in November, 2009, the interface has been used by over 12,700 online users.
- Through the work of the subcommittee, the Judiciary has adopted a **usability and accessibility checklist** for all forms.

Multimedia e-Learning Tools

The Media Development subcommittee of the SRL Committee created a pilot multimedia e-learning segment on *Bringing a Small Claim*. This PowerPoint video was designed as a simple, easy to produce way to deliver legal information to the self-represented. The video is available on the Commission's website, under a new link for "Video and Multimedia Help": www.mdcourts.gov/mdatjc/needhelp.html. An accompanying script is provided for the visually impaired. The subcommittee plans to develop a series of short, single-topic videos in a similar format on a range of topics relevant for the self-represented.

Public Education

My Laws, My Courts, My Maryland: A Public Education Campaign

Through its Public Education Committee, the Commission outlined a public education campaign entitled, "My Laws, My Courts, My Maryland," to promote public understanding of the law, the civil justice system and the legal resources available in our State. During 2010, the Commission took the first step in executing that campaign by developing and distributing eight posters. The posters focus on a variety of themes which include how to obtain legal help, the positive role of the courts, the need to support civil legal services, and debunking the myth that individuals have a right to counsel in all civil matters. Posters will be distributed free-of-charge upon request to courts, legal services providers, social services providers, public libraries, and other public and private entities frequented by low- and moderate-income Marylanders. Free copies of the posters may also be downloaded as 8 ½" x 11" mini-posters from the Commission's website, www.mdcourts.gov/mdatjc.

Overcoming Language Barriers

The Critical Barriers Committee created a new subcommittee during 2010 to focus specifically on how the Commission and its civil justice system partners might better address the needs of those with limited English proficiency. While work is still underway, the Critical Barriers Committee proposed several additional recommendations that, if implemented, will strengthen the court's ability to respond to the needs of these individuals who face significant obstacles in using the courts.

> **Recommendation 1. Translation Protocol**. The Commission recommends that the Judiciary adopt a policy that, in the absence of a translator provided by the Administrative Office of the Courts, Program Services Unit, courts should use a translator certified by the American Translators Association.
>
> **Recommendation 2. Document Translation.** The Commission recommends that the Judiciary build a robust resource to make it easier to translate materials by hiring qualified translators in several core languages as full-time, permanent employees of the Judiciary, and that this service be provided to all courts and court offices. Document translation should be integrated into the regular document review process so translations are kept up to date.
>
> **Recommendation 3. Machine Translation.** The Commission recommends that the Judiciary adopt a policy that machine translations for websites or other documents are disfavored and should not be used.

These recommendations were endorsed by the full Commission and forwarded to the Maryland Administrative Office of the Courts.

Creating an Incentive for Access to Justice Efforts

To raise awareness about access to justice and to encourage behaviors and ideas that promote access to justice, the Commission is planning to make annual awards in five categories: 1) to a judge who exemplifies access to justice; 2) to a Judicial Branch employee (non-judge) who exemplifies access to justice; 3) to a program from any branch of government that enhances access to justice; 4) to a legislator who exemplifies Maryland's commitment to access to justice; and 5) to a person, program or department of the Executive Branch that has improved access to justice. The Commission expects to make its first awards during 2011.

Conclusion

The Commission has worked to advance many of the recommendations made in its 2009 *Interim Report*. A number of the implementation projects undertaken by the Commission have been launched; others will require further collaboration, advocacy and resourcefulness. The Commission will continue to work with its many civil justice system partners to ensure that those ideas bear fruit in the lives of individual Marylanders, to make access to justice not just aspirational, but inspirational.

APPENDICES

IN THE COURT OF APPEALS OF MARYLAND

ADMINISTRATIVE ORDER AS TO THE MARYLAND ACCESS TO JUSTICE COMMISSION

WHEREAS, The Maryland Judiciary is committed to equality, fairness and integrity in the judicial process, which it affirms by supporting a broad range of programs that enhance the legal services delivery system, in an effort to increase access to representation and other forms of legal assistance; and

WHEREAS, The Maryland judicial system is established upon the principle that justice be accessible to all, and where it is in the interest of all Maryland attorneys, stakeholders, legal services providers and the general public that the principle of equal justice be advanced in our State; and

WHEREAS, There is a lack of public understanding of the civil justice system or the civil legal services delivery system, with negative implications for access to justice; and

WHEREAS, The Maryland Judiciary acknowledges its responsibility to ensure that in Maryland, the unmet legal needs of low and moderate income persons who face a range of barriers in accessing the courts, seeking legal assistance or otherwise trying to solve legal problems are addressed, and that courts recognize the importance of access to the civil justice system for all in maintaining a just and civil society; and

WHEREAS, The Conference of Chief Justices, in 2001, adopted Resolution 23 recognizing that the Judicial Branch "shoulders primary responsibility to preserve and protect equal justice and take action to ensure access to the justice system for those facing impediments that they are unable to surmount on their own," and urging members of the

Conference to establish partnerships, in their respective states, with state and local bar organizations, legal service providers and others to address access to justice issues; and

WHEREAS, In 2006, a Work Group on Self-Representation in the Maryland Courts was established and charged with planning a strategic and integrated response to the needs of self-represented litigants; and

WHEREAS, In August 2007, the Work Group completed its work, and recommended, among other proposals, the establishment of an Access to Justice Commission to coordinate the Maryland Judiciary's efforts to improve access to justice for self-represented litigants and those of limited means; and

WHEREAS, In the fall of 2008, the Chief Judge of the Court of Appeals adopted the Work Group's recommendations and established the Maryland Access to Justice Commission, charging it with the responsibility of addressing existing barriers to access to the courts and legal services in Maryland, and with expanding opportunities for citizens to benefit from the protections, rights and resources that the law provides; and

WHEREAS, The membership of the Commission, which includes leaders from the Judicial, Legislative and Executive Branches of government, the Maryland State Bar Association, legal service providers, faith-based and social service communities, as well as lay persons, was established by the Chief Judge of the Court of Appeals, the functions and duties of the Commission were not, nor was an Administrative Order issued addressing these matters; and

WHEREAS, It is appropriate that such Order be issued to memorialize the Commission's existence and functions.

NOW, THEREFORE, I, Robert M. Bell, Chief Judge of the Court of Appeals and

administrative head of the Judicial Branch, pursuant to the authority conferred by Article IV, § 18 of the Maryland Constitution, do hereby order this 18th day of March 2010, effective immediately:

1. Commission.

a. Composition. The Commission shall consist of 45 members appointed by the Chief Judge of the Court of Appeals.

b. Chair and Vice Chair. The Chief Judge of the Court of Appeals shall designate the Chair and Vice Chair of the Commission.

c. Membership. The membership of the Commission, which is subject to modification by the Chief Judge of the Court of Appeals, shall include the following:

Judiciary Participants

(i) The Court of Appeals Judge serving as Chair of the Judicial Institute; Chief Judge of the Court of Special Appeals; Chair of the Conference of Circuit Judges; Chief Judge of the District Court; Chair of the Legislative Committee; Chair of the Family Law Committee; additional Circuit Court and District Court Judges, as appropriate;

(ii) The State Court Administrator; Chair of the Conference of Court Administrators;

(iii) The Chair of the Conference of Circuit Court Clerks; Chief Clerk of the District Court; Coordinator of Commissioner Activities;

(iv) The Family Division Director of a large jurisdiction;

(v) The Executive Director, Judicial Information Systems, AOC; Executive Director, Family Administration, AOC; Executive Director, MACRO; Executive Director, Problem Solving Courts, AOC; Executive Director, ADR, District Court;

(vi) The Court Information Officer, Office of Communications and

Public Affairs;

(vii) The Maryland State Law Librarian; Chair of the Conference of Maryland Court Law Library Directors.

Non-Judiciary Participants

(i) A United States Senator or Congressional Representative or a designee;

(ii) The Governor of Maryland; President of the Maryland Senate; Speaker of the Maryland House of Delegates, as *ex officio* members;

(iii) The Maryland Attorney General or a designee;

(iv) The Public Defender;

(v) A State's Attorney;

(vi) The President of the Maryland State Bar Association;

(vii) The Dean of the University of Maryland School of Law or a designee;

(viii) The Dean of the University of Baltimore School of Law or a designee;

(ix) The Executive Director of the Governor's Office on Crime Control & Prevention;

(x) The Executive Director, Legal Aid Bureau of Maryland; Executive Director, Maryland Volunteer Lawyers Service; Executive Director, Maryland Legal Services Corporation; Executive Director, *Pro Bono* Resource Center of Maryland; Executive Director, Women's Law Center of Maryland; Executive Director, Public Justice Center; Executive Director, Alternative Directions; Executive Director, Interfaith Works;

(xi) The President of the League of Women Voters of Maryland;

(xii) A representative from the Maryland Department of Budget and Management;

(xiii) A representative from the Maryland Association of Public Law Librarians;

(xiv) Two (2) practicing attorneys with a demonstrated commitment to access to justice issues.

d. Term. The Commission will be established for an initial term of (3) three years. The term of the Commission will be extended if the Commission has demonstrated significant progress toward the goals of a significant increase in funding for access to justice, improved planning and coordination in legal service delivery, and reduction in the barriers to access to justice.

e. Compensation. The members and advisors are not entitled to compensation, but to the extent provided in the Judiciary's budget, may be reimbursed for expenses in connection with travel related to the work of the Commission.

f. Officers. The Chair may designate additional officers and committee chairs as appropriate.

g. Staff. There shall be an Executive Director of the Commission, who shall serve as staff.

2. Functions.

a. Purposes.

By bringing together leaders and stakeholders from the Maryland Judiciary and its justice system partners, the Commission gives meaningful voice to the public whose interest it serves. Therefore, subject to the limitations set forth in Section 3 of this Order, the Commission shall develop, consolidate, coordinate and/or implement initiatives designed to, and which are consistent with the Judiciary's policy to expand access to, and enhance the quality of, civil justice for persons who encounter barriers in gaining access to Maryland's civil justice system.

b. Duties. To carry out its purposes, the Commission shall:

(i) Consult extensively with members of communities that experience barriers to justice, including persons living in poverty, language minorities, persons with disabilities, and others, to obtain their views

regarding the barriers to equal justice and proposed solutions;

(ii) Establish a coordinated planning process that involves members of the community affected by the crisis in equal access to justice in an effort to develop strategies to improve access and reduce barriers;

(iii) Facilitate efforts to create improved coordination and support of civil legal services programs;

(iv) Work with the courts, administrative agencies and lawmaking bodies to propose and promote rules and systemic changes that will open greater access to the justice system; and

(v) Propose and promote strategies to generate adequate levels of public, private and volunteer resources and funding for the State's civil justice network and the access to justice initiatives identified by the Commission.

c. Report. The Commission shall prepare and file with the Court of Appeals, an annual report of the progress of the Commission's work during the preceding 12 months.

The initial report shall be filed one (1) year from the date of this Order.

3. Scope of Authority.

Any recommendations by the Commission shall be made in the name of the Commission only, and not in the name of the individual members or the institutions they represent. The Commission shall not promote or pursue legislative or policy initiatives inconsistent with Judiciary policies or positions.

/s/ Robert M. Bell
Robert M. Bell
Chief Judge of the Court of Appeals

Filed: March 19, 2010

/s/ Bessie M. Decker
Bessie M. Decker
Clerk
Court of Appeals of Maryland

Tell Us What You Think: Access to Justice Listening Events

Come and speak with members of the Maryland Access to Justice Commission and its several committees about your experience with the civil justice system.

NOVEMBER 24	Wicomico Co. Public Library Salisbury Time: 6:00—8:00 pm
DECEMBER 15	Southern Maryland Higher Education Center, California Time: 6:00—8:00 pm
JANUARY 19	Langley Park Community Ctr., Hyattsville Time: 2:30—4:30 pm
FEBRUARY 23	Executive Office Building Rockville Time: 6:00—8:00 pm
MARCH 23	Our Daily Bread Baltimore Time: 3:00—5:00 pm
APRIL 20	Maryland Court of Appeals Annapolis Time: 6:00 — 8:00 pm

REGISTRATION REQUIRED.
Register at www.mdcourts.gov/mdatjc

The Maryland Judiciary recently created the Maryland Access to Justice Commission to make and implement recommendations to expand access to the state's civil justice system. The Commission hopes to enhance the quality of justice in civil legal matters for persons who encounter barriers when dealing with the courts or trying to solve a legal problem.

SPANISH and ASL Interpreters will be present at all events. Additional interpreters available upon request.

Maryland Access to Justice Commission

Maryland Access to Justice Commission
2011D Commerce Park Drive
Annapolis, MD 21401
Phone: 410-260-1258
Fax: 410-260-3612
www.mdcourts.gov/mdatjc

SUMMARY OF ISSUES COMMENTED ON BY SPEAKERS AT THE *TELL US WHAT YOU THINK: ACCESS TO JUSTICE LISTENING EVENTS*[*]

Hosted by the Maryland Access to Justice Commission
2009- 2010

ACCESS TO LEGAL SERVICES

Legal Services

- *Provide a renewed and increased investment in legal services.*
- *Inability of existing programs to meet rising demand.*
- *Broader right to counsel in civil matters.*
- *Attorneys make a difference.*
- *Greater emphasis on pro bono representation.*

Self-Represented Litigants

- *Self-help centers are in high demand and more is needed.*
- *Develop more resources including written and online materials, and classes.*
- *The self-represented often feel disadvantaged.*

KEY CASE TYPES

Consumer Law

- *Debt collection laws and procedures operate to the disadvantage of the consumer.*
- *Self-represented consumers are unaware of their rights under the law.*
- *Representation for alleged debtors makes a significant difference.*
- *Some debt buying firms do not have required documentation to support their claims.*
- *The power differential between creditors and debtors is exacerbated by court procedures.*
- *Court personnel play a role in access to justice.*

Landlord-Tenant Matters

- *Current law expedites the recovery of rent but is much less responsive to concerns about housing conditions and habitability.*
- *Judgments may be entered without a tenant who appears ever seeing a judge.*
- *Procedural and evidentiary requirements are often not enforced.*

Domestic Violence

- *Victims are sometimes pressured to proceed directly to a final hearing.*
- *Physical environment, geography can act as a barrier for victims seeking protection.*
- *In rural jurisdictions, transportation and limited judicial resources can impede protection.*
- *Lack of sensitivity to victims among judges, law enforcement.*
- *Need for civil expungements.*

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[*] This is a summary of the testimony of speakers who appeared at the Listening Events and represents the personal views of the speakers.

Child Welfare

- *Noted improvements in the handling of child welfare matters over the years.*
- *Problem-solving courts are effective at addressing underlying issues for families.*
- *Emphasis on mediation in these matters has had a significant impact.*
- *More funding needed for CASAs, social services.*

Family Law

- *The adversarial system remains costly and problematic for families.*
- *Limited scope practice is an emerging model which may make counsel more affordable.*
- *Need standards, accountability for custody and psychological evaluations.*

Child Support

- *Child support agency overstressed and not always responsive.*

Child Counsel in Custody Matters

- *Courts do not always follow the new rules regarding child counsel.*

SAFETY, ACCESSIBILITY & CONVENIENCE

- *Lack of transportation can be a barrier to justice.*
- *With few legal service providers, clients in some jurisdictions must travel long distances to meet with an attorney.*
- *Court users often need child care.*
- *Bailiffs in some jurisdictions do an excellent job protecting victims in the courthouse.*

OTHER CRITICAL POPULATIONS

Persons with Disabilities

- *Online documents need to be accessible to all; advocacy groups can provide technical assistance to help improve access for persons with disabilities.*
- *Physical access to facilities remains a challenge.*
- *Some disabilities may be less obvious to the casual observer.*
- *Attitudinal barriers to justice remain.*

Incarcerated Individuals

- *There are few resources to aid the incarcerated with civil legal issues.*
- *Once released, these individuals face many barriers to reentering society.*

Language Access

- *Need for more interpreters, especially in rural areas.*
- *Bilingual staff can make a big difference; court should prioritize hiring of bilingual staff.*
- *Need for interpreters for court services and court-like proceedings.*
- *Improved procedures for requesting interpreters.*
- *Improved training and support for staff in use of telephonic interpretation services.*
- *Sensitivity or awareness training for court personnel.*

Seniors

- *Expedite review of garnishments to minimize dire financial consequences for seniors.*

Victims of Sexual Assault

- *Civil legal needs of child victims often arise in family matters.*

OTHER ISSUES

Bias

- *Bias sometimes affects outcomes for racial minorities, non-English speakers, the poor, the LGBT community and women.*
- *Need for a more diversified bench.*

Accountability

- *Some suggested more accountability for attorneys and judges needed.*

Continuing the Conversation

- *Find a way to continue receiving input from court users, stakeholders.*

SENATE BILL 248

D1 (0lr1317)

ENROLLED BILL

— Judicial Proceedings/Judiciary —

Introduced by **Senators Frosh, Brochin, Forehand, Gladden, Haines, Muse, Raskin, and Stone**

Read and Examined by Proofreaders:

_____

Proofreader.

_____

Proofreader.

Sealed with the Great Seal and presented to the Governor, for his approval this

_____ day of _____ at _____ o'clock, _____M.

_____

President.

CHAPTER _____

AN ACT concerning

Civil Cases – Maryland Legal Services Corporation Fund ~~– Surcharges~~

FOR the purpose of altering a certain surcharge on certain fees, charges, and costs in certain civil cases in the circuit courts and the District Court; *requiring the executive director of the Maryland Legal Services Corporation to prepare a budget for the Corporation; requiring a certain informational budget to be submitted to the General Assembly in conjunction with the budget of the Judicial Branch of the State government; providing for the termination of this Act;* making a stylistic change; and generally relating to ~~certain surcharges deposited into~~ the Maryland Legal Services Corporation Fund.

BY repealing and reenacting, with amendments,
Article – Courts and Judicial Proceedings
Section 7–202(a)(1) and (d) and 7–301(c)

EXPLANATION: **CAPITALS INDICATE MATTER ADDED TO EXISTING LAW**.
[Brackets**]** indicate matter deleted from existing law.
Underlining indicates amendments to bill.
~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.
Italics indicate opposite chamber/conference committee amendments.

Annotated Code of Maryland
(2006 Replacement Volume and 2009 Supplement)

BY repealing and reenacting, without amendments,
Article – Courts and Judicial Proceedings
Section 7–202(e)
Annotated Code of Maryland
(2006 Replacement Volume and 2009 Supplement)

BY adding to
Article – Human Services
Section 11–208
Annotated Code of Maryland
(2007 Volume and 2009 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article – Courts and Judicial Proceedings

7–202.

(a) (1) **(I)** The State Court Administrator shall determine the amount of all court costs and charges for the circuit courts of the counties with the approval of the Board of Public Works.

(II) The fees and charges shall be uniform throughout the State.

(d) The State Court Administrator, as part of the Administrator's determination of the amount of court costs and charges in civil cases, shall assess a surcharge that:

(1) May not be more than **[**$25**]** ~~**$70**~~ ***$50*** ***$55*** per case; and

(2) Shall be deposited into the Maryland Legal Services Corporation Fund established under § 11–402 of the Human Services Article.

(e) If a party in a proceeding feels aggrieved by any fee permitted under this subtitle or by §§ 3–601 through 3–603 of the Real Property Article, the party may request a judge of that circuit court to determine the reasonableness of the fee.

7–301.

(c) (1) The filing fees and costs in a civil case are those prescribed by law subject to modification by law, rule, or administrative regulation.

(2) The Chief Judge of the District Court shall assess a surcharge that:

(i) May not be more than:

1. **[**$5**]** ~~**$10**~~ ~~***$7***~~ ***$8*** per summary ejectment case; and

2. **[**$10**]** ~~**$20**~~ ~~***$15***~~ ***$18*** per case for all other civil cases; and

(ii) Shall be deposited into the Maryland Legal Services Corporation Fund established under § 11–402 of the Human Services Article.

(3) The Court of Appeals may provide by rule for waiver of prepayment of filing fees and other costs in cases of indigency.

Article – Human Services

11–208.

(A) THE EXECUTIVE DIRECTOR SHALL PREPARE AN ANNUAL BUDGET FOR THE CORPORATION.

(B) (1) FOR INFORMATIONAL PURPOSES ONLY, THE CORPORATION SHALL SUBMIT ITS BUDGET TO THE GENERAL ASSEMBLY IN CONJUNCTION WITH THE BUDGET REQUEST OF THE JUDICIAL BRANCH OF THE STATE GOVERNMENT ON NOVEMBER 1 OF EACH YEAR.

(2) THE INFORMATIONAL BUDGET REQUIRED UNDER THIS SUBSECTION SHALL INCLUDE 3 YEARS OF DATA, INCLUDING THE MOST RECENTLY COMPLETED FISCAL YEAR, AN ESTIMATE FOR THE CURRENT FISCAL YEAR, AND AN ESTIMATE FOR THE NEXT FISCAL YEAR, INCLUDING:

(I) A SUMMARY OF TOTAL EXPENDITURES AND THE SOURCES OF REVENUE THAT SUPPORT THAT SPENDING;

(II) LINE ITEM EXPENDITURE DETAIL FOR PERSONNEL, OPERATING EXPENSES, AND GRANTS, INCLUDING INDIVIDUAL GRANTEES;

(III) NARRATIVE EXPLANATION OF ALL REVENUE AND SPENDING CHANGES BETWEEN THE CURRENT FISCAL YEAR AND THE NEXT FISCAL YEAR;

(IV) PERFORMANCE MEASUREMENT DATA THAT DETAILS THE USE OF FUNDS; AND

(V) DETAIL ON THE CORPORATION'S RESERVE FUND, INCLUDING ACTUAL AND ESTIMATED END OF FISCAL YEAR BALANCES, TRANSFERS TO AND FROM THE RESERVE FUND, AND THE POLICIES GOVERNING THE RESERVE FUND.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect ~~June 1, 2010~~ *July 1, 2010. It shall remain effective for a period of 3 years and, at the end of June 30, 2013, with no further action required by the General Assembly, this Act shall be abrogated and of no further force and effect*.

Approved:

_____

Governor.

_____

President of the Senate.

_____

Speaker of the House of Delegates.

FEE-SHIFTING TO PROMOTE THE PUBLIC INTEREST IN MARYLAND
A White Paper of the Maryland Access to Justice Commission[†]
Fall 2010

I. Changing Incentives to Create Meaningful Rights Enforcement in Maryland

Markets are shaped by incentives. Incentives in turn are shaped by the laws and regulations that govern the market. When it comes to access to justice, one market that matters is the market for legal representation in civil rights and other types of cases with low or non-monetary relief potential. Under ordinary market conditions, few attorneys have an incentive to offer representation to these claimants, despite the relatively large number of potential claims. Statutes that authorize an award of attorney's fees in such cases can shift market forces, creating incentives for attorneys to take clients and pursue meritorious claims which do not normally make sense from a business perspective. Fee-shifting, in other words, connects the individuals who may have been harmed with counsel who can aid them in seeking to enforce their rights under the law. The action of these private individuals provides a significant public benefit by enforcing the law, deterring future misconduct and promoting compliance with the law while reducing the need for government resources for enforcement of critical remedial laws.

In its *Interim Report*, the Maryland Access to Justice Commission recognized the role fee-shifting schemes play in expanding access to legal representation. The Commission noted the large number of fee-shifting statutes in the State, each of which is associated with a particular type of claim, and each of which operates distinctly, creating a non-uniform panoply of individual, statutorily created fee provisions. The Commission also highlighted the notable lack of a provision for fees in cases involving State constitutional claims:

> Federal claimants have the benefit of 42 USC § 1988. There is no state equivalent in Maryland, forcing many litigants to focus on federal law claims and sue in federal court when they could instead litigate in their own communities under Maryland law if they could attract counsel.[1]

To strengthen and render more uniform the award of attorney's fees in Maryland, the Commission "endorsed the principle of a general fee-shifting provision as a means to

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[†] This document is the work of the Maryland Access to Justice Commission only. It does not represent the policy of the Maryland Judiciary.

[1] MARYLAND ACCESS TO JUSTICE COMMISSION, INTERIM REPORT & RECOMMENDATIONS (Fall 2009), 26. See Stephen J. Shapiro, *Suits Against State Officials For Damages For Violations Of Constitutional Rights: Comparing Maryland and Federal Law*, 23 U. BALT. L. REV. 423, 435 (1994) ("Although there is no statutory remedy in Maryland similar to Section 1983 for violations of rights provided by the Maryland Constitution, the court of appeals has held that a common-law action for damages is available for such violations. In setting forth the **[*436]** guidelines for common-law actions against state officials, the court of appeals has established different standards of liability than those in a Section 1983 action.")

promote access to justice through an award of attorney's fees for individuals successfully enforcing their rights under Maryland law or the Maryland Constitution."[2]

In acting on this recommendation, Maryland will have an opportunity to shape the market for legal services to create economic incentives that protect important rights. This will, of necessity, require a nuanced approach that balances the need for increased access to counsel, and subsequently an increase in the use of litigation to enforce those rights in a way that does not unduly burden state and local governments and large institutional defendants who are most often the targets of this type of litigation. The challenge is to modify the current incentive structure to promote only meritorious actions like those anticipated by the framers of the Maryland Constitution and rights-creating statutes. While it may be difficult to achieve that balance, it is worth pursuing, for without it, many of the rights established in the State remain unenforceable.

This white paper is intended to address the many issues likely to be raised in a State conversation about whether to adopt a general fee-shifting provision for State statutory and constitutional claims. Section II will examine the history of fee-shifting in the context of the American and English Rules. Section III will explore the various rationales for fee-shifting and its effect on market incentives. In Section IV, the paper will discuss several variants on the theme of how a fee-shifting scheme could or should be structured. Section V will discuss how fee awards are calculated and issues Maryland should consider in crafting its scheme. Section VI considers the implications of fee-shifting for sovereign immunity and the possible impact on the Maryland Tort Claims Act. Section VII discusses the many fee-shifting provisions embedded in individual Maryland laws to address how those might be rendered more uniform by a generic statute. Finally, in Section VIII, the paper will propose language for a general fee-shifting statute in Maryland.

II. Fee-Shifting in the Context of the American Rule

Under the prevailing "American Rule," each party to a lawsuit generally must pay his or her own legal fees, regardless of the outcome.[3] This presumption was adopted early in the American colonies, as a rejection of the "English Rule" under which the losing party in British courts is required to pay the litigation costs of both parties. Today, the United States is in a minority of industrialized nations in adhering to the American Rule. England and Europe generally follow the English Rule, also referred to as "general indemnity."[4] The English Rule discourages non-meritorious claims. Only plaintiffs who expect to prevail are likely to take the significant risk of initiating litigation. The American Rule was intended to increase access to the courts because "impecunious

[2] *Id.*
[3] *Thomas v. Gladstone*, 386 Md. 693, 669 (2005) (Maryland follows the American Rule).
[4] Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical* Overview, 1982 DUKE L.J. 651 (1982).

plaintiffs could bring meritorious lawsuits without fear that they would be responsible for paying opposing counsel's fees if unsuccessful."[5]

Even the reduced risk under the American Rule creates significant barriers for some potential claimants, however. Low-income individuals with legal needs may lack the resources to engage an attorney. The American Rule colors the type of claims that are brought by preserving the economic incentive for meritorious cases with high damage claims, but eliminating the incentive for cases with low or non-monetary claims.[6] Even plaintiffs who do go forward must be willing to be made "less than whole," because they must deduct their litigation costs from the compensation awarded. "If a prevailing party can recover her physician bills, it is not clear why she cannot recover her attorney fees, since both represent out-of-pocket expenses."[7] Finally, the American Rule discourages claims for non-monetary relief. Prayers for injunctive or declaratory relief could never survive a simple cost-benefit analysis. A plaintiff with means may elect to spend the money on counsel to pursue such claims, but those of limited means have neither the option to do so with their own resources, nor the ability to secure counsel on the promise of payment from the returns.[8]

It is precisely the poor and politically powerless who are likely to have more difficulty attracting counsel in such a market. Low-income individuals are likely to have lower damage claims, especially when based on lost income. Further, claims to vindicate important rights under the state constitution may nonetheless result in only nominal damages awards.

Exceptions to the American Rule. The American Rule, while still the prevailing assumption under which the civil courts operate in the United States, is hardly inviolate. Exceptions to the American Rule were introduced early on to counter some of the rule's limitations.

Contingency fees were an initial departure from the rule, which did not change its underlying premise.[9] The adoption of contingency fees, once thought usurious, permitted the plaintiff to use damage recoveries to encourage and finance the litigation. This innovation was seen as a means to secure representation and redress for the poor. It also benefited the cash poor. One reason suggested for the rise of contingency fees was the scarcity of circulating cash in the American colonies. Settlers deprived of land had no species with which pay for an attorney up front.[10] The use of contingency fees increased during the late 19th and early 20th Centuries. Notably opposed to contingency fee

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[5] Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress and Statutory Fees*, 69 TEX. L. REV. 291, 297 (1990-1991).
[6] Harold J. Krent, *Explaining One-Way Fee-Shifting*, 79 VA. L. REV. 2039, 2048 (1993).
[7] *Id.* at 2069.
[8] Daniel L. Lowery, *"Prevailing Party" Status for Civil Rights Plaintiffs: Fee-Shifting's Shifting Threshold*, 61 U. CINN. L. REV. 1441,1443 (1992-1993).
[9] Brand, *supra* note 5 at 299. For a history of contingency fees see Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV 231 (1998).
[10] Karsten, *supra* note 9, at 234-5.

arrangements at the turn of the 20th Century were railroad attorneys, physicians facing malpractice claims, and jurists.[11]

Fee-shifting schemes have become another significant departure from the American Rule – and have their origins in both judge-made and statutory innovation. By the late 1930s, American courts, especially the federal courts, had begun to craft these types of exceptions to the American Rule.[12]

There were two primary doctrines courts drew upon in justifying the award of attorneys fees in contravention of the American Rule. The "common fund" or "fund-in-court" doctrine permits a plaintiff whose actions result in the creation of a fund in which others have a common interest, to be reimbursed from that fund for the costs they incurred in bringing the lawsuit.[13] The doctrine is designed to avoid the unjust enrichment of those who benefit from the fund created by the litigation, but would otherwise bear none of the litigation costs.[14]

Courts also began to use their authority to fashion equitable relief to extend the common-fund doctrine to cases in which the returns were small, but the benefits widespread. The "private attorney general" doctrine justifies the extension of fee awards to individuals who initiate actions that secure non-monetary benefits or rights for persons not party to the litigation.[15] This private attorney general concept was crafted to acknowledge the role individuals play in supplementing government enforcement of the law. Government may not be able to enforce all provisions of the laws that make up the complex remedial scheme created to protect individual rights. Many of those laws create a private right of action, precisely to encourage private individuals to take steps to enforce the law. Those private actions put violators on notice that the law will be enforced, deterring future non-compliance. Under the private attorney general doctrine, this larger social benefit justifies the award of attorney's fees to the successful plaintiff.

The private attorney general doctrine was foreclosed to federal courts by *Alyeska Pipeline Service Co. v. Wilderness Society*.[16] Plaintiffs had sued the Secretary of the Interior seeking declaratory and injunctive relief to prevent the issuance of construction permits for the Alaska oil pipeline. The Court of Appeals for the District of Columbia Circuit awarded fees under the private attorney general theory in the absence of a statutory fee-shifting provision. The Supreme Court reversed, positing that the creation of a fee-shifting scheme was the prerogative of Congress and could not be judicially-created under a private attorney general doctrine.[17]

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[11] *Id.* at 254.
[12] THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES: REPORT OF THE THIRD CIRCUIT TASK FORCE, 108 F.R.D. 237, 241 (October 8, 1985).
[13] *Id.*
[14] For an early example see, *Trustees v. Greenough*, 105 U.S. 527 (1882).
[15] Third Circuit Task Force, *supra* note 12 at 241.
[16] 421 U.S. 241 (1975).
[17] *Id.* at 265.

Alyeska Pipeline closed one door but opened another, ushering in an era of statutorily-created fee-shifting schemes. The most significant of these statutes was the Civil Rights Attorneys' Fees Awards Act of 1976 (Fees Act) passed by Congress in direct response to *Alyeska*.[18] The Fees Act authorizes a court to award reasonable attorney's fees to the prevailing party in civil rights litigation. Other fee statutes were passed during this period including the Equal Access to Justice Act, enacted in 1982, providing fees to prevailing parties in non-tort civil litigation against the federal government,[19] the Freedom of Information Act,[20] and the Truth in Lending Act.[21] By 1990 there were over 100 federal fee-shifting statutes.[22], [23]

***Contractions of the Private Attorney General System*.** Both judge-made and statutory expressions of the private attorney general doctrine have experienced some retrenchment over the last 30 years.

A number of restrictions were imposed on organizations funded by the federal Legal Services Corporation (LSC) significantly affecting the ability of these providers to take advantage of fee-shifting rules to benefit the poor. The LSC Act of 1974 and additional provisions passed in 1996 prohibited funded organizations from, among other things, handling fee-generating cases, or receiving an award of attorney's fees. More onerously, the 1996 restrictions extended these restrictions to activities funded by non-LSC funds.[24]

The Bush I Administration adopted a policy that disfavored fee-shifting under the aegis of the President's Council on Competitiveness and its Agenda for Civil Justice Reform in America.[25, 26] At the Council's recommendation, President George H.W. Bush signed an Executive Order, since revoked, discouraging federal agencies from seeking enactment of any more one-way fee-shifting statutes.[27] Fee-shifting schemes are admittedly designed to encourage litigation by small, individual complainants aggrieved by larger, institutional actors like governments, employers and corporations. The

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[18] 42 U.S.C. § 1988 (2009). *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980) (Fees Act permits prevailing plaintiffs in a 1983 action to recover fees whether the claim is brought in state or federal court).
[19] 5 U.S.C. § 504, 28 U.S.C. § 2412, 42 U.S.C. § 1988 (2010).
[20] 5 U.S.C. § 522(a)(4)(E) (2010).
[21] 15 U.S.C. § 1640(a) (2010).
[22] Brand, *supra* note 5 at 301.
[23] Another notable and long-standing exception to the American Rule has been the Alaskan experiment where for over one hundred years, court rules have provided for two-way fee-shifting, similar to the English Rule. Alaska Rule of Civil Procedure 82 provides fees on a specific schedule to the prevailing party. ALASKA R. CIV. PRO. 82. See Walter Olson and David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161 (1996). (Authors advocate the use of a two-way fee-shifting scheme similar to Alaska's, in the interests of "symmetry.")
[24] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a), 110 Stat. 1321, 50 (1996). See Camille D. Holmes, Linda E. Perle, and Alan W. Houseman, *Race-Based Advocacy: the Role and Responsibility of LSC-Funded Programs*¸CLEARINGHOUSE REVIEW (May-June 2002), 62, n. 2-5.
[25] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003).
[26] Krent, *supra* note 6 at 2039.
[27] Exec. Order No. 12778, 3 C.F.R. 359, 365 (1991). That Order was revoked by Exec. Order No. 12988, *reprinted in* 28 U.S.C.A. § 519 (2010).

Council, established to create a favorable climate for business and corporate interests, correctly perceived that fee-shifting statutes were designed to level the playing field for individuals who would otherwise have little opportunity to insist on enforcement of existing laws that check corporate and government behavior. When the playing field is leveled, it seems even a lion can fear a mouse.

The federal bench has also played a role in narrowing the effectiveness of private attorneys general. In *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*,[28] the Court rejected the *catalyst* theory under which a plaintiff could be awarded fees when the lawsuit led the defendant to change its behavior, whether or not the case went to trial. *Buckhannon* altered the definition of "prevailing plaintiff" to exclude those who do not secure a judicially-imposed result in their favor.

These and other retrenchments reflect a denigration of public interest practice and undercut the important public policy considerations that led Congress to pass the Fees Act and other statutory fee-shifting provisions. "The premise of the Fees Act is that there is a dearth of public interest lawyers and that competitive market rates are necessary to attract competent counsel."[29]

III. Rationales for Fee-Shifting and Its Effect on Market Incentives

There are a range of rationales that have been used to justify fee-shifting. Some are based on equitable principles, others are incentive-based.[30] An examination of these rationales and counterarguments helps to illustrate the range of implications to be considered in trying to craft a market for legal representation which promotes access to justice without inappropriately burdening either the courts or institutional defendants.

Fee-Shifting Promotes Fairness. The primary argument for a rule of general indemnity is that of fairness – viz., that the "prevailing party, having been adjudged to be in the right, should not suffer financially for having to prove the justice of his position."[31] This argument is compelling, although it can be easily used to justify a two-way fee-shifting scheme. Congress, when it has imposed a statutory scheme, has generally favored one-way fee-shifting, for reasons that will be analyzed in Section IV.

Fee-Shifting Permits the Aggrieved to be "Made Whole." An individual who has been harmed can point to two sources of injury – the damages she suffered in enduring the initial harm, and the amount she expended to redress the wrong by bringing the suit. If the latter must be deducted from the former, she will feel acutely that she has not been "made whole." There are some limitations to this rationale as well. "Make whole" compensation, considered alone, can lead to a particularly harsh result if it was an extremely close call whether the loser did anything wrong, such as when a novel question of law is involved. It is only really justifiable if the loser is somehow at fault. Where

[28] 532 U.S. 598 (2001).
[29] Brand, *supra* note 5 at 377.
[30] Rowe, *supra* note 4 at 652.
[31] *Id*. at 654.

two parties have a legitimate, good faith, disagreement over the interpretation of law, fee-shifting may be less justified by the "make whole" rationale alone, as neither party created or exacerbated the litigation expense.[32] This is in part why such awards remain discretionary, even though intended to be virtually automatic.

Fee-Shifting Deters and Punishes Undesirable Behavior. Fee awards have been used by courts to punish willful disobedience of a court order, as part of a fine, or when the losing party has acted in bad faith.[33] More generally, statutory fee awards permit the significance of the defeat to have a larger effect on the loser, especially where the damage award itself is low or non-pecuniary. When a statute includes a one-way fee-shifting provision, private actors must consider the potential plaintiff's litigation costs when weighing the full costs of non-compliance. In this way, the prospect of attorney's fees acts as a check on undesirable behavior.[34] Even for governmental agencies who do not normally internalize all the costs of litigation, the prospect of attorney's fees makes litigation more expensive, deters dilatory tactics and discourages deep pocket defendants from over-litigating small cases to intimidate opposing parties.[35]

Fee-Shifting Promotes Compliance with the Law. The compliance benefits of fee-shifting are derived from the private attorney general doctrine. Private action minimizes the legislature's cost of monitoring executive branch and private behavior.[36] Whistleblower lawsuits and private enforcement shed light on contested administrative practices and decisions, engaging the Judicial Branch in enforcing laws passed by the Legislative Branch.

Too Much Litigation? This rationale is vulnerable to the corollary presumption that fee-shifting encourages litigation. To the extent litigation is seen as a tool for strengthening the law, this is not necessarily a problem. Fee shifting encourages litigation as a proxy for agency investigation and prosecution.[37] Fee shifting removes, what some would consider an undesirable "market constraint on litigation."[38] Statutes and constitutions that create rights, were intended to generate litigation to ensure their efficacy. "The incentive to litigate small claims aggressively may prove beneficial to the system as a whole."[39] To concerns about limiting access as a means of controlling crowded court dockets, Senator Mathias, citing Justice Brennan, had this to say:

> It is true of course that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of a litigant with a legitimate claim for

[32] *Id.* at 659.
[33] *Alyeska Pipeline Service Co. v. Wilderness Society, et. al.*, 421 U.S. 240, 258 (1975), citing *Toledo Scale Co. v. Computing Scale Co.,* 261 U.S. 399, 426-428 (1923), *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714 (1967), and *F.D. Rich Co.,* 417 U.S. at 129.
[34] See Rowe, *supra* note 4 at 660-661 and Krent, *supra* note 6 at 2063-2069.
[35] Krent, *supra* note 6 at 2052.
[36] *Id.* at 2044.
[37] *Id.* at 2056.
[38] *Id.* at 2052.
[39] *Id.*

relief, particularly a claim for a deprivation of a constitutional right, seems to be not only the wrong tool but a dangerous tool for solving the problem.[40]

One incentive-based analysis suggests one-way or "Pro-plaintiff" fee-shifting generates the least litigation.[41] One-way fee-shifting encourages both suit (by enhancing access to the courts) and simultaneously encourages settlement – "because low non-compliance rates result in low predicted probabilities of success, which in turn reduce the settlement gap between plaintiffs and defendants."[42] This describes the ideal incentive scenario and suggests one-way fee-shifting creates the most robust market for legal services.

The ideal scenario is one in which the legislature passes laws to express its values and priorities. While the legislature may not have the means to police enforcement, private citizens are able to secure counsel, and counsel are willing to take those cases precisely because they know that, even if their client has limited means, their fee will be covered by a fee award. Attorneys still bear the risk of losing their fee should they not prevail at trial, and thus, have an incentive to only accept meritorious cases. Potential defendants know that should they fail to comply with the law, the aggrieved will have few barriers in seeking redress. Thus rational defendants have a strong incentive to comply with the law in the first place. It follows that few cases will be brought, and when they are brought, they will be cases of merit.

Fee-Shifting Addresses the Free Rider Problem. Few plaintiffs will undertake the considerable risk and expense of litigation unless it is likely to benefit them individually in some way. In other words, before taking on such a project, a plaintiff will perform a cost-benefit analysis. The problem with public interest activities is that the benefits to any single individual are relatively small. In many cases, the benefits are non-pecuniary. The benefits may be small enough that no one individual could ever justify the risk and expense. These activities have a larger social benefit, however, which when valued in the aggregate certainly justify the litigation costs.[43]

It is an appropriate role for government to use its authority to create incentives for private individuals to take actions that have a larger social benefit. Governments act to shape markets all the time in a variety of contexts. For example, governments recognize the benefits of public interest activities undertaken by organizations and support those efforts by providing such organizations with tax-exempt status, and in some cases by providing grant funding.[44] Fee-shifting statutes are merely an extension of this idea – a tool government can use to shift market incentives to encourage individuals, including

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[40] Quoted in Brand, *supra* note 5 at 364-5.
[41] Keith Hylton *Fee Shifting and Incentives to Comply with the Law*, 46 VANDERBILT L. REV. 1069, 1097 (1993).
[42] *Id.*
[43] Robert V. Percival and Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 234-5. ("[I]nherent in the concept of public interest activity is the notion of action benefiting a larger group than the individual group responsible for the activity.")
[44] *Id.* at 237.

primarily private attorneys, to engage in certain types of activities that would otherwise be performed by a public entity.

IV. Structuring the Fee-Shifting Scheme

There are a variety of ways to structure a fee-shifting scheme, each of which will have a different effect on market incentives. An argument may be made for two-way fee-shifting in the interests of equity and symmetry although such a system may create perverse incentives. One-way fee-shifting in favor of a prevailing plaintiff, on the other hand, is narrowly targeted to fulfill the goals expressed by the private attorney general doctrine. It will also be important to carefully define "prevailing party" to achieve the desired result.

A two-way fee-shifting system is one of general indemnity. This is essentially the English Rule under which the losing party, whether plaintiff or defendant, is responsible for the prevailing party's attorney's fees. Arguments have been made for general indemnity in the interests of symmetry[45] and equity.[46] Advocates note that the English Rule provides a number of advantages. It discourages speculative or non-meritorious litigation.[47] It discourages purposeful delay by defendants aware of probable liability. It addresses the question of fairness for defendants, involuntarily subjected to litigation and forced to incur litigation expenses when perhaps they are without fault. A "loser pays" system "limits the tactical leverage parties with weak cases can obtain by threatening to inflict the cost of litigation on their opponents.[48]

But two-way fee-shifting can create conflicts of interest for plaintiff's counsel. One study of British cases where general indemnity was available examined the impact of "who pays" on lawsuit outcomes. When litigation is privately funded, i.e., the plaintiff bears the cost of the representation, there was a substantial incentive for solicitors to settle the case, to ensure the defendant would pay their fee. This permits the solicitor to avoid having to collect from the plaintiff who may or may not have adequate means. During the 1980s in England, solicitors with income-eligible clients were paid directly for their services by legal aid. They received a reduced but guaranteed payment. When a legal aid litigant lost, the prevailing party was not entitled to collect fees from either the losing party or the legal aid fund. Thus, if a settlement was not achieved, the solicitor had little to lose by pursuing the matter as far as necessary. One result was that fewer legal aid cases in England settled, and barristers found their trial calendar included a disproportionate number of legal aid cases. Finally, during this period a large number of individuals had legal services available to them through trade unions. In these cases, the solicitor was paid in full for her services by the union. Statistics reflected that the union

[45] Walter Olson and David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161 (1996).
[46] Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231 (1987-1988).
[47] Olson and Bernstein, *supra* note 45 at 1161.
[48] *Id.*

solicitor was the most successful advocate. Full payment by the union removed the disincentives for advocacy associated with two-way fee-shifting.[49]

Other studies of litigation under the English Rule suggest that financial responsibility for litigation costs also affects whether the defendant will make an offer. Individual plaintiffs have fewer resources with which to pursue litigation, and are more likely to be risk averse.[50] These studies suggest that in a two-way fee-shifting system, large, corporate or institutional defendants have an advantage over one-time petitioners. "If the plaintiff can be protected in some way from the risks of paying the other sides' fee, the defendant will be more willing to make a settlement offer."[51] This resonates with the studies referenced, above. When the plaintiff did not have to worry about paying defendant's litigation costs, plaintiff's counsel was more likely to pursue the claim aggressively. Concomitantly, "[w]hen the plaintiff is fully at risk, the defendant can refuse to make an offer in the hope that the plaintiff will withdraw the claim rather than run the risk of a cost award."[52]

The incentives of a two-way fee-shifting scheme may appear attractive and more in line with the judicial goals of neutrality and impartiality. Unfortunately, such a system can create disincentives that undermine the goals of the private attorney general doctrine:

> Legal costs influence all aspects of the litigation process, from the decision to file suit to the choice between settlement and trial to the question whether to take precautions against a dispute in the first place. . . The combination of all these external effects are too complicated to be remedied by a simple rule of "loser pays." Instead, indemnity of legal fees remedies some externalities while failing to address and even exacerbating others.[53]

Fee-shifting is not an administrative remedy designed to create a strictly neutral playing field. It is designed to level the inequities of the world outside the courtroom, to ensure that both parties to a dispute enter the neutral judicial forum on equal footing, despite the power imbalances that prevail without. These goals can only be fulfilled by the creation of a carefully crafted one-way fee-shifting mechanism.

The Supreme Court understood this to be Congress' intent in enacting the Civil Rights Act of 1964, and articulated that understanding in *Newman v. Piggie Park Enterprises*:[54]

> When a plaintiff brings an action under [Title II], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private

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[49] Herbert M. Kritzer, *What We Know and Do Not Know About the Impact of Civil Justice on the American Economy and Policy: Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1957 (2002).
[50] Krent, *supra* note 6, at 2062.
[51] Kritzer, *supra* note 49, at 1957.
[52] *Id.*
[53] *Id.* at 1948.
[54] 390 U.S. 400 (1968).

> attorney general," vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees – not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.[55]

In providing for attorney's fees to a prevailing plaintiff, a legislature does not confer a legal advantage. The plaintiff must still prove her case in accordance with the standard set forth by the substantive law. Rather, a one-way fee-shifting provision merely shifts the incentive structure to permit individual plaintiffs to bring actions so they can have the opportunity to present their case. "[T]he goal of fee-shifting statutes in general is to ensure that individuals, when injured by violations, or threatened violations, of certain laws, have access to legal counsel by a 'statutory assurance that [his or her counsel] will be paid a 'reasonable fee[.]'"'[56] If the legislature truly wanted to confer an advantage it could do so by altering the liability standard or lowering the standard of proof. A fee-shifting provision is merely an affirmation that the legislature intends its substantive law to be meaningful and enforceable.

One-way fee shifting still contains the inherent risk that plaintiffs may be encouraged to pursue a weak case too far – unnecessarily increasing costs for an innocent defendant. This can be addressed by including a "bad faith exception" in the one-way fee-shifting provision. Fees may be awarded to a prevailing defendant only when the plaintiff brings an action in bad faith.[57] An alternative would be an exception for "frivolous" actions. Under Section 1988, an exception is provided where the action brought by the plaintiff is frivolous, which is less onerous for defendants, but still protects plaintiffs with non-frivolous claims.[58] A "frivolous" standard may be interpreted more generously by courts than a "bad faith" exception and may strike a better balance.[59]

Fee-shifting provisions must carefully identify when the rule is triggered by articulating a clear definition of "prevailing party." To fully explicate what it means by "prevailing party," a well-crafted provision will address:

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[55] *Id.* at 402.
[56] *Friolo v. Frankel [Friolo III]*, 403 Md. 443, 457 (2008).
[57] Hylton, *supra* note 41 at 1107. A "two-way" bad faith exception is found in Maryland Rule 1-341 which provides for fee-shifting in civil matters if the court finds the conduct of either party "was in bad faith or without substantial justification." The fee can be extracted from either the offending party or the attorney advising the conduct, or both. The rule has been applied infrequently and is intended only for cases where there has been a clear and serious abuse of judicial process. *Black v. Fox Hills N. Community Ass'n*, 90 Md. App. 75, 599 A2d 1228, cert. denied, 326 Md. 177, 604 A.2d 444 (1992).
[58] 42 USC § 1988.
[59] *Christiansburg Garment Co., v. EEOC*, 432 U.S. 412, 421 (1978) (Plaintiff's subjective bad faith is not a necessary prerequisite to a fee award against him.); but compare *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (The claim must be "meritless in a sense that it is groundless or without foundation. The fact that a plaintiff might ultimately lose his case is not in itself a sufficient justification for the assessment of fees.")

- Whether a formal judgment in the plaintiff's favor is required, or whether a consent decree, settlement or change in the defendant's behavior is sufficient to trigger the award of fees (Equivalency Doctrine).[60]
- If a change in the defendant's behavior is sufficient, whether the plaintiff's lawsuit must have been the "catalyst" or direct cause of the change. (Catalyst Theory).[61]
- Whether the relief must alter the "legal relationship" between the parties. (Legal Relationship Test).[62]
- The impact of partial resolutions and whether the outcome must have been resolved in the plaintiff's favor on the "central issue."
- Whether the plaintiff must have benefited from the outcome.[63]
- The impact of settlement offers.[64]
- Whether the parties can simultaneously negotiate settlement and attorney's fees, and whether the defendant can extract a waiver of fees in exchange for a favorable settlement.[65] Permitting settlement offers contingent upon a waiver of fees can have a deleterious effect on access to justice, and creates an untenable conflict for counsel.[66]
- Whether the fee belongs properly to the litigant only,[67] or whether the award can be made directly to the attorney.[68]

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[60] Brand, *supra* note 5 at 318. *See Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam), *Hewitt v. Helms*, 428 U.S. 751 (1987) and *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam). In Maryland see *Hyundai Motor America*, supra at 272 (No express judicial approval of the settlement was necessary where the procedure used was sufficiently indicative of prevailing party status).

[61] Karlan, *supra* note 25 at 206. *See Buckhannon*, *supra* note 28.

[62] *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989).

[63] *Farrar v. Hobby*, 113 S.Ct. 566 (1992).

[64] In *Marek v. Chesny*, 473 U.S. 1 (1985), the Court held that the prevailing plaintiff was not entitled to statutory fees for work performed after the date of a Rule 68 offer of judgment if the plaintiff failed to achieve better results than those offered. This can put defendants in the driver's seat. Once the defendant makes an offer, plaintiff's counsel is at risk for losing his post-offer fee. This can create some conflict of interest for plaintiff's counsel who must counsel his client to accept the offer or risk losing any subsequent fee if he were to pursue his client's case more aggressively.

[65] *Evans v. Jeff D.*, 475 U.S. 717 (1986) (Court allowed defendants to condition settlement of civil rights case on the waiver or reduction of plaintiff's attorney's fees). *See* Paul Reingold, *Requiem for Section* 1983, 3 DUKE J. CONST. LAW & PUB. POL'Y 1 (2008) who suggests *Evans* destroyed the enforcement mechanism of the Civil Rights Act. Permitting the defendant to condition settlement on a waiver of fees can create a conflict of interest as well for plaintiff's counsel. Counsel may have to forgo a fee in order to secure a favorable settlement for her client. This can become problematic for defendants who may need to know their bottom line before making a settlement offer. Some solutions suggested have included: standardizing market rates so defendants know what to expect; permitting defendants to discover information about probable attorney's fees; permitting defendants to make settlement offers contingent on a satisfactory resolution of the fees; or permitting defendants to make lump sum offers intended to cover both liability and fees. See *Third Circuit*, *supra* note 12, at 268-270.

[66] It has been suggested that this issue might best be settled by the creation of an ethical rule to outlaw the type of quandary created by *Jeff D, see note 65, above.* Compton, Ashley E., *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 GEO. J. LEGAL ETHICS, 761 (2009).

[67] *Astrue v. Ratliff*, 56 U.S. ___ (2010) (Fee awards under the Equal Access to Justice Act are payable to the litigant, not the attorney, and as such are subject to a government offset to satisfy a pre-existing debt the litigant owes to the United States); *Marek v. Chesny*, *supra* note 64.

- Whether fees can be awarded to legal services providers representing the prevailing party *pro bono*.[69]
- The impact of mootness.[70]
- The impact of injunctive, declaratory or otherwise non-pecuniary relief.
- The impact of nominal damages or *de minimis* relief.[71]

In Maryland, the Court of Special Appeals has not followed *Buckhannon*, suggesting the catalyst theory under which the plaintiff's lawsuit must have been the "catalyst" or direct cause of the change may still be grounds for establishing prevailing party status.[72] Under current Maryland law, the court need not sanction a settlement by issuing a consent decree before a party can be determined to have prevailed. In *Hyundai Motor America v. Alley*,[73] the Maryland Court of Special Appeals found the plaintiff had prevailed even thought the settlement was not finalized in a consent decree, although the court clearly acquiesced in the settlement and the settlement was entered into the record. Maryland courts may prefer an interpretation of these issues that promotes settlement. Most recently, the Maryland Court of Appeals found that fees were the property of the attorney, and thus, payable directly to a legal services provider, avoiding the diversion of funds to cover the litigant's outstanding state debt.[74]

V. Calculating the Fee Award

Courts have articulated several methods for calculating attorney's fees, when warranted. Until the early 1970s, fee calculations were largely left to court discretion. Courts generally used a standard of reasonableness to award fees.[75] Courts often used a reasonable "percentage of recovery" to determine the award, although this sometimes drew criticism when awards appeared disproportionate to the actual effort expended by counsel.[76] Awarding fees based on a percentage of recovery also fails to provide a market incentive for attorneys to accept clients with claims for injunctive or other non-pecuniary relief, or where the anticipated damages are low.

In the federal system, the Fifth Circuit established an alternative method for calculating fees, delineating in *Johnson v. George Highway Express, Inc.*, twelve factors

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[68] This issue has implications for whether the attorney can decline to accept a settlement offer contingent upon a waiver of fees, whether the fee can be diverted to pay a government debt, and also for whether fees can be awarded to a legal services provider who represented the prevailing party *pro bono*. Some legislatures and state courts, including the Maryland Court Appeals, have made attorneys' fees under fee-shifting statutes the property of the attorney. *Henriquez v. Henriquez*, ____ Md. ____ (2010) (No., 81, September Term 2009, Filed: 13 April 2010).
[69] Maryland has said "yes." *Henriquez, supra* note 68.
[70] *Rhodes v. Stewart*, 488 U.S. 1 (1988)..
[71] *Farrar, supra* note 63.
[72] *Hyundai Motor America v. Angela R. Alley*, 183 Md. App. 261, 269 (2007).
[73] *Id.* at 270-272.
[74] *Henriquez, supra* note 68.
[75] Third Circuit Task Force, *supra* note 12 at 242.
[76] *Id.*

the court must consider.[77] These factors included considerations of time and labor, novelty and difficulty, the skill required, the preclusion of other employment by the attorney, and the attorney's customary fee, among others.[78] According to some, the *Johnson* method failed to provide a meaningful analytical framework to guide courts in calculating the fee award, and awards based on the method may be more subject to reversal and remand.[79]

Today federal courts generally use the "lodestar" approach in calculating fee awards. As noted by Judge Wilner in the Court's opinion in *Friolo v. Frankel:*[80]

> The term "lodestar" has an Anglo-Saxon origin – "lad," a way or path, and "sterre," a star. It thus was a guiding star. *See* WEBSTER'S UNABRDIGED DICTIONARY at 1062. It later came to denote a "guiding ideal; a model for imitation." *Id.* At some point, the term began to be applied to the method noted for determining reasonable attorney's fees.[81]

In its most elemental form, the lodestar method requires the court to multiply reasonable hours, actually worked, by a reasonable market rate.[82] The lodestar method, however, was always used as part of a more nuanced approach. Even when used early on, it was intended to be used in the context of other factors including the likelihood of success, the complexity and novelty of the issues, the quality of the attorney's work, and the recovery obtained.[83] After *Hensley v. Eckerhart*,[84] and *Blum v. Stenson*,[85] the lodestar method became the predominant method for calculating fees in the federal system.[86]

The Maryland Court of Appeals has applied the lodestar method to the state's wage and hour laws, and "indicated a general approval of the approach in conjunction with other fee-shifting statutes that provide for the possible award of attorney's fees, but lack criteria for how to calculate such fees."[87] According to the Court, *Friolo I* established the lodestar method as generally acceptable, but did not mandate its use, and did not preclude the use of other standards such as those provided in *Johnson*, *Hensley* or Rule 1.5 of the Maryland Rules of Professional Conduct.[88] While lodestar is the presumptive method of calculation under the wage and hour laws in the state, its use will necessarily involve the clear application and explanation of factors and case-specific adjustments.[89]

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[77] 488 F.2d 714 (5th Cir. 1974).
[78] *Id*., at 717-719.
[79] Third Circuit Task Force, *supra* note 12 at 245.
[80] *Friolo v. Frankel (Friolo I)*, 373 Md. 501 (2003).
[81] *Id.*, at 504, n. 1.
[82] Third Circuit Task Force, *supra* note 12 at 243.
[83] *Friolo I*, *supra* note 79 at 521, citing *Lindy Bros. Bldrs., Inc. of Phila. v. American R. & S. San. Corp., 487 F.2d 161, 168 (3d Cir. 1973).*
[84] 461 U.S. 424 (1983).
[85] 465 U.S. 886 (1984).
[86] Third Circuit Task Force, *supra* note 12 at 245-6.
[87] *Manor Country Club v. Betty Flaa*, 387 Md. 297, 320 (2004), citing *Friolo I*, *supra* note 80 at 504-5.
[88] *Id.* at 320.
[89] *Friolo I*, *supra* note 80 at 505.

These factors can be applied as multipliers to increase or decrease an award of fees. California, for example, permits the use of multipliers to account for a variety of factors, including: the quality of the representation; the results obtained; contingent risk; the preclusion of other employment, the undesirability of the case; a delay in payment; partial success; public benefit; and the identity and resources of parties or counsel.[90] As noted by the California Supreme Court:

> [The purpose of a multiplier] is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. . . . [The multiplier] for contingent risk [brings] the financial incentives for attorneys enforcing important constitutional rights . . . into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis.[91]

In a recent opinion, the Supreme Court expressed concern about multipliers and enhancements to the fee. In *Perdue v. Kenny A.*, the Court held that the party seeking fees has the burden of identifying a factor that the lodestar method does not adequately address.[92] Without completely precluding multipliers and enhancements, the opinion certainly further decreases the likelihood that a multiplier will be applied in a federal case.

While multipliers are less favored in the federal context,[93] the Maryland Court of Appeals seems to have suggested multipliers might be permissible in the State, since the lodestar calculation is itself, not the sole method of arriving at a reasonable fee. In *Friolo I*, the Court seems to have suggested this in saying that Rule 1.5 which requires an attorneys' fee be reasonable, "is not inherently in conflict with fee-shifting statutes," because "[t]here are situations in which the two can be in harmony and where appropriate adjustments to a lodestar approach can produce a fee that would be reasonable under both

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[90] Gregory M. Bergman and John P. Dacey, *Attorney Fee-Shifting Litigation: Obtaining and Contesting Attorney Fees and Cost Awards*, (Powerpoint), Strafford Webinar, presented December 16, 2009.

91 *Ketchum v. Moses*, 24 Cal.4th 1122, 1132 (2001).

[92] 559 U.S. _____ 2010 (No. 08-970).

[93] See also *Brand, supra* note 5 at 336-339. In *Hensley*, the court entertained the possibility of adjustments to the lodestar. In *Blum* the Court reversed a 50% enhancement of the lodestar. In *Delaware Valley II*, the Court permitted an enhancement for risk of loss, but suggests Brand, a plurality of justices suggested there should be no enhancement in such instances absent a showing that the adjustment was necessary to attract competent counsel in that particular type of litigation. *Brand, supra*, at 339. Subsequently in *Burlington v. Dague*, 505 U.S. 557 (1992), the Court invalidating an enhancement, called into question whether a multiplier for contingent risk would ever be endorsed. The Court noted that the lodestar is the presumptive method for federal courts, and that its calculations already presumably account for contingent risk. The Court also emphasized that the use of enhancements would add uncertainty to the process and increase the probability of fee litigation.

the rule and the statute."[94] According to the Court, in *Friolo I*, when courts have used lodestar, the "strict hours times rate methodology is simply the beginning point."[95]

Finally, in determining how fees are computed, legislatures and courts may want to consider whether a losing defendant should have to pay a "contingency bonus" to plaintiff's counsel who assumed the risk of not being paid in case of defeat.[96] Another consideration is whether counsel should be able to recover the difference between a fee award and a negotiated contingency rate. Some jurisdictions provide that the attorney can recover from the prevailing plaintiff additional fees established in a contingency fee agreement.[97]

Whatever method is chosen, proportionality has no place in it. "[A] rule of proportionality would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose. . ."[98] Proportionality is antithetical to the underlying purposes of fee-shifting.

The use of the lodestar method, nuanced or not, is limited in Maryland. The Maryland Court of Appeals recently clarified in *Monmouth Meadows Homeowners Association, Inc., v. Tiffany Hamilton*,[99] that the "lodestar method is an inappropriate mechanism for calculating fee awards in private, contractual debt-collection cases. Use of the lodestar in such cases is inappropriate because they lack the substantial public interest justification underlying its application in the context of true fee-shifting statutes."[100] The cases in *Monmouth Meadows* involved actions by homeowners' associations against residents delinquent in paying their annual assessments. The residents in each case were contractually required to pay costs and fees incurred by the associations in collecting delinquent assessments. These types of contractual provisions, while enforceable under Maryland law, do not share the public policy underlying most fee-shifting statutes.[101] The court was not persuaded that the enforcement of the contractual provisions, while authorized by law, provide any real public benefit that might warrant the greater fees available under a lodestar calculation. The proper method for calculating fees in private debt collection actions is rather the reasonableness approach provided for in Rule 1.5 of the Maryland Lawyer's Rules of Professional Conduct. To those who might worry that use of the lodestar approach might create a slippery slope likely to lead to enhanced fee awards in a broad range of case types, *Monmouth Meadows* suggests there are limits.

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[94] *Friolo I*, *supra* note 80 at 529.
[95] *Id.*
[96] *Rowe*, *supra* note 4.
[97] *Rowe*, *supra* note 4 at 674.
[98] *City of Riverside v. Rivera*, 477 U.S. 561, 577 (1986).
[99] Nos. 43-45, September Term, 2009, Op. by Adkins, J. Battaglia, J., joins in judgments only. Filed: October 25, 2010.
[100] *Id.*, at 10.
[101] *Id.*, at 8.

VI. Implications for Sovereign Immunity and the Maryland and Local Tort Claims Acts

Claims against state government in Maryland are permitted subject to the limited waiver of sovereign immunity provided for by the Maryland Tort Claims Act.[102] That act limits damages for injuries to a single claimant to $200,000.[103] The act provides for counsel fees not to exceed 20% for a settlement, or 25% of a judgment.[104] This means that a prevailing plaintiff may receive an award of no more than $40,000 in a case which settles, and no more than $50,000 in a case which results in a judgment in his favor.

This creates several problems for the potential litigant, especially in light of the holding in *Lee v. Cline*,[105] that immunity under the Maryland Tort Claims Act covers constitutional torts.[106] Some claims, especially constitutional claims, are likely to result in low damages. Potential constitutional claimants would have to have deep pockets indeed, and a willingness to part with their resources, in order to pursue a claim that would limit attorney fee awards to a percentage of recovery. The use of a percentage scheme to award fees eliminates all incentives for these types of claims for damages, and its effect has a disproportionately higher impact on low-income Marylanders.

Even a claimant able to secure maximum damages under the act, may incur attorney's fees well in excess of $50,000. In such an instance, the claimant would either be made less than whole, or would have a significant incentive to settle the case when the $50,000 mark or the likely percentage cap were reached in attorney's fees. Plaintiff's counsel may also have a conflict of interest that might cause them to urge settlement once it became clear that the fees incurred were approaching the cap, rather than pursuing their client's claim to the fullest extent possible.

As aforementioned, limiting fees to a percentage of recovery undercuts the public policy foundations of the private attorney general doctrine. It creates a remedy gap between those with means and those without.

In considering a general fee-shifting provision, the Maryland General Assembly should consider amending the Maryland Tort Claims Act to ensure the fee incentives permit aggrieved parties to have a meaningful opportunity to invoke the limited waiver of immunity provided by the act. This might include amending the fee provisions of the Maryland State Tort Claims Act to create an exception to the fee caps for constitutional torts and actions to enforce rights under Maryland laws, and to permit fees to be awarded in addition to rather than subject to the limited liability provided under the act, in this subset of cases.

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[102] MD. CODE ANN. STATE GOV'T §§12-101 – 12-110 (2010).
[103] MD. CODE ANN. STATE GOV'T § 12-104.
[104] MD. CODE ANN. STATE GOV'T § 12-109.
[105] 384 Md. 245, 266 (2004) ("immunity under the Maryland Tort Claims Act . . . encompasses constitutional torts and intentional torts.").
[106] Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 51 (2006).

Similar changes might be contemplated for the Local Government Tort Claims Act, which includes no fee provision. The Local Government Tort Claims Act provides for a cap on damages in cases involving the liability of a local government. In such claims, liability may not exceed $200,000 per individual claim, or $500,000 per total claims that arise from the same occurrence.[107] The act does not provide for attorneys fees. It might be appropriate to invoke the general fee shifting provision in that act, or amend the act itself to provide for reasonable fees to a prevailing plaintiff in actions involving constitutional claims or to enforce rights under Maryland law.

VII. Maryland's Numerous Fee-Shifting Provisions

Maryland law includes numerous statutes with fee-shifting provisions including laws governing:

- Wages and hours of employment
- Wage payment and collection
- Discrimination and civil rights
- Worker's compensation
- Consumer protection
- Email fraud
- Whistleblowers[108]

These separate provisions, of which there are over 80, provide for fees using a variety of terms, expressions and specifics. Some provide for "reasonable attorney's fees"[109] or "reasonable counsel fees,"[110] while others provide for "fees that are just and proper under all the circumstances."[111] Some provide for "expenses"[112] or reasonable or necessary expenses "of prosecuting or defending the proceeding,"[113] while others add specific conditions under which fees may be awarded. In an action to recover unpaid wages, for example, the court may award a prevailing employee reasonable counsel fees and other costs, provided the action was not the result of a bona fide dispute.[114]

Most include no guidance on how the fee is to be calculated. The family law fee-shifting provisions provide some direction to the court in determining whether to exercise its discretion to award fees, but no guidance on precisely how the fee is to be calculated. In actions concerning divorce, marital property, alimony and child support, before granting an award of attorney's fees, the court must consider the financial status or

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[107] MD. CODE ANN. COURTS & JUD. PROC. § 5-303.
[108] For a comprehensive list of statutory provisions for plaintiff's attorney's fees, see PAUL MARK SANDER AND JAMES K. ARCHIBALD, PLEADING CAUSES OF ACTION IN MARYLAND, 4TH ED. (2008) at 42.
[109] See for example, MD. REAL PROP. CODE ANN. § 8-203(b)(2) and MD. STATE GOV'T. CODE ANN. § 20-1035(e)(2).
[110] See for example, MD. LAB. & EMPL. CODE ANN. § 3-507.
[111] MD. FAM. LAW . CODE ANN. § 12-103(a) (in an action for child support).
[112] See for example, MD. COM. LAW I . CODE ANN. § 3-411 (The comments provide that "There is no express provision for attorney's fees, but attorney's fees are not necessarily meant to be excluded).
[113] For example, MD. FAM. LAW . CODE ANN. § 7-107(b) (in divorce matters).
[114] MD. LAB. & EMPL. CODE ANN. § 3-507.1(b).

resources, and financial needs of both parties, and whether there was substantial justification for prosecuting or defending the proceeding.[115] On the other hand, attorney's fees in civil actions by merchants against shoplifters are to be calculated without regard to the ability of the respondent to pay.[116] Fees are capped at $500 in actions brought to impose a lien for nonpayment of ground rent.[117] For the most part, what guidance there is on calculating the fee comes primarily from Maryland case law.[118]

The family law fee provisions highlight another feature of the panoply of statutory fee provisions. Most Maryland statutory fee provisions provide for one-way fee shifting, authorizing the award of fees to a prevailing plaintiff. A few, including those governing fees in family law matters, and those involving time-shares,[119] mobile home park rent,[120] discriminatory housing practices,[121] ground rent,[122] violations of the Maryland condominium act, [123]and those involving letters of credit[124] provide for two-way fee-shifting. A few others, like the family law provisions, provide for one-way fee shifting, with a bad faith exception – permitting an award of fees to the defendant in an action brought in bad faith or without substantial justification.[125]

In its *Interim Report*, the Maryland Access to Justice Commission urged the adoption of a generic fee-shifting provision in part, to render more uniform the many different fee-shifting provisions embedded in the law.[126] Such a provision could codify Maryland case law on how those provisions should be interpreted, and how the fees should be calculated. A generic fee-shifting provision would improve the ability of Maryland judges to understand and apply those provisions uniformly, and would ensure that those provisions are effectively enforced to ensure access to representation in these matters which are so critical for many Marylanders.

VIII. A Proposed Fee-Shifting Provision for Maryland

Massachusetts and Connecticut have each adopted statutes that award attorneys' fees to prevailing plaintiffs for state constitutional claims brought under those states' civil rights acts.[127] California legislation, a codification of the private attorney general

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[115] MD. FAM. LAW . CODE ANN. §§ 7-107, 8-214, 11-110 and 12-103.
[116] MD. CTS. & JUD. PROC. CODE ANN. § 3-1305.
[117] MD. REAL PROP. CODE ANN. § 8-402.3 (j)(3).
[118] See Section V, *supra*.
[119] MD. REAL PROP. CODE ANN. § 11A-125(c).
[120] MD. REAL PROP. CODE ANN. § 8A-1501(b)(4).
[121] MD. STATE GOV'T. CODE ANN. § 20-1035(e)(2).
[122] MD. REAL PROP. CODE ANN. § 8-402.3 ((j).
[123] MD. REAL PROP. CODE ANN. § 11-1113 (c).
[124] MD. COMM. LAW CODE ANN. §5-111(e).
[125] *Supra*, note 112.
[126] MARYLAND ACCESS TO JUSTICE COMMISSION, *supra* note 1 at 26-27.
[127] Conn. Gen. Stat. §§ 52-25Ib, 46A-58 (2010) (attorneys' fees allowed in a civil action to recover damages for injury to the person or property arising out of a deprivation of state or US constitutional rights, privileges or immunities, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability.). Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch. 12 § 11H, 11I (2010) (Reasonable attorneys' fees may be awarded in an amount to be fixed by the court, to

doctrine, permits the award of attorney's fees to successful parties in any action which has resulted "in the enforcement of an important right affecting the public interest" provided a significant benefit, monetary or non-monetary, has been conferred on the general public or a large class of persons, the costs of private enforcement render an award appropriate, and such fees should not be paid out of the recovery, in the interests of justice.[128] The California version is broader, including claims that affect the public interest, not just constitutional claims, although it appears to favor class actions and actions in which the benefit to a larger group is clearly evident.[129]

The following proposed statutory language for Maryland is designed to capture the benefits of both types of provisions. On the one hand, it is designed to provide attorneys' fees to prevailing plaintiffs asserting state constitutional claims or vindicating rights under Maryland remedial laws. It is also intended to bring under one umbrella the application of attorney's fees to other state laws which already authorize such an award. As such it is intended to codify existing state law defining "prevailing plaintiff" and articulate the mechanism for calculating the fee award using the nuanced lodestar method envisioned by current Maryland case law. Finally, the proposed act would amend the fee provisions of the Maryland State Tort Claims Act to create an exception to the fee caps for constitutional torts and actions to enforce rights under Maryland laws, and to permit fees to be awarded in addition to rather than subject to the limited liability provided under the act, in this subset of cases. The latter change is likewise proposed for the Local Government Tort Claims Act.

The proposed statute should either cross-reference all existing statutory fee-shifting provisions, or in the alternative, replace those provisions with a reference to the proposed provision offered below noting that "Prevailing plaintiffs under this law are entitled to fees and expenses under this statute in accordance with [the new provision]."

Md. Code Ann., Cts. & Jud. Proc. Title 3, NEW Subtitle 4A or 18:

§ 3-4A-01/3-1801. Attorney's fees in actions vindicating Maryland rights

Notwithstanding any other provision of law, in any civil action to enforce rights secured by the Constitution, Declaration of Rights, or laws of Maryland, the court may award the prevailing party reasonable attorney's fees and expenses as part of the costs.

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an aggrieved person who prevails in an action under [the commonwealth's civil rights statute.]). See Jennifer Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, VOL. 1, 4th Edn. (2010), 10-03, for a review of state legislation authorizing attorney fee awards.

[128] Cal. Code Civ. Proc. § 1021.5 (2010).

[129] Friesen, *supra* note 105 at 10-3 ("[W]hile the language [of the California act] is not confined to suits in the nature of a class action, it is probable that the enforcement of a constitutional right must, in the particular case, have a broader impact than to rectify an individual injustice.").

§ 3-4A-02/3-1802. Prevailing party

(a) For purposes of this subtitle or any other provision of a remedial state statute authorizing an award of attorney's fees,

(1) a prevailing plaintiff includes one whose litigation achieved the desired result in whole or in substantial part, by bringing about a voluntary change in the conduct of the defendant;

(2) a defendant may be awarded attorney's fees only upon a finding that the plaintiff's action was frivolous.

§ 3-4A-03/3-1803. Calculation of award

(a) For purposes of this subtitle or any other provision of a remedial state statute authorizing an award of attorney's fees, the court shall determine the award by:

(1) multiplying the number of hours reasonably expended by reasonable hourly rates;

(2) determining whether any adjustment should be made to that total after considering:

(i) the time and labor required;

(ii) novelty and difficulty of the questions;

(iii) the skill required to perform the legal service properly;

(iv) preclusion of other employment by the attorney due to acceptance of the case;

(v) the customary fee for similar work in the community;

(vi) whether the fee is fixed or contingent;

(vii) time limitations imposed by the client or circumstances;

(viii) the amount involved and the results obtained;

(ix) the experience, reputation, and ability of attorneys;

(x) undesirability of the case;

(xi) the nature and length of professional relationship with the client; and

(xii) awards in similar cases; and

(3) and awarding reasonable expenses.

Amendments to the Maryland Tort Claims Act:

Md. Code Ann., State Gov't. Title 12:

§ 12-104. Waiver of State tort immunity

(a)(2) The liability of the State and its units may not exceed $200,000 to a single claimant for injuries arising from a single incident or occurrence, IN ADDITION TO ANY AWARD OF ATTORNEY'S FEES AND EXPENSES MADE PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801.

§ 12-109. Counsel fees

EXCEPT PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801, [C]counsel may not charge or receive fees that exceed:

(1) 20% of a settlement made under this subtitle; or

(2) 25% of a judgment made under this subtitle.

Amendments to the Local Government Tort Claims Act:

Md. Code Ann., Cts. & Jud. Proc. Title 5, subtitle 3:

§ 5-302. Representation by counsel; scope

(b)(2)(i) An employee shall be fully liable for all damages awarded in an action in which it is found that the employee acted with actual malice, IN ADDITION TO ANY AWARD OF ATTORNEY'S FEES AND EXPENSES MADE PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801.

§ 5-303. Local government liability; defenses available

(a)(2) The limits on liability provided under paragraph (1) of this subsection do not include interest accrued on a judgment OR ANY AWARD OF ATTORNEY'S FEES OR EXPENSES MADE PURSUANT TO COURTS AND JUDICIAL PROCEEDINGS § 3-4A-01/3-1801.

APPENDICES

A. Cal. Code Civ. Proc. § 1021.5 (2010)

B. Conn. Gen. Stat. §§ 52-25Ib, 46A-58 (2010)

C. Mass. Gen. Laws Ann. ch. 12 § 11H, 11I (2010)

LEXSTAT CAL. CIV. PRO. CODE 1021.5

*** THIS DOCUMENT IS CURRENT THROUGH 2009-2010 EXTRAORDINARY SESSIONS 1-5, ***
7, AND 8, AND URGENCY LEGISLATION THROUGH CH 30 OF THE 2010 REGULAR SESSION

CODE OF CIVIL PROCEDURE
Part 2. Of Civil Actions
Title 14. Miscellaneous Provisions
Chapter 6. Costs

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Code Civ Proc § 1021.5 (2010)

§ 1021.5. Attorney fees in cases resulting in public benefit

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor, unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commencing with *Section 900) of Division 3.6 of Title 1 of the Government Code.*

Attorney's fees awarded to a public entity pursuant to this section shall not be increased or decreased by a multiplier based upon extrinsic circumstances, as discussed in *Serrano v. Priest, 20 Cal. 3d 25, 49.*

HISTORY:

Added Stats 1977 ch 1197 § 1. Amended Stats 1993 ch 645 § 2 (SB 764).

NOTES:

Amendments:

1993 Amendment:

(1) Amended the first paragraph by adding **(a)** ", or of enforcement by one public entity against another public entity," after "private enforcement" in the first sentence; and **(b)** ", unless one or more successful parties and one or more opposing parties are public entities, in which case no claim shall be required to be filed therefor under Part 3 (commenc-

LEXSTAT CONN. GEN. STAT. 52-251B

LEXISNEXIS (TM) CONNECTICUT ANNOTATED STATUTES

*** THIS DOCUMENT IS CURRENT THROUGH THE 2009 LEGISLATION (2010 SUPPLEMENT) ***
ANNOTATIONS CURRENT THROUGH APRIL 27, 2010
(SUPERIOR COURT THROUGH MARCH 23, 2010)

TITLE 52 CIVIL ACTIONS
CHAPTER 901 DAMAGES, COSTS AND FEES

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 52-251b (2010)

Sec. 52-251b. Costs and attorney's fees in action for deprivation of civil rights.

(a) In any civil action to recover damages for injury to the person or to real or personal property arising out of a violation of *section 46a-58*, the court may allow the prevailing party his costs, together with a reasonable attorney's fee to be taxed by the court.

(b) The provisions of subsection (a) of this section shall not be deemed: (1) To create a new cause of action against any individual, the state or any municipality, or against any officer, official or employee of the state or any municipality; or (2) to confer any new jurisdiction upon the Superior Court in any action against any individual, the state or any municipality or any officer, official or employee thereof.

HISTORY: (P.A. 84-36, S. 1, 2.)

CASENOTES:

Cited. *204 Conn. 17.* Cited. *216 Conn. 85.*

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Compensatory Damages & Costs

LEXSTAT CONN. GEN. STAT. 46A-58

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ANNOTATIONS CURRENT THROUGH APRIL 27, 2010
(SUPERIOR COURT THROUGH MARCH 23, 2010)

TITLE 46a HUMAN RIGHTS
CHAPTER 814c HUMAN RIGHTS AND OPPORTUNITIES
PART II DISCRIMINATORY PRACTICES

GO TO CONNECTICUT STATUTES ARCHIVE DIRECTORY

Conn. Gen. Stat. § 46a-58 (2010)

Sec. 46a-58. (Formerly Sec. 53-34). Deprivation of rights. Desecration of property. Placing of burning cross or noose on property. Penalty.

(a) It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability.

(b) Any person who intentionally desecrates any public property, monument or structure, or any religious object, symbol or house of religious worship, or any cemetery, or any private structure not owned by such person, shall be in violation of subsection (a) of this section. For the purposes of this subsection, "desecrate" means to mar, deface or damage as a demonstration of irreverence or contempt.

(c) Any person who places a burning cross or a simulation thereof on any public property, or on any private property without the written consent of the owner, shall be in violation of subsection (a) of this section.

(d) Any person who places a noose or a simulation thereof on any public property, or on any private property without the written consent of the owner, and with intent to intimidate or harass any other person on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability, shall be in violation of subsection (a) of this section.

(e) Any person who violates any provision of this section shall be guilty of a class A misdemeanor, except that if property is damaged as a consequence of such violation in an amount in excess of one thousand dollars, such person shall be guilty of a class D felony.

HISTORY: (1949 Rev., S. 8374; P.A. 74-80; P.A. 77-278, S. 1; P.A. 80-54; 80-422, S. 7; P.A. 84-15; P.A. 05-288, S. 155; P.A. 07-62, S. 1; 07-217, S. 166; P.A. 08-49, S. 1.)

NOTES:

History Notes:

Sec. 53-34 transferred to *Sec. 46a-58* in 1981; *Conn. Const. Art. I, Sec. 20* re equal protection of the law.

See *Sec. 1-1f* for definitions of "blind" and "physically disabled".

LEXSTAT MASS. GEN. LAWS ANN. CH. 12, § 11H

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
Chapter 12 Department of the Attorney General and the District Attorneys

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 12, § 11H (2010)

§ 11H. Impairment of Civil Rights; Action by Attorney General.

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

HISTORY: 1979, 801, § 1; 1982, 634, § 4.

NOTES: Editorial Note

The 1982 amendment rewrote the last sentence of the section, deleting "or persons" from after "person".

Jurisprudence

7 Am Jur 2d, Attorney General § 10.

24 Am Jur Trials 1, Defending Antitrust Lawsuits.

Annotations

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. *60 ALR3d 665.*

Excessiveness or inadequacy of attorneys' fees in matter involving commercial and general business activities. *23 ALR5th 241.*

Treatise References

Greaney, Tuoni, Moriarty, Robertson, *Massachusetts Jury Instructions -- Civil (Michie) §§ 1.1(b), 14.1.*

Hirsch, *Labor and Employment in Massachusetts, 2d Ed. (Michie) §§ 4-1-4-8, 5-1, 5-3, 5-7, 7-1, 7-2.*

LEXSTAT MASS. GEN. LAWS ANN. CH. 12 § 11I

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE II EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
Chapter 12 Department of the Attorney General and the District Attorneys

GO TO MASSACHUSETTS CODE ARCHIVE DIRECTORY

ALM GL ch. 12, § 11I (2010)

§ 11I. Impairment of Civil Rights; Private Remedy.

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

HISTORY: 1979, 801, § 1.

NOTES: Jurisprudence

7 Am Jur 2d, Attorney General § 10.

24 Am Jur Trials 1, Defending Antitrust Lawsuits.

Annotations

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency. *60 ALR3d 665.*

Excessiveness or inadequacy of attorneys' fees in matter involving commercial and general business activities. *23 ALR5th 241.*

Allowance of interest on award of attorney fees under § 706(k) of Civil Rights Act of 1964 *(42 USCS § 2000e-5*(k)). *77 ALR Fed 272.*

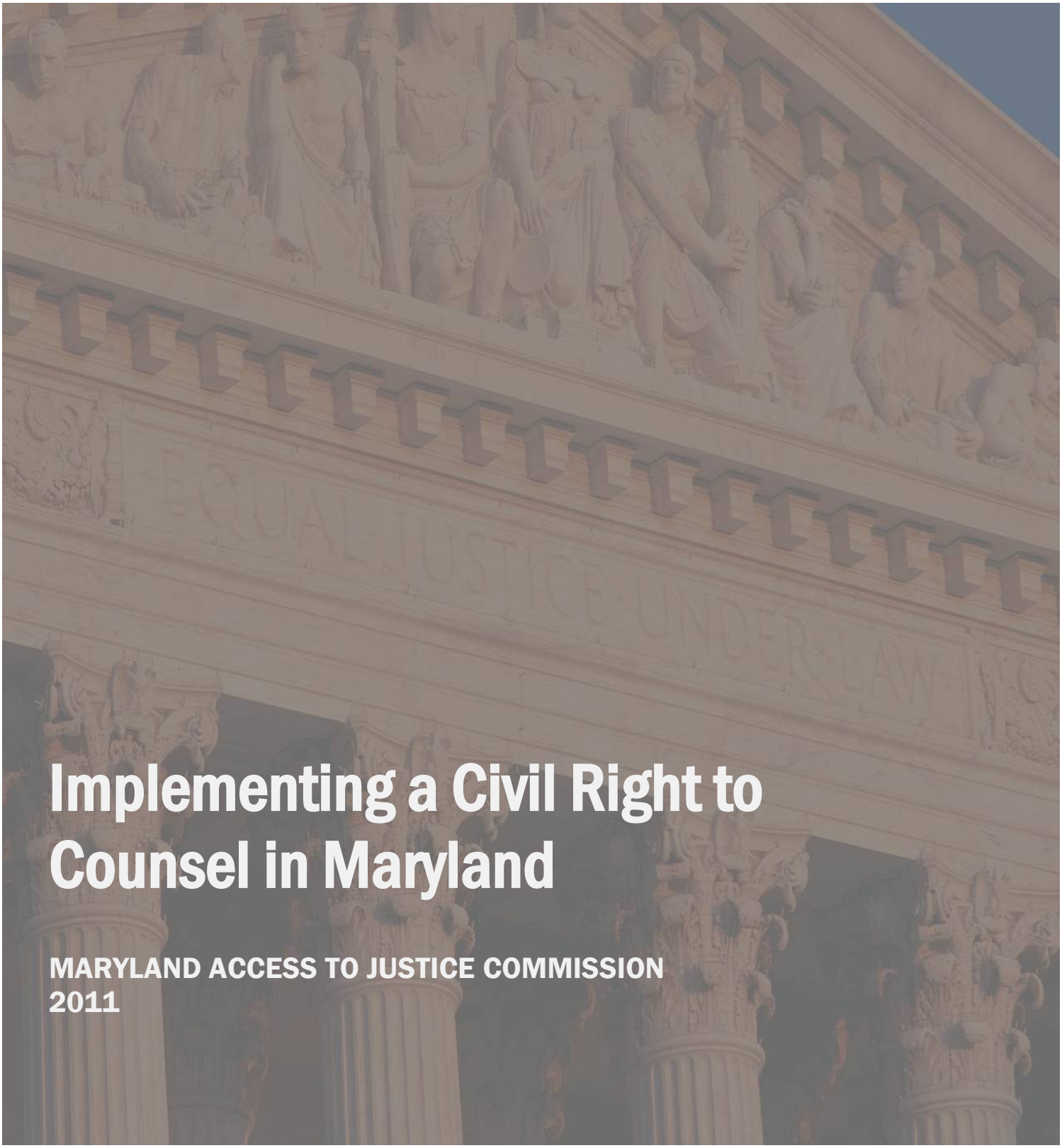
Treatise References

Greaney, Tuoni, Moriarty, Robertson, *Massachusetts Jury Instructions -- Civil (Michie) § 14.1*.

Hirsch, *Labor and Employment in Massachusetts, 2d Ed. (Michie) §§ 5-1*, *7-1*, *7-2*.

Ward, *Massachusetts Landlord-Tenant Practice: Law and Forms* (Michie) §§ 14-2, 14-7.

Mottla, *Proof of Cases in Massachusetts* § 1208.



Implementing a Civil Right to Counsel in Maryland

MARYLAND ACCESS TO JUSTICE COMMISSION
2011

Maryland Access to Justice Commission
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410.260.1258
www.mdcourts.gov/mdatjc

Letter from the Chair

In its 2009 *Interim Report,* the Maryland Access to Justice Commission recommended Maryland support the principle that low-income Marylanders should have the right to counsel at public expense in basic human needs cases.

Over the past year the Commission has explored the one question that has hampered consideration of this important initiative – how might a civil right to counsel be implemented in our State? The Commission explored a range of implementation variables – issues that would need to be resolved if a program or entity were created to provide counsel for the many individuals who would be entitled to assistance should a civil right to counsel ever be established by legislation or case law.

The Commission also asked the unthinkable question – what might it cost to provide meaningful access to counsel should the right be established?

The enclosed document contains two parts. The first provides a substantive description of how a right might be implemented. The second provides a fiscal narrative, an effort to approximate a fiscal note for a civil right to counsel in Maryland.

The Commission is publishing this document in an effort to advance the statewide conversation about a civil right to counsel, as one vehicle through which we might achieve the Commission's goal of equal access to justice for all.

Sincerely,

Irma S. Raker

Irma S. Raker
Maryland Court of Appeals (ret.)
Chair, Maryland Access to Justice Commission

Table of Contents

Recommended Implementation Strategies for a Civil Right to Counsel in Maryland†

1. THE SCOPE OF THE RIGHT

1.1. Scope of Case Type to Which the Right Attaches

The Maryland Access to Justice Commission supports the principle that low-income Marylanders should have a right to counsel at public expense in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.

Comment 1.1(a). The promise of justice cannot be realized until all have a meaningful opportunity to participate in the legal system, in a way that ensures they understand and are guided through its many complexities. Limiting the right to counsel to basic human needs cases strikes a balance between resource constraints and the goal of improved well-being for all Marylanders.

Comment 1.1(b). Determining where there is a need for counsel in child access cases, whether contested or uncontested, would be the responsibility of the provider. Issues of custody, visitation and other solutions along the spectrum of parent-child involvement are not easily separated. As long as the provider determines the level of assistance required to meet the individual's needs, it is unlikely intensive legal assistance will be provided for truly uncontested matters where a litigant might proceed effectively self-represented, perhaps with limited support. Parties may secure counsel during the pendency of the matter, changing the balance of power in the case, or matters that begin uncontested may devolve into a contested posture unexpectedly. As these matters are of sufficient gravity and importance to warrant the right to counsel, that right should attach by virtue of case type, and regardless of case posture.

Comment 1.1(c). All parties to a dispute should have a right to counsel, as long as the case fits the criteria that triggers the right. Maryland should not establish a state-created right without providing the benefit to both sides in a dispute.

Comment 1.1(d). The ABA Basic Principles of a Right to Counsel in Civil Legal Matters (2nd Working Draft, 10 March 2010), define the categories as follows:

- "Shelter" includes a person's or family's access to or ability to remain in a dwelling, and the habitability of that dwelling.
- "Sustenance" includes a person's or family's ability to preserve and maintain assets, income, or financial support, whether derived from employment, court ordered payments based on support obligations, government assistance including monetary payments or "in-kind" benefits (e.g., food stamps), or from other sources.
- "Safety" includes a person's ability to obtain legal remedies affording protection from the threat of serious bodily injury or harm, including

† This document is the work of the Maryland Access to Justice Commission only. It does not represent the policy of the Maryland Judiciary.

proceedings to obtain or enforce protection orders because of alleged actual or threatened violence, and other proceedings to address threats to physical well-being.

- "Health" includes access to health care for treatment of significant health problems, whether the health care at issue would be financed by government programs (e.g., Medicare, Medicaid, VA, etc.), financed through private insurance, provided as an employee benefit, or otherwise.
- "Child custody" embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.

1.2. Narrow or Broad Subject Matter Criteria

Case type alone should determine subject matter eligibility.

Comment 1.2(a). A broader, simpler definition of case type is preferable to more complex, constraints often used in legal services programs to determine eligibility. Such additional criteria (e.g., mental disability, one-side represented, etc.) require more administrative oversight and necessitate the exercise of more discretion on the part of providers.

1.3 Narrow or Broad Case Posture Criteria

The right to counsel should attach when an individual is evaluating a legal problem or contemplating court action, although that right would be tempered by the screening decision of the provider or administering agency. An otherwise eligible person would consult with the provider to determine what, if any, legal services they needed and to which they would thus be entitled. The individual could appeal that decision to the administrative agency.

Comment 1.3(a). Civil matters must be distinguished from criminal matters in this regard. In criminal matters the right attaches once an individual has been identified as a suspect and the individual is the subject of State action. In civil matters, the individual herself may initiate the action. To fairly determine whether she has an actionable cause, the individual in a civil matter needs access to counsel before the commencement of court action.

Comment 1.3(b). When the right attaches can be seen on a continuum from the moment an individual recognizes they may have a legal problem, to the post-judgment and appeal phase. The closer you posit the attachment of the right to the beginning of that continuum – towards the "consultation" end – the more you increase the period of time for which the system is providing counsel, and the potential costs increase. On the other hand, providing access to counsel early on may help individuals with legal problems avert unnecessary litigation, avoid noncompliance with the law, and reduce the overall social costs of civil conflict.

1.4. Differentiated or Undifferentiated Forms of Legal Service

The level of service should be undifferentiated. The provider should be able to exercise discretion, based solely on the client's needs, the merits of the action, and ethical considerations.

Comment 1.4(a). Once the right attaches it should be up to the provider, as an attorney, to evaluate the client's needs and determine the most appropriate level of service. Some model acts envision a system where individuals with different needs are entitled to different levels of service. In such a system, the administering agency would then be determining what is best for the client. We feel that is something that is more appropriately done by the attorney directly.

Comment 1.4(b). Individuals concerned with the type or quality of representation afforded them would have available to them the normal grievance procedures.

1.5. Timeliness of Appointments

The court will normally not play a role in appointing counsel. The system will be client and provider driven. Clients entitled to counsel will request assistance directly from the provider. For plaintiffs, because the subcommittee recommends that the right would attach when the individual may need to file a petition of some kind in an adversarial matter in a basic human needs case, they could seek assistance prior to filing. Respondents should have a right to have counsel in sufficient time to ensure the assistance can be effective. It is incumbent upon all litigants to seek assistance in time to assure counsel can provide effective assistance without creating unnecessary delay.

Comment 1.5(a). This recommendation follows from the determination that the right should attach when an individual recognizes they may have a legal problem. (See 1.3, above).

1.6. Advice of Rights

There should be a meaningful public education campaign to provide general notice of the right, should one be created. A notice should be provided to all respondents when the pleadings are served. This might be an automated notice included with the summons. All parties filing initial court documents, who do not enter an attorney's appearance, should likewise receive an automated notice from the court advising them of the right. It would be a best practice for courts to likewise advise self-represented litigants that they may have a right to be represented.

Comment 1.6(a). Notice of a right is as essential to the efficacy of the right as the establishment of the right itself.

1.7. Merits Testing

The right should attach to all matters of particular case types without a lot of additional administrative overlay. It should be at the discretion of the provider to determine the level of legal service necessary to assist the client effectively, which may include a determination of merit, much as any attorney would do.

1.8. Rights on Appeal

Appellees should have a right to counsel in an appeal. An appellant should have a right if the appeal has merit in the eyes of the provider.

Comment 1.8(a). This should include a simple merits test, similar to that articulated for appellants in the California Basic Access Act. That act provides that eligible appellants or petitioners should have a right to full legal representation only if there is a reasonable probability of success on appeal. Financially eligible respondents or real-parties-in-interest, however, should, except in extraordinary circumstances, have full legal representation unless there is no reasonable possibility the appellate court will affirm the decision of the trial court or other forum.

2. ADMINISTRATION

2.1. Service Delivery

Maryland has a rich and diverse provider community. A civil right to counsel should be implemented to take advantage of the existing delivery community. The Commission envisions a mixed delivery model through which the administering entity would provide grants to a range of providers selected through a competitive grant application process.

Comment 2.1(a). The system established should build on and supplement, without replacing, the existing discretionary civil legal services system.

2.2. Independent Program Administration

The right should be administered by a quasi-governmental independent non-profit agency that makes grants to non-profit legal service providers.

The way the entity is setup is going to have an effect on its ability to effectively manage the program. Lessons from the national experience in administering the criminal right to counsel suggest that the entity needs to be independent. The program needs to be managed independently in two ways. It needs to be independent from political influence, and the administering of the right and the assignment of counsel needs to be independent from the judges hearing the cases, and from any agencies that might have a conflict of interest. For this reason, the administering agency must not be housed in the Executive.

The administering entity should be fully funded with stable, general fund appropriations, but it should not be precluded from seeking other sources of funding as well. Diversity of funding can provide the program with flexibility during difficult times.

Comment 2.2(a). The Maryland Legal Services Corporation, MLSC, which administers the existing discretionary civil legal services system on behalf of the State, is an example of the type of administering agency envisioned. The Commission anticipates that a civil right to counsel could be administered by an existing entity, like MLSC, or a new entity. However it is administered, care should be taken to ensure that the funding and services directed to support a civil right to counsel do not subsume or replace the current discretionary delivery system.

Comment 2.2 (b). In crafting a government structure for the administering agency, the State should learn from the successful history of the 9-member MLSC Board and avoid structural issues like those that affected the Office of the Public Defender until its governing board was recently reconfigured.

2.3 Appealing the Provision of the Right

Individuals who disagreed with certain decisions made by the provider should be entitled to an administrative appeal. Appeals could be on determinations of:

- Financial eligibility
- Case type
- Whether to provide counsel on appeal

The quality of representation, and judgments made by the individual lawyer in representing the client would *not* be subject to administrative appeal as these would be covered by the normal grievance procedures.

Comment 2.3(a). Although, in general, the performance of attorneys is already covered by the ethical rules and grievance process, individuals may need recourse to appeal the decision made by the providing entity as to whether they were allowed to exercise their right to counsel.

2.4 Financial Issues

2.4.1. Funding

The implementation of a civil right to counsel should be at public expense, from State general funds. This follows the model of the Office of the Public Defender and funding for the Maryland Legal Services Program (MLSP), both of which were created to provide counsel where clients have a right to be represented, and where, in both instances, funding is provided from State general funds. The State has established a precedent by grounding right-based representation programs on the most stable funding source available.

Comment 2.4.1(a). The implementation of a right to counsel should not result in the diversion of existing funding away from the current civil legal services delivery system, nor should it eliminate the discretionary legal services currently provided by that system.

Comment 2.4.2(b). The source of funds identified for programs implementing a civil right to counsel should reflect the significance and centrality of the right in a just and civil society. Funding should be provided from State general funds, the most stable and reliable source available, to ensure the right is not compromised in the future by changes in interest rates, special fund revenues, or State or federal grant funding priorities.

2.4.2. Compensation Rates for Counsel

As a mixed delivery model is envisioned, compensation rates for attorneys will vary. Where representation is provided by staff attorneys, salary rates should be comparable to salaries paid to attorneys employed by the Office of the Public Defender. When the service is to be provided by private attorneys on a contractual basis, those contracts should be competitively bid. Administrative costs should be provided in addition to sufficient funding for attorney salaries. Ultimately compensation rates will be determined by the administering agency.

2.4.3. Income-Eligibility Criteria - Uniformity

In administering the right, the State should use a uniform income-eligibility requirement for ease of administration and to support the appearance of fairness.

Comment 2.4.3(a). Despite regional economic differences, Maryland has a long history of applying statewide uniform income-eligibility criteria. MLSC, LAB and the OPD all use a uniform criteria. By adopting uniform criteria, the State can more easily predict and control the costs of program implementation.

2.4.4. Income-Eligibility Criteria – Level

A program to implement a civil right to counsel should be limited to low-income individuals who meet MLSC income guidelines.

Comment 2.4.4(a). While it might be optimal, it would be fiscally difficult to extend a State-funded right to counsel to moderate income Marylanders, but even a low-income standard can educate the public that there is a right to counsel.

2.4.5. Financial Contribution of the Parties

A program administering a civil right to counsel may charge an appropriate one-time registration fee to be determined based on case type, with a waiver for clients receiving public assistance.

Comment 2.4.5 (a). Current experience with the Judicare program suggests that in some case types, a one-time fee appears to have benefits for program administration. Clients are more likely to follow through with the case and the program operates more efficiently.

2.5 Quality Assurance

2.5.1 Caseload

The entity administering the civil right to counsel program should negotiate caseload standards with prospective providers, especially those that operate staff programs.

Comment 2.5.1(a). Caseload standards are easier to monitor in a staffed or contractual practice model, than if private or *pro bono* attorneys accept occasional cases to handle along with their regular workload. If the private bar is involved in the provision of the right, it may be best to allow the ethical rules and grievance process to function to ensure caseload does not compromise quality.

2.5.2. Quality Assurance Standards

In implementing a civil right to counsel, the State should develop and support quality assurance standards to ensure that programs implementing the right can support their practitioners in meeting their professional standards. We are presuming a level of competence and professionalism among the attorneys, but the program has to be structured, funded and staffed in such a way as to support practice at that level. Quality assurance standards can help support programs in advocating for funding by underscoring the impact funding shortfalls have on program performance. In all likelihood, these standards would be fairly generic to cover all practice areas. Standards may include provisions that address supervision, access to supervision, malpractice avoidance systems, among others.

Comment 2.5.2(a). Experience over the last several decades has shown that bar enforcement and ineffective assistance litigation has not been adequate to police the quality of work of the indigent defense bar. A lack of funding can too often be reflected in a decrease in the quality of representation. Having a quality assurance standard would help balance the inevitable pressure to increase caseloads and do more with less in publicly funded programs.

Fiscal Narrative:
Approximating a Fiscal Note for a Civil Right to Counsel

Step One: How many cases are we talking about?

- "Basic human needs cases" would presumably include: landlord-tenant matters, domestic violence cases, divorce and family matters involving child access issues, and a broad range of administrative hearings including those involving medical assistance, health insurance for children, child support, and income maintenance. The following data is from annual reports for the Judiciary and the Office of Administrative Hearings. This is an effort to estimate the number of persons currently appearing without counsel.

Case Type	No. Filed Per Year	Percent SRLs	Subtotal	Percent Likely Eligible*	Total
Landlord-Tenant	633,425	95	601,753	48	288,841
Domestic Violence	29091	70 x 1 40 x 1	20,363 11,636	48	9,774 5,585
Divorce or Other Domestic with Child Access Issues [from WLC Study estimates]	42,179	70 x 1 40 x 1	29,525 16,871	67	19,781 11,303
OAH: Medical Assistance	4495	95	4,270	100	4,270
OAH: Child Health Insurance Program (CHIP)	389	95	369	100	369
OAH: Child support	96	95	91	100	91
OAH: Income Maintenance	4,691	95	4,456	100	4,456
Total			689,334		344,470

* The percentage of SRLs who are likely eligible for legal services from MLSC-grant funded providers is based on demographic data collected by the District Court Self-Help Center (DCSHC) and the Family Law Self-Help Centers (FLSHC) operated by the Maryland courts. Approximately 48% of DCSHC users report household incomes under $30,000 per year (December 2009 – October 2010). Approximately 67% of FLSHC users report household incomes under $30,000 per year (FY07).

- The figures in this table represent an estimate of the *unmet* legal needs of income-eligible Marylanders – those who currently proceed without the benefit of counsel. This fiscal estimate is an effort to identify the *additional* funds required to enhance, and not replace, the existing voluntary legal services delivery system. These costs would need to be added to the amount already expended to provide the existing level of legal services. It should also be noted that there is little data available on the income status of most court

users, and it is therefore difficult to extrapolate what percentage of those who appear in these cases are indigent. To approximate this information this estimate uses household income data collected from court-based self-help centers to estimate the percentage of the self-represented likely to be income eligible in any given case type. Because of the nature of these cases, it is likely that the percentage of litigants in these case types that are indigent is likely to be higher than the percentage of those who are indigent among the general population.

- Another way of looking at the question is to look at estimates of the unmet legal needs of low-income Marylanders. MLSC has reported that approximately 1 million Marylanders are eligible for MLSC services. Of those, approximately 470,000 per year have a legal problem or may need assistance. Currently approximately 105,000 receive help through MLSC-funded grantees, which means there are probably about 365,000 additional Marylanders with unmet legal needs.

- For the purposes of this estimate we will use this smaller, more conservative figure of 344,470.

Step Two: What is the cost per case?

- **Hours.** Many thousands of Marylanders are able to resolve their legal problem or question with brief advice. Presumably many Marylanders will be able to continue representing themselves in simple case types, but will be able to do so more effectively with help from a knowledgeable and supportive provider. Those with limited abilities, high conflict matters, or critical needs, will be able to get full representation in contested proceedings. In other words, the hours spent per case will vary based on each person's legal needs. A complex custody matter can require 100 hours of assistance; a simple legal inquiry may be resolved in 15 minutes. For the purpose of this estimate we will use 4 hours per case. This rough estimate attempts to arrive at a weighted average including large volumes of relatively simpler cases (e.g., most evictions) mixed with smaller volumes of relatively more complex and time-consuming matters (e.g., custody cases contested through trial).

  It should be noted that this model is based on an assumption that services will continue to be delivered in the most efficient manner possible that will achieve access to justice in basic human needs cases. Undoubtedly a right to counsel will require a substantial increase in expenditures, but the implementation model proposed

does not provide for unlimited representation where the case does not warrant it.

- **Hourly Rate**. For the purposes of this estimate we will use the $80/hour currently provided by the Judicare program. This does not include administrative costs.

- **Cost per Case**. Based on these figures, the cost per case would be $80 x 4 hours - $320 per case.

Step Three: Will the program generate any income?

- **One-time registration fee.** The Judicare program charges a one-time $25 registration fee. This has enhanced client follow-through and accountability and some participating providers report it has been a positive innovation. If the program were to charge a one-time fee, it should be waived for the most indigent. For the purposes of this exercise we will assume the waiver would apply to the 8.3% of Marylanders below the federal poverty line. This would be approximately 464,000 Marylanders. MLSC estimates about 47% of the total eligible population needs legal assistance, so we might extrapolate that that same percentage (47%) of 464,000 would have a legal problem and be eligible to have the fee waived. That means 218,080 individuals would get the waiver. The total amount generated by the fee would be 365,000 – 218,080 (waiver eligible) 146,920 X $25 = $3,673,000, if collected.

Step Four: Putting it all together.

- Based on these assumptions, we can approximate the cost of the extension of a civil right to counsel to basic human needs cases.

344,470 individuals X $320 / case =	$ 110.2 million
Less revenue generated from fee:	($ 3.6 million)
Total Cost:	$ 106.6 million

- For purposes of comparison we might note that the Office of the Public Defender had an appropriation of $ 85 million in FY10, down from $ 90 million in FY09. The agency handled approximately 220,000 cases in FY09 and estimated it would handle slightly more than that amount in FY10.

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DRAFT RULES
LIMITED SCOPE REPRESENTATION

RULE X. **Limited Representation.**

(a) **Limited Representation - Generally.**

(i)An attorney may undertake to provide limited representation in accordance with Maryland Rule of Professional Conduct 1.2. Providing limited representation of a person under these rules shall not constitute an entry of appearance by the attorney under Rules 2-131, 3-131, and 7-107, and does not authorize or require the service or delivery of pleadings, papers or other documents upon the attorney. Representation of the person by the attorney at any proceeding before a judge, magistrate, administrative law judge or other judicial officer on behalf of the person does constitute an entry of appearance pursuant to Rules 2-131, 3-131, or 7-107, except to the extent that a limited notice of appearance as provided for under Rule X.1 is filed and served prior to or simultaneous with the actual appearance.

(ii)A lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto which is filed with the court, may not thereafter limit representation as provided by this Rule.

(iii) This rule applies to civil matters only.

(b) **Scope of Limited Services.** An attorney acting pursuant to an agreement with a client for limited representation that complies with Maryland Rule of Professional Conduct 1.2 may offer a range of services including:

(1) legal advice concerning potential litigation, which shall include information about any applicable statute of limitation or any other time limitation;
(2) advice about the availability of alternative methods of dispute resolution including mediation;
(3) evaluation of the client's rights and responsibilities;
(4) guidance and procedural information to aid the otherwise self-represented client in filing or serving documents;
(5) review pleadings and other documents prepared by the otherwise self-represented client;
(6) suggest documents to be prepared;
(7) draft legal and court documents to be submitted by the client, pursuant to Rule X.2.;
(8) factual investigation including contacting witnesses, public record searches, and interviewing the client;
(9) legal research and analysis;
(10) evaluate settlement options or proposed agreements resulting from mediation or alternative dispute resolution processes;
(11) conduct discovery including, but not limited to, the preparation of, or response to, interrogatories, depositions and requests for the production of documents;
(12) plan for negotiations;
(13) referrals to other counsel, expert witnesses or professionals;
(14) counsel the otherwise self-represented client about an appeal;
(15) assistance in taking and perfecting an appeal;
(16) argue a specific motion or motions, as provided for in Rule X.1 - Limited Appearance;
(17) attend a pretrial conference, settlement conference, court-ordered mediation or other court-ordered

(18) act as counsel for a particular hearing or trial, as provided for in Rule X.1 - Limited Appearance;
(19) with leave of court, for a specific issue or a specific portion of a trial or hearing, as provided for in Rule X.1 - Limited Appearance;
(20) other services, discrete in scope, consistent with this Rule, and agreed upon by the client.

RULE X.1. **Limited Appearance.**

(a) An attorney acting pursuant to an agreement with a client for limited representation that complies with Maryland Rule of Professional Conduct 1.2 may enter an appearance limited to one or more of the following purposes on behalf of a client who is otherwise self-represented:

(1) Arguing a specific motion or motions.
(2) Attending a pretrial conference, settlement conference, court-ordered mediation or other court-ordered alternative dispute resolution proceeding for purposes of advising the client during the proceeding.
(3) Acting as counsel for a particular hearing or trial.
(4) With leave of court, for a specific issue or a specific portion of a trial or hearing.

(b) **Notice of Limited Appearance.** An attorney who wishes to enter an appearance for one of the purposes in Section (a) of this Rule, shall file a Notice of Limited Appearance as soon as practicable prior to commencement of the appearance. The purpose and scope of the appearance shall be specifically described in the notice, which shall represent that the client is otherwise self-represented. The attorney's name and a brief statement of the purpose of the limited appearance shall be entered upon the docket.

(1) Every document required to be served upon a party's attorney that is to be served after entry of a limited appearance shall be served upon the party and upon the attorney entering that appearance unless the attorney has been granted leave to withdraw pursuant to paragraph (c) of this Rule.

(c) **Withdrawal of Limited Appearance.** An attorney who has entered a limited appearance shall be granted leave to withdraw as a matter of course when the purpose for which the appearance was entered has been accomplished, and upon the filing of a notice of withdrawal in writing, with a copy to all parties including the client. The withdrawal shall be effective upon the filing of the notice, without further court action. An attorney who seeks to withdraw before that purpose has been accomplished may do so only on motion and notice, for good cause, and on terms as provided in Rules 2-132, 3-312, and 7-107.

RULE X.2. **Attorney assistance in preparation of court documents.**

(a) **Nondisclosure.** An attorney who contracts with a client to provide limited representation for the purpose of drafting or assisting in drafting legal documents, but not to make an appearance in the case, is not required to disclose that he or she was involved in preparing the documents.

(b) **Reliance on client's representation of fact.** An attorney who provides drafting assistance in accordance with this Rule may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance, the attorney shall make an independent reasonable inquiry into the facts.

(c) **Attorney's fees.** If a litigant seeks a court order for attorney's fees incurred as a result of document preparation, the litigant shall disclose to the court information required for a proper determination of the attorney's fees, including:

(1) The name of the attorney who assisted in the preparation of the documents;

(2) The time involved or other basis for billing;

(3) The tasks performed; and

(4) The amount billed.

(d) **Application of rule.** This rule does not apply to an attorney who has made a general appearance in a case, or to

a lawyer who signs a complaint, counterclaim, cross-claim or any amendment thereto which is filed with the court.

☐ **CIRCUIT COURT** ☐ **DISTRICT COURT OF MARYLAND FOR**_____
City/County

Located at._____ Case No. _____

_____	vs	_____
Name of Plaintiff / Petitioner		Name of Defendant / Respondent
_____		_____
Street Address, Apt. No.	Street	Address, Apt. No.
_____		_____
City, State, Zip Code Telephone		City, State, Zip Code Telephone

NOTICE OF LIMITED APPEARANCE

_____ files this Notice of Limited Appearance on behalf of
Attorney's Name

_____ ☐ Plaintiff / Petitioner ☐ Defendant / Respondent .
Party's Name

for the following limited purposes (*check all that apply)*:

☐ Arguing a motion or motions. (*Please specify*): _____
☐ Attending a pretrial conference, settlement conference, court-ordered mediation or other court-ordered alternative dispute resolution proceeding for purposes of advising the client during the proceeding. (*Please specify*): _____
☐ Acting as counsel for a particular hearing or trial. (*Please specify*): _____
☐ With leave of court, for a specific issue or a specific portion of a trial or hearing. (*Please specify*): _____

The clerk of the court is requested to enter this notice of record.

Copies of all future court papers should be mailed to the undersigned attorney at the address listed and to the ☐ Plaintiff / Petitioner ☐ Defendant / Respondent at

_____
Name, Address, Telephone Number

_____

_____ _____ _____
Date *Signature*

CERTIFICATE OF SERVICE

I certify that on this ____ day of _____, 2____, a copy of the foregoing Notice of Limited Appearance was: ☐ mailed, postage prepaid ☐ faxed, or ☐ hand-delivered to _____ at
Opposing Party or His/Her Attorney

_____
Street Address, City, State, Zip Code

_____ _____ _____
Date *Signature*

LIMITED SCOPE CLIENT-LAWYER AGREEMENT

The following form should be used in conjunction with Rule 1.2 of the Maryland Rules of Professional Conduct when entering into limited scope representation.

INFORMATION ABOUT LIMITED SCOPE REPRESENTATION

By completing and signing this form, you are making an agreement between you and a lawyer for limited representation. "Limited representation" is the use of a lawyer for only certain parts of a matter.

The lawyer **does not have to give you additional services**.

The lawyer has made no representations or guarantees regarding the outcome of any proceedings.

If you and a lawyer have agreed to limited representation, you should complete this form and sign your name at the bottom. Your lawyer will also sign to show that he or she agrees. If you and the lawyer both sign, the lawyer agrees to help you by performing the **limited services** listed in this agreement**.** You agree to pay for the services provided in accordance with this agreement.

NAME OF CLIENT: _____
NAME OF LAWYER:_____

CLIENT RESPONSIBILITIES & CONTROL:

The client intends to handle his/her own case and **understands that** he/she will remain in control of the case and be responsible for all decisions made in the course of the matter.

The client agrees to:

a. Cooperate with the lawyer by complying with all reasonable requests for information in connection with the matter for which the client is requesting services.
b. Keep the lawyer advised of the client's concerns and any information that is relevant to the client's case, until the lawyer has fulfilled the limited tasks for which he or she was engaged.
c. Provide the lawyer with copies of all correspondence relevant to the part of the case the lawyer is handling, until the lawyer has fulfilled the limited tasks for which he or she was engaged.
d. Keep all documents related to the case in a file for review by the lawyer.

LENGTH OF REPRESENTATION AND WITHDRAWAL OF LIMITED COURT APPEARANCE:

The lawyer will provide you with general advice about your legal rights and responsibilities in connection with the following matter:

_____

_____

The lawyer shall provide this help as:

☐ consultation at a one-time meeting; or

☐ consultation at an initial meeting and further meetings, telephone calls or correspondence (by mail, fax or email) as needed, or as requested by you.

If you have engaged the lawyer to go with you to court or if the lawyer enters an appearance with the court, the lawyer will withdraw from representing you when the purpose for which the appearance was entered has been accomplished. The lawyer will notify you and the court at that time, and the withdrawal shall be effective upon the filing of the notice.

THE LAWYER WILL PROVIDE THE FOLLOWING SERVICES:

Write YES or NO in the space provided:

____ a. Legal advice concerning potential litigation: office visits, telephone calls, fax, mail, e-mail;

____ b. Advice about availability of alternative methods to resolving the dispute, including mediation, arbitration and collaborative law;

____ c. Evaluation of your self-diagnosis of the case and advising you about legal rights and responsibilities;

____ d. Guidance and procedural information for filing or serving documents;

____ e. Review pleadings and other documents that you prepare;

____ f. Suggest documents to be prepared;

____ g. Draft the following court papers for your use:

_____

_____;

____ h. Factual investigation: contacting witnesses, public record searches, in-depth interview of you;

____ i. Legal research and analysis regarding:

_____
_____;

____ j. Evaluate settlement options;

____ k. Prepare or propound and/or respond to discovery: interrogatories, depositions, requests for document production;

____ l. Preparation for mediation or other alternative dispute resolution process;

____ m. Assist you in the preparation for negotiations;

____ n. Consultation after mediation or other alternative dispute resolution process, or after negotiation, to evaluate a proposed agreement;

____ o. Assist you in the preparation for court appearances;

____ p. Refer you to other counsel, expert witnesses, or professionals;

____ q. Counsel you about an appeal;

____ r. Procedural assistance with an appeal and assisting with substantive legal argument in an appeal;

____ s. Argue a specific motion or motions: _____

____ t. Attend a pretrial conference, settlement conference, court-ordered mediation or other court-ordered alternative dispute resolution proceeding for purposes of advising you during the proceeding: _____

____ u. Act as counsel for a particular hearing or trial: _____

____ v. With leave of court, act as counsel for a specific issue or a specific portion of a trial or hearing which deals with a specific issue as detailed below:

_____

____ w. Other limited service:_____

PAYMENT FOR SERVICES

Under this agreement, some tasks require the payment of a single flat fee, while others may be billed at an hourly rate.

Fee Type. Fees for legal services will be incurred by the following method:

- ☐ Tasks will incur a **flat fee** as detailed below.
- ☐ Tasks will be billed at an **hourly rate** as detailed below.
- ☐ Some tasks will be billed at a **flat fee,** while others will incur an **hourly rate,** depending on the task (both methods), as detailed below.
- ☐ Services will be provided **pro bono publico**, at no cost to the client.

A. Tasks to Be Performed for a Flat Fee. The following services will be performed by the lawyer for the flat fee indicated below.

Service	Flat Rate Amount	Notes or Specifications
TOTAL PART A:		

B. Tasks to Be Performed at an Hourly Rate. The following services will be performed by the lawyer at an hourly rate. You have elected to have the attorney perform the tasks listed below at the rate shown, and agree to pay the attorney in full for these tasks up to the maximum hours specified. The attorney agrees to obtain your written consent to provide services beyond the maximum hours indicated, before proceeding further.

Service	Hourly Rate	Max Hours Approved	Max Payment Approved (Rate x Hours)	Notes or Specifications
TOTAL PART B:				

C. Projected Court Fees, Costs and Reimbursable Expenses. In addition to the flat or hourly rate fee for legal services, you are responsible for court filing fees and other costs associated with litigation. At this time, it is projected that the following fees may be required. The lawyer cannot predict with certainty the amount of fees and litigation costs that will be incurred, but estimates costs as follows:

_____.

Estimate of Total Costs. In sum, the following represents the total projected costs, based on information available to date, for the limited scope representation:

Total Projected Costs: _____ (Part A) + _____ (Part B) + _____ (Part C) = _____

Billable hours can be charged in _____ minute increments. The increment will be divided by the billable hourly rate of the person performing the service.

Payment Method. This section of the agreement covers how you will be required to pay for these legal services. You agree to pay for these services in the following manner:

☐ Full payment of fees and costs upon the signing of this agreement.

☐ Payment of a retainer, with monthly payments to replenish the retainer and pay for services when performed, as detailed below.

Retainer Required. Payment for all services is due at the time performed. You agree to provide a retainer in the amount of $_____ at this time which will be deposited into an escrow account with the lawyer's office. All attorneys' fees and costs will be charged against the retainer at the time services are performed or expenses incurred. The lawyer will forward to you monthly statements that show the amount charged each month against the retainer and the remaining balance held as retainer. At any time that the retainer drops below $_____, you will also receive a billing to replenish the retainer. You agree to replenish the retainer to a balance of $_____ . At the conclusion of the limited scope representation, the balance of any retainer(s) shall be refunded to you.

Termination of Representation. You have the right to terminate the representation. The lawyer reserves the right to terminate the lawyer-client relationship in the event you fail to pay the statement of services as provided herein, to replenish the escrow account, or any expenses incurred by the lawyer. This includes withdrawing appearance from any court action. In the event the representation is terminated by either you or the lawyer, you will be charged for all time expended and all necessary disbursements in connection with the termination prior to refunding to you the unused portion of any retainer.

Additional Advisements.

1. **Preserve the Attorney-Client Privilege by Not Disclosing Confidential Communications.** Client communications with the lawyer are privileged and confidential unless disclosed to another person (a third party).

    a. ***Be Cautious About Email Communications.*** If you communicate with the lawyer or law firm by email, be advised that those communications may not be subject to attorney-client privilege as they may be viewed by third parties. Please make sure that your email address is secure and password protected.

    b. ***Do Not Share Attorney-Client Communications.*** Please do not share attorney-client communications with anyone and be especially carefully about not sharing such communications on internet sites. Doing so could jeopardize your right to claim those communications are privileged and may ultimately require you or the lawyer to disclose them to the opposing party.

2. **Use Phone and Email Consultations Carefully as they are Billed by the Hour.** You will be billed for time spent by the lawyer or the lawyer's staff to read and review the entire contents of any e-mail communications.

3. **Entire Understanding.** This writing contains the entire agreement between you and the lawyer. This contract may not be modified except by a writing signed by all of the parties. This contract shall be binding upon the parties and their respective heirs, executors, representatives, and successors. This contract shall be construed under the laws of the State of Maryland. All of the paragraphs of this contract and each part of the contract shall be considered as severable, one from the other. In the event any part of this contract shall be considered by a court of appropriate jurisdiction to be invalid, null or void, the contract shall be construed as if the offensive paragraph has never been included within it and shall nonetheless be binding in all other respects.

CONSENT

I have read this Limited Scope Client-Lawyer Agreement and I understand what it says. As the lawyer's client, I agree that the legal services specified above are the **only** legal services this lawyer will give me. **I understand and agree that:**

- The lawyer who is helping me with these services is not my lawyer for any other purpose and does not have to give me any more legal help then specified in this agreement.
- The lawyer is not promising any particular outcome.

- Because of the limited services to be provided, the lawyer has limited his or her investigation of the facts to that necessary to carry out the identified tasks with competence and in compliance with court rules.
- If the lawyer goes to court with me, the lawyer does not have to help me afterwards, unless we both agree in writing or unless ordered to do so by a court of competent jurisdiction.

I agree the address below is my permanent address and telephone number where I may be reached. I understand that it is important that my lawyer, the opposing party and the court handling my case, if applicable, be able to reach me at this address. I therefore agree that I will inform my lawyer or any Court and opposing party, if applicable, of any change in my permanent address or telephone number.

_____	_____
Client (print or type your name)	Lawyer (print or type your name)
_____	_____
Signature	Signature
_____	_____
Date	Date
_____	_____
Full mailing address	Full mailing address
_____	_____
City, State and Zip code	City, State and Zip code
_____	_____
Phone number	Phone number
_____	_____
FAX	FAX
_____	_____
Email	Email

I Wish I Had Known

You do not have a constitutional right to a free lawyer in civil cases, but Maryland's legal service providers may be able to help.

Civil cases include:

child custody
child support
divorce
landlord-tenant
creditor-debtor
small claims
domestic violence
public benefits
bankruptcy

If you think you may have a legal problem, call a Maryland legal service provider. Get help early to avoid bigger problems later.

For legal help contact:

- Maryland Legal Aid, 800-999-8904
- Maryland Volunteer Lawyers Service, 800-510-0050
- Or see www.peoples-law.org for a complete list of Maryland legal service providers for low-income Marylanders, or to find information on lawyer referral services, pro bono programs, self-help centers, hotlines and other resources. Limitations may apply.

MARYLAND ACCESS TO JUSTICE COMMISSION

Maryland Access to Justice Commission

My Laws, My Courts, My Maryland

Promoting Equal Justice for All

www.mdcourts.gov/mdatjc

I got legal help when I needed it

If you think you may have a civil (non-criminal) legal problem and cannot afford to hire an attorney, call a Maryland legal service provider.

Get help early to avoid bigger problems later.

- lawyer referral services
- pro bono programs
- self-help centers
- hotlines
- staff attorney programs

For legal help contact:

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My home was in foreclosure and I didn't know what to do

I found a free lawyer through a Maryland legal service program. The lawyer helped me understand my options and take steps to solve my problem.

Get help early to avoid bigger problems later.

- lawyer referral services
- pro bono programs
- self-help centers
- hotlines
- staff attorney programs

For legal help contact:

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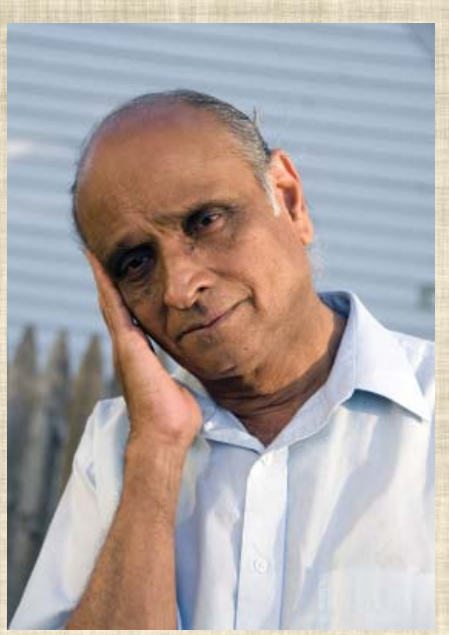
I was in debt and didn't know what to do

A Maryland legal service program found me a free lawyer who helped me understand my options and take steps to protect my rights.



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When my family had a problem, the courts were there to help

Every time an issue came up about our kids, my ex-wife and I would disagree. Finally we went back to court.

The court was a neutral place where we could work out our differences and make some decisions together about our kids.

The court referred us to mediation and then helped us finalize our agreement.

For more information about Maryland's courts, visit www.mdcourts.gov.

For legal help contact:

- Maryland Legal Aid, 800-999-8904
- Maryland Volunteer Lawyers Service, 800-510-0050
- Or see www.peoples-law.org for a complete list of Maryland legal service providers for low-income Marylanders, or to find information on lawyer referral services, pro bono programs, self-help centers, hotlines and other resources. Limitations may apply.

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Right to a free lawyer? ... maybe not

My friend was charged with a crime. He could not afford to hire a lawyer. He was able to get a free lawyer through the public defender's office.

I thought I also had a right to a free lawyer since I could not afford one either. But I was wrong. My case was a civil case, not a criminal one.

I wish I had known.

You do not have a right to a free lawyer in most civil cases, but Maryland's legal service providers may be able to help.

For legal help contact:

- Maryland Legal Aid, 800-999-8904
- Maryland Volunteer Lawyers Service, 800-510-0050
- Or see www.peoples-law.org for a complete list of Maryland legal service providers for low-income Marylanders, or to find information on lawyer referral services, pro bono programs, self-help centers, hotlines and other resources. Limitations may apply.

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I had a legal problem and didn't know what to do

I found a free lawyer through a Maryland legal service program. The lawyer helped me understand my options and get the help I needed.

Support programs that support people in need.

Support Maryland's free and low-cost legal services providers.

- lawyer referral services
- pro bono programs
- self-help centers
- hotlines
- staff attorney programs

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